



THE NETHERLANDS: PHASE 2

FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2 RECOMMENDATIONS

APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 REVISED RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 17 December 2008.

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SUMMARY AND CONCLUSIONS BY THE WORKING GROUP ON BRIBERY

a) *Summary of Findings*

1. In October 2008, the Netherlands presented its written follow-up report, outlining its responses to the recommendations adopted by the Working Group on Bribery at the time of the Netherlands' Phase 2 examination in June 2006. The Working Group welcomed the information provided by the Dutch authorities in the course of this exercise and recognised the Netherlands' significant efforts to implement the recommendations by the Working Group. The Working Group considers that the Netherlands has fully implemented 13 out of the 18 recommendations made during the Phase 2 examination, while 4 recommendations have either been partially or not implemented. One recommendation has been abandoned as it is considered no longer relevant.

2. As of October 2008, no foreign bribery cases had been brought before the Dutch courts. Nevertheless, the prosecution authorities have concluded out-of-court transactions with seven companies for paying kickbacks in the context of the Oil-for-Food Programme in Iraq, although the offence charged was the violation of sanctions legislation and not the foreign bribery offence. In addition, the Netherlands reported that 12 feasibility investigations and 3 preliminary investigations are underway in alleged foreign bribery cases, and that 4 requests for mutual legal assistance have been sent out in respect of a foreign bribery offence.

3. The Netherlands has taken a number of initiatives to raise awareness of and improve training on the foreign bribery offence. In particular, efforts have been made to ensure that adequate information and training on foreign bribery issues is provided to staff of Dutch government departments and public agencies involved with Dutch enterprises operating abroad, such as the Dutch Export Promotion Agency, EVD, the ministries for Foreign Affairs and Economic Affairs, and the Tax and Customs Administration. These ministries and agencies, in turn, have developed awareness raising programmes targeted at the private sector, in coordination with Dutch business associations. In addition, specific attention has been paid to raising awareness of the foreign bribery offence among the accounting and auditing professionals, given their specific role in the detection and reporting of foreign bribery. In this respect, the Code of Conduct for Auditors and Accountants has been clarified to clearly include bribery as a reportable fraud, and regular meetings occur between the Dutch Ministry of Finance and the accountants and auditors' oversight bodies to address the issue of foreign bribery.

4. With regard to Working Group recommendations to improve the reporting and detection of foreign bribery, the Netherlands has taken important steps to broaden the possibilities for reporting in the public sector. Both the Instructions for the Investigation and Prosecution of Corruption Offences in Public Office Committed Abroad (a Directive addressed to the Dutch police and prosecutors) and the Foreign Service Code of Conduct attempt to interpret broadly the Dutch legislation to encourage reporting of foreign bribery offences by Dutch public servants. The Foreign Service Code of Conduct goes so far as to put in place detailed guidelines on when and how to report suspected foreign bribery instances. Nevertheless, the Working Group regretted that Dutch legislation is still not explicit regarding the obligation to report all suspicions of foreign bribery, including where the foreign bribery

is committed by a private person. The Working Group noted the announcement made by the Netherlands that steps would be taken to address the Working Group recommendations, also based on an evaluation to be carried out within the Netherlands. On related issues concerning reporting, the Netherlands has taken specific measures to improve reporting by the tax administration, by issuing specific instructions and providing training to tax officials on the subject. Regarding related money laundering reporting, steps have been taken to ensure a better flow of information between the law enforcement and the reporting entities, that adequate feedback is provided, and that all professions, including accountants, are duly aware of their reporting obligations under the anti-money laundering system.

5. The Netherlands has also adopted important measures concerning the investigation and prosecution of foreign bribery. In particular, Instructions for the Investigation and Prosecution of Corruption Offences in Public Office Committed Abroad were adopted in June 2007 by the Board of Procurators General and addressed to the Public Prosecutors' Offices and the Rijksrecherche (the Dutch National Police Internal Investigation Department). These Instructions have clarified the competence and coordinating role of the Rijksrecherche in foreign bribery investigations. In this respect, the Netherlands have provided a significant increase of EUR 1.2 million in 2008 to the Rijksrecherche's budget for the investigation of corruption, including foreign bribery. A further increase of 0.6 million is planned for 2009. The Instructions also outline the proactive approach which the Rijksrecherche may take in opening foreign bribery investigations, and enumerate various sources which may trigger a foreign bribery investigation, including media reports, mutual legal assistance requests from other countries, as well as reports from Dutch diplomatic missions and whistleblowers. Importantly, the Instructions clarify the approach of the Public Prosecution Department to small facilitation payments: these payments, while they constitute, strictly speaking, a criminal offence under the Dutch Penal Code, will not be prosecuted, assuming they meet certain factors listed in the Instructions (for instance, small amounts, recorded in the company's accounts, made at the initiative of the foreign public official).

