



# IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION



## PHASE 4 ONE-YEAR FOLLOW-UP REPORT: **The Netherlands**



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The OECD Working Group on Bribery (the Working Group) adopted the Netherlands Phase 4 report on 16 October 2020. The Phase 4 report evaluated and made recommendations on the Netherlands implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. The Working Group invited the Netherlands to submit a written report in one year (October 2021) on progress with legislative reforms to its non-trial resolution framework and the amendment to the Whistleblowers Authority Act to implement the EU Whistleblower Protection Directive. This report, submitted by the Netherlands, provides information on the progress made by the Netherlands in implementing recommendations 2(a) and 6(a)-(d). The Netherlands presented its update to the Working Group on 11 October 2021.

In October 2022, the Netherlands will submit a written report to the Working Group on the implementation of all Phase 4 recommendations and its enforcement efforts.

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## PHASE 4 EVALUATION OF THE NETHERLANDS: ONE-YEAR WRITTEN FOLLOW-UP REPORT

### *Instructions*

*This document seeks to obtain information on the progress that the Netherlands has made in implementing a number of recommendations of its Phase 4 evaluation report.*

*Responses to the first question should reflect the current situation in your country, not any future or desired situation or a situation based on conditions which have not yet been met. For each recommendation, separate space has been allocated for describing future situations or policy intentions.*

*Please submit completed answers to the Secretariat on or before **17 September 2021**.*

<b>Name of country:</b>	<b>The Netherlands</b>
<b>Date of approval of Phase 4 evaluation report:</b>	<b>16 October 2020</b>
<b>Date of information:</b>	<b>16 September 2021</b>

### PART I: RECOMMENDATIONS FOR ACTION

Text of recommendation 2(a):

2. Regarding detection of foreign bribery by whistleblowers, the Working Group recommends that the Netherlands:

a) amends the Whistleblower Authority Act to transpose the EU Whistleblower Protection Directive, as a priority [2009 Recommendation IX (iii)] and implement, as appropriate, the recommendations of the various evaluations of the Whistleblower Authority, to ensure that public and private sector employees that report suspected acts of foreign bribery are protected from discriminatory and disciplinary action.

Action taken as of the date of the follow-up report to implement this recommendation:

[The bill implementing the EU Whistleblower Protection Directive](#) was submitted to the House of Representatives on 1 June 2021. Submission of the bill means that the parliamentary approval procedures can begin. This bill provides for an important improvement in the whistleblower's position, which also emerged as a point for improvement from the evaluation of the Whistleblower Authority Act (WAA). This relates to the shift in the burden of proof, whereby the employer/client must prove that there is no relationship between the measures of retaliation taken towards the whistleblower and the report made by them. In addition, the following improvements for the whistleblower's position have been included in the bill:

- Indemnification of legal proceedings in response to the report on violations of European Union law or suspicion of wrong doing where the public interest is at stake (for example, in the event of a breach of a duty of confidentiality);

- In certain cases, legal protection can also be invoked when cases have been made public: in situations of abuse or violation of European Union law (EU Directive 2019/1937), and in situations of wrong doings when a public interest is at stake according to national law;
- The protection of the identity of the whistleblower when reporting to the Whistleblower Authority, other competent authorities, and employers has been increased;
- The prohibition of retaliation includes any form of retaliation towards a whistleblower;
- The personal scope of the protective measures is wider;
- There is no obligation to first report internally.

The House of Representatives is informed by [letter dated 21 December 2020](#) about the substantive response of the Minister of the Interior and Kingdom Relations to the evaluation of the WAA. A separate bill, to implement the results of this legislative evaluation aims to further improve the whistleblower's position. Follow-up to the improvements of the bill implementing the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, is currently being prepared.<sup>1</sup>

The researchers of the evaluation concluded that legal aid and psychosocial support are of great importance to the whistleblower and that the proper organization of this support contributes to achieving the goals of the WAA. In the above-mentioned letter, the minister stated that further support for whistleblowers is desirable. The design of this support is a topic of conversation with the social partners that are united in the “Stichting van de Arbeid”<sup>2</sup>.

**If no action has been taken to implement recommendation 2 (a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

In addition to the measures described above, additional measures have been identified and are in diverse stages of development.

- A pilot project is being started to gain insight into the best possible structural set-up and organization of mediation and legal support for whistleblowers.
- Furthermore the aim is to establish a network of professionals in the psychosocial domain in collaboration with the Whistleblower Authority from the beginning of 2022, so that the Authority can refer the whistleblower to the right support as quickly and as effectively as possible.

**Text of recommendation 6(a):**

6. Regarding non-trial resolutions, pursue the proposed reforms to its non-trial resolution framework as a priority and in this context:

a) publish, as necessary and in compliance with the relevant rules, the essential elements of resolutions in all foreign bribery cases [Convention Arts 3 and 5; 2009 Recommendation III(i)];

**Action taken as of the date of the follow-up report to implement this recommendation:**

Press releases of non-trial resolutions in foreign bribery cases and statements of facts are being published on the public website of the Dutch Public Prosecution Service: [www.om.nl](http://www.om.nl). Please (also) refer to <https://www.om.nl/onderwerpen/hoge-transacties> and the elaboration under recommendation

<sup>1</sup> No time-frame can currently be given for this bill.

<sup>2</sup> [Stichting van de Arbeid | Labour foundation | Stichting van de Arbeid | StvdA](#)

6.b.

The Public Prosecution Service thus renders public accountability for the settlement of these cases. To compensate for the lack of a public court hearing, the Public Prosecution Service publishes increasingly longer press releases and statements of facts are included. This can be compared with the inquisitor that a public prosecutor would read out at the court hearing.<sup>3</sup> Paragraph 6 of the (temporary) Directive on Large Transactions (Aanwijzing Hoge Transacties<sup>4</sup>) contains provisions about publication of press releases and extensive statements of facts of non-trial resolutions.

A recent example is the non-trial resolution is the so-called Nelson case:

<https://www.om.nl/onderwerpen/hoge-transacties/nieuws/2021/04/28/econosto-mideast-econosto-eriks-cmk-en-mammoet-salvage-treffen-transacties-met-het-openbaar-ministerie>

(English version: <https://www.prosecutionservice.nl/latest/news/2021/04/28/econosto-mideast-econosto-eriks-cmk-and-mammoet-salvage-reach-settlement-agreements-with-the-netherlands-public-prosecution-service>).

**If no action has been taken to implement recommendation 6 (a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 6 (b):**

6. Regarding non-trial resolutions, pursue the proposed reforms to its non-trial resolution framework as a priority and in this context:

b) introduce, as planned, appropriate oversight of proposed non-trial resolutions in foreign bribery cases [Convention, Article 5 and Annex I D];

**Action taken as of the date of the follow-up report to implement this recommendation:**

As was discussed in the context of the reading of the Dutch report, in September 2020 the first steps were taken to introduce a new system of oversight.

As was shared with the WGB in the context of the Netherlands Fourth Evaluation the new Directive on Large Transactions which came into effect on 4 September 2020 introduced a (temporary) independent review commission. This new procedure ended the approval role of the Minister of Justice in the process. A letter to parliament on this topic can be found: [Kamerbrief over publicatie Aanwijzing hoge transacties door het Openbaar Ministerie | Kamerstuk | Rijksoverheid.nl](#)

Although the government has not formally published the members of the commission upon introduction of the new system, their names are a matter of public knowledge. They can be found in the written reports on the proposed settlements and also media reports, including an interview in *het*

<sup>3</sup> <https://www.om.nl/onderwerpen/hoge-transacties/ontwikkelingen>

<sup>4</sup> <https://wetten.overheid.nl/BWBR0044047/2020-09-04> An English translation was provided in the context of the Dutch evaluation.

*Financieele Dagblad* with one of the members of the review commission, a former judge.<sup>5</sup>

Since September 2020, the new regime has been followed in several cases (though not all related to foreign bribery). For example a settlement with a Dutch bank on charges of money laundering. It is standard that the report of the review commission is also published. [ABN AMRO pays EUR 480 million on account of serious shortcomings in money laundering prevention | News item | Public Prosecution Service](#)  
[Advies Toetsingscommissie Hoge Transacties | Publicatie | Openbaar Ministerie](#)

A case which is linked to foreign bribery, in which the new regime was applicable, was also concluded with a settlement agreement:

Dutch -contains links to supporting documents, including the advice of the review committee:  
[Econosto Mideast, Econosto, ERIKS, CMK en Mammoet Salvage treffen transacties met het Openbaar Ministerie | Nieuwsbericht | Openbaar Ministerie](#)