6. Notwithstanding the significant progress achieved through these Instructions, the Working Group noted that some of the content is still cause for concern and may be interpreted contrary to the Anti-Bribery Convention. For instance, the Instructions focus on corruption offences "committed abroad", whereas the bribery of a foreign public official may occur abroad but also within Dutch territory. Of most concern to the Working Group, however, is the list of criteria to be taken into account "in assessing whether situations are eligible for investigation and prosecution". This list could pose problems in respect of compliance with Article 5 of the Convention,¹ in that it includes factors such as the involvement of senior (foreign) public servants or politicians, and the potential impact on the reputation of the Dutch trading and political interests if a suspicious case is not investigated. The list also refers to factors which should not necessarily be relevant, such as the investigation and prosecution efforts on the part of the foreign country involved. The Working Group welcomed and encouraged the Netherlands' expressed intention to make the necessary amendments to the Instructions.

7. With respect to the treatment of foreign bribery cases by the Dutch courts, training sessions on foreign bribery were held in 2007 and 2008 and attended by judges. Concerning the Working Group's recommendation to increase fines for legal persons convicted of foreign bribery, the situation has not evolved since Phase 2 and the maximum fine applicable to a legal person for the most serious foreign bribery offence is still EUR 670 000. The Netherlands reiterated its view that the combination

¹ Article provides that "investigation and prosecution of the bribery of a foreign public official [...] shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."

of fines and confiscation measures currently applicable is sufficient. The Working Group however continues to consider that the financial penalty applicable to legal persons does not amount to sufficiently effective, proportionate and dissuasive sanctions. Furthermore, given that no foreign bribery cases have been adjudicated before Dutch courts to date, the Working Group considers that it cannot be satisfied at this point that confiscation measures would effectively compensate the low level of financial sanctions applicable to legal persons in the Netherlands.

8. In relation to the related money laundering offence, the Working Group was satisfied by the statistics compiled and provided by the Netherlands.

9. Finally, where the Netherlands Antilles and Aruba are concerned, the Working Group acknowledges that the Kingdom of the Netherlands in Europe has pursued its efforts to encourage these territories to ratify the Convention. The Working Group regrets, however, that no significant step towards ratification has been accomplished by these territories, and encourages the Netherlands to maintain contacts in this regard.

b) Conclusions

10. Based on the findings of the Working Group on Bribery with respect to the Netherlands' implementation of its Phase 2 recommendations, the Working Group concluded that the Netherlands has fully implemented recommendations 1(a), 1(b), 2(b), 2(c), 2(d), 2(e), 3(a), 3(b), 3(c), 3(e), 4, 5(b), and 6; that the Netherlands has partially implemented recommendations 2(a) and 7; and that recommendations 3(f) and 5(a) have not been implemented. Furthermore, the Working Group is of the view that recommendation 3(d) is no longer relevant, given investigations underway in the Netherlands.

11. The Working Group invited the Netherlands to report orally, within one year after the written follow-up examination, i.e. by October 2009, on the implementation of the four recommendations that the Group considers to be not yet satisfactorily implemented.

WRITTEN FOLLOW-UP TO PHASE 2 REPORT

Name of country: The Netherlands

Date of approval of Phase 2 Report: 15 June 2006

Date of information: October 2008

Part I: Recommendations for Action

Text of recommendation 1a:

1. With respect to awareness raising and prevention related activities to promote implementation of the Convention and the Revised Recommendation, the Working Group recommends:

a) that the Netherlands integrate additional training, information and awareness-raising activities about combating foreign bribery in relevant anti-corruption initiatives of the Dutch government (Revised Recommendation, Paragraph I).

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

Numerous articles and books have been published, various conferences and trainings have been organised by the private sector. Promoting integrity and fighting of corruption in international economic relations has drawn attention of the media frequently over the past years. Additionally a number of specific activities have been undertaken by the government:

- *The export promotion agency EVD has established fraud guidelines and implemented provisions regarding bribery of foreign public officials in the general conditions for the public contracts used by EVD. Furthermore EVD has drawn up training material for employees in which the subject is given special attention. Supplementary EVD has conducted an integrity policy which is given effect in the performance interviews with employees (see details below).*
- *September 2007, a third conference on prevention of and combat against corruption was organised in co-operation with VNO (Employers' Union) and the ministries of Foreign Affairs and Economic Affairs. .*
- *In the training programme of the Foreign Service the subject of integrity will be included in the programme (see above Netherlands' Action Plan.). Integrity is included in Performance interviews.*
- *In order to raise the awareness of auditors of the Tax and Customs Administration, the subject of bribes is incorporated into the so called 'control set' (database with risks assessment methods).*

- *Booklets with toolkits on corporate social responsibility (CSR) including promotion of integrity for 8 countries have been published by the EVD (Export Promotion Service) and MVO-Nederland (office in charge of CSR promotion). More publications will follow.*
- *VNO (Employers' Union) will issue a new brochure, drawn up in close collaboration with the ministries of Economic Affairs and Foreign Affairs*
- *The export support programmes of the government have been evaluated with due attention to integrity. Awareness of the OECD Guidelines for Multinational enterprises is a precondition for government support.*
- *Beginning 2008 an extensive government paper outlining the policy regarding CSR including integrity has been presented to parliament.*
- *Atradius DSB (official export credit agency) has developed an awareness programme for its employees.*

Note on EVD

The fight against corruption is for EVD part and parcel of corporate social responsibility (CSR).