English-

[Econosto Mideast, Econosto, ERIKS, CMK and Mammoet Salvage reach settlement agreements with the Netherlands Public Prosecution Service | News item | Public Prosecution Service](#)  
[Statement of Facts & Settlement Agreements | Publication | Public Prosecution Service](#)

This temporary system of oversight is operational, as can be seen through the examples. As was shared with the WGB during the reading of our report, this would be a temporary regime, before the introduction of a new system of judicial oversight (“verlofprocedure”) for which legislative proceedings are underway. On 11 March 2021 a draft law was published for internet consultation, which allowed interested parties to submit views on the proposed law. Parties may choose to make their opinions public within this consultation phase. Please also refer to the background information on the current situation of the Dutch government as provided below. This significantly influences several current legislative processes.

[Overheid.nl | Consultatie Conceptwetsvoorstel naar aanleiding van de evaluatie van de Wet OM-afdoening \(internetconsultatie.nl\).](#)

The draft law shall introduce a judicial review by the court of appeal (*Gerechtshof*) of a specific category of settlements (the so called “hoge transacties in de sfeer van de rechtspersonen”), and would only allow for these settlements after judicial review of the intended settlement. This aims to increase the legitimacy of such settlements, increase legal protection for all parties involved and increase the transparency of the settlement procedures. This also aims to increase public acceptance of these types of settlements.

No specific timeframe can be given on the adoption of the draft law at time of writing.

**If no action has been taken to implement recommendation 6(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 6 (c):**

<sup>5</sup> [‘Een schikking mag niet worden gebruikt om verantwoordelijken uit de wind te houden’ \(fd.nl\)](#)

6. Regarding non-trial resolutions, pursue the proposed reforms to its non-trial resolution framework as a priority and in this context:

c) provide guidance on procedures for self-reporting and the level of cooperation expected from defendants [Convention Articles 3 and 4 and Annex I D];

**Action taken as of the date of the follow-up report to implement this recommendation:**

First of all, the Ministry of Justice and Security decided to commission independent research into this topic. The Scientific Research and Documentation Centre (Wetenschappelijk Onderzoek- en Documentatiecentrum, WODC) has selected the “Vrije Universiteit Amsterdam” to conduct research into the topics of the use of self-investigation and self-reporting by companies.

Please see: [Onderzoek naar voor- en nadelen van zelfonderzoek en zelfmelden door bedrijven | Welk onderzoek doen we? | WODC - Wetenschappelijk Onderzoek- en Documentatiecentrum](#)

The research will focus on literature regarding pros and cons of self-reporting and elaborate on best practices in countries where this already takes place. Publication of the research is expected by spring 2022 and may be used to determine possible future policy initiatives.

Aside from the research commission, other factors also contribute to this topic. The ‘Directive on the Investigation and Prosecution of Foreign Corruption’<sup>6</sup> stipulates that in the event that suspects report themselves with regard to foreign corruption committed by them or within and/or by their own company or organization and are open about this towards the Public Prosecution Service, the Public Prosecution Service will consider this transparently in the (method of) settlement and possible punishment.

Paragraph 4 of the Directive on Large Transactions stipulates that in determining the amount of the transaction it is, among other things, important whether or not there has been self-reporting and to what extent the suspect cooperated with the investigation.

The following considerations in the press release and statements of facts of the Nelson case<sup>7</sup>, can be pointed out:

*“The fine for the bribery offences and falsification of documents committed [...] includes a 25% discount because the facts were reported to the NPPS by the companies themselves<sup>8</sup>. All companies cooperated fully in the investigation into all the investigated offences. For this reason, in determining the fines, the NPPS applied an (additional) 25% discount.”*

*“In calculating the amount of the fine, the NPPS assesses whether, and if yes to what extent the suspect cooperated in the criminal investigation. The extent of cooperation is assessed according to a variety of aspects, including the scope, quantity, quality and timing of the cooperation in the given circumstances. One important relevant aspect is whether the defense cooperated proactively or reactively. Also relevant is the extent to which the FIOD and the NPPS are able to use the documents and information provided to verify the information.”*

<sup>6</sup> <https://wetten.overheid.nl/BWBR0044138/2020-10-01>

<sup>7</sup> The English version of the statements of facts and settlement agreements in the three sub investigations Nelson are available at <https://www.prosecutionservice.nl/documents/publications/fp/hoge-transacties/feitenrelaas/statements-of-facts--settlement-agreements>

<sup>8</sup> Note: no discount for self-reporting was granted in the two sub investigations that the suspects did not report themselves (CMK/investigation Wadi and Mammoet Salvage /investigation Gali)

In the Nelson case the Public Prosecution Service affiliated with the discount percentages, a maximum of 50%, applied in the United States (Foreign Corrupt Practices Act Corporate Enforcement Policy<sup>9</sup>) and the United Kingdom<sup>10</sup>. Since there is not yet a crystallized discount framework for fraud or corruption cases in the Netherlands, it remains a matter of customization, whereby the quantity and quality of the self-reporting and cooperation by the Public Prosecution Service are assessed and taken into account in the determination of the fine. If a self-report or cooperation by the Public Prosecution Service is incomplete, a lower discount percentage on the fine will be given, depending on the extent to which the cooperation was lacking.

**If no action has been taken to implement recommendation 6(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 6 (d):**

6. Regarding non-trial resolutions, pursue the proposed reforms to its non-trial resolution framework as a priority and in this context:

d) clarify if and under which conditions non-trial resolutions are available to natural persons in foreign bribery cases, including under the Directive on Large Transactions

**Action taken as of the date of the follow-up report to implement this recommendation:**

Although the Directive on Large Transactions states that, in general,

- large transactions occur in relation to legal persons, due to the fact, among other things, that in most cases against legal persons a court can impose no other penalty on a legal person than a fine;
- with regard to suspected natural persons such as de facto managers referred to in Article 51 WvSr (Criminal Code), the basic principle is that they will be prosecuted if possible, since a penalty other than a fine can be imposed,

the Directive also makes clear (under 4) that, as an exception to the general rule, transactions can be imposed on natural persons since for each suspect the case will be judged on its own merits in connection with the decision to prosecute. The seriousness of the facts and the (personal) circumstances are taken into account in this regard. Apart from this general rule, the (additional) conditions under which non-trial resolutions are available to natural persons in foreign bribery cases are the same as for legal persons.

Paragraph 180 and 181 of the Phase 4 evaluation report of the Netherlands deal with the “*Criteria for proposing non-trial resolutions*”:

With regards to the future “verlofprocedure” or judicial review by the court of appeal. This is still a draft law in the consultation phase. Nevertheless we can share that :

In line with the current practise the draft law will also operate within the goal of instituting criminal proceedings against natural persons where possible. In exceptional cases a public prosecutor may, in

<sup>9</sup> <https://www.justice.gov/criminal-fraud/file/838416/download>

<sup>10</sup> <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/>. In DPA October 30, 2020, SFO vs Airline Services Limited (ASL) the review judge ruled that "50% could be appropriate not least to encourage others how to conduct themselves when confronting criminality"

the context of a settlement with a legal person, offer a settlement to a natural person who is (criminally) involved in the illegal conduct of the legal person. In these circumstances the settlement with the natural person will always be subject to judicial review, also if the intended settlement itself remains (far) below the two thresholds. Therefore no settlement will be agreed upon without judicial leave (verlofprocedure). The court of appeal<sup>11</sup> assesses whether a public prosecutor could reasonably decide to make the provisional transaction offer after considering all the relevant interests. In the case of an intended transaction offer to natural persons, testing against the Directive on Large Transactions entails that the court of appeal checks whether it can reasonably be expected that the judge in the case in question would not impose a prison sentence on the suspect. After all, only in that case it is possible to make a transaction offer to a natural person on the basis of the temporary Directive on Large Transactions.

**If no action has been taken to implement recommendation 6(d), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

### **Background information**

On 15 January 2021, Prime Minister Mark Rutte tendered to the King of the Netherlands the resignation of all the government ministers and state secretaries following a report issued by the Parliamentary Committee on Childcare Benefit. A caretaker government – consisting of most sitting ministers and state secretaries- took over at this time. Parliamentary Elections for the House of Representatives took place on 15,16 and 17 March. The new House started its work on 31 March. At time of writing a new government is yet to be formed and the caretaker government is still in its place. This does influence governmental policy as the caretaker government cannot deal with matters that have been determined “sensitive” by both Houses of Parliament. In general no new policy initiatives tend to be introduced before the new government is installed.

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<sup>11</sup> draft MvT inz Art 563 lid 3

[www.oecd.org/daf/anti-bribery](http://www.oecd.org/daf/anti-bribery)