Corporate social responsibility gets structural attention. The annual programme indicates which activities are carried out in this area. EVD provides information by various means to the Dutch business society concerning CSR including prevention of and combating of corruption.

Country toolkits.

EVD has developed country toolkits, which offer country specific information on CSR. The toolkits provide practical guidelines and offer companies concrete advice on CSR. Within each of the toolkits a separate chapter has been dedicated to the fight against corruption. References are included to relevant external Internet sites (www.internationaalondernemen.nl.) Toolkits for BRIC's, Indonesia and South Africa are published; toolkits for Ghana, Morocco, Romania, Turkey, Vietnam are under preparation. Besides the country toolkits also general advice and information on corruption is provided.

CSR training for EVD employees.

EVD employees who have regular contact with companies participated in a training on CSR. The first training sessions have taken place in May 2008 and were organised by the knowledge centre MVO-Nederland. These sessions will continue in fall. The topic "fight against corruption" is part of the training. Other items on the programme are: OECD guidelines for multinationals and the National Contact Point.

Trade promotion missions.

EVD organises a large number of economic country missions per year. CSR is included in the programme and from country to country it is assessed which CSR themes deserve special attention. The regular programme includes among other things presentations concerning CSR themes and visiting CSR projects. THE OECD Guidelines are included in the information folder for the mission participants.

If no action has been taken to implement recommendation 1, 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:

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Text of recommendation 1b:

1. With respect to awareness raising and prevention related activities to promote implementation of the Convention and the Revised Recommendation, the Working Group recommends that the Netherlands:

b) encourage the accounting and auditing professions to develop initiatives to raise awareness of the foreign bribery offence and the accounting and auditing requirements under the Convention, and encourage both professions to develop specific training on foreign bribery in the framework of their professional education and training programmes (Revised Recommendation, Paragraph I).

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

A Ruling of the year 2007 on the Code of Conduct for Auditors and Accountants stipulates that a course on integrity, objectivity, expertise, prudence, confidentiality and professionalism is mandatory at the beginning of a career. Ethical problems including notably bribery are dealt with in this curriculum. In refresher courses fraudulent reporting is one of the important topics. NIVRA, the organisation representing the profession, confirms that the attendance is large.

It is beyond doubt that bribery is included in the concept of fraud. A relevant (abbreviated) quote reads: The auditor ought to realise that when engaged in financial control activities non-compliance of the law can have material effect upon annual reporting. Appropriate education and training programmes now pay specifically more attention to preventing and combating fraud and bribery.

Based on ISA 240 of the International Federation of Accountants (IFAC) more specific and detailed rules have been developed for Dutch accountants and auditors. In general it can be stated that the Dutch rulings are more strict and stringent as combating fraud is considered to be of the essence for the auditing profession. Briefly the improvements contain: 1) the obligation to consult an expert when there is an indication of fraud (including bribery) 2) the obligation to investigate whether there is a connection with an indication of an unusual or suspicious transaction 3) the obligation to inform management in writing of the indication and 4) in case of a reasonable suspicion of fraud, which is more than an indication, corporate governance as to be informed in writing.

Moreover ISA 240 only applies in case of control of historic annual reporting. The Dutch accountants profession (NIVRA) has decided that owing to the importance for society of combating fraud Dutch standard rules are also applicable in other instances. The auditing profession states that owing to the additional rulings in the Netherlands auditors and accountants need to be proactive as well as reactive vis à vis the risk of fraud. They need to be proactive with a view to discovery of fraud and bribery and reactive in case of fraud and infringement of rules and regulations. In this connection attention is drawn to 1) supervision and 2) the Code of Conduct

1) Supervision

In order to implement the 8th EU directive the Dutch Law on Supervision of Auditors has entered into force on October 1st, 2006. A license of the Authority Financial Markets (AFM) is required for the auditing profession and AFM is in charge of permanent supervision. In all cases of legally required control a material risk in connection with a reasonable suspicion of fraud has to be reported.

2) Code of conduct

Starting January 1st, 2007, a new code of conduct based on the code of ethics of IFAC has been introduced. All auditors, not only those in charge of annual reporting, are bound by this code. For auditors five fundamental principles have been introduced including:

- 1) Integrity
- 2) Objectivity
- 3) Expertise and prudence
- 4) Confidentiality
- 5) Professionalism.

If no action has been taken to implement recommendation 1, 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 2a:

2. With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that the Netherlands:

a) clarify the obligations of public servants to report suspicions of crimes, including foreign bribery, to Dutch law enforcement or prosecution authorities and raise awareness among public servants about their obligations, and the mechanisms and reporting channels available to fulfil these obligations (Revised Recommendation, Paragraph I).

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

The obligation of public servants to report suspicions of crimes, particularly foreign bribery, has been clearly outlined in a legally binding instruction of Public Prosecution. The Ministry of Justice is conducting research on the application of the article concerning the obligation to report crimes for public servants, including foreign bribery (Art. 162 Criminal Prosecution) and will advise Parliament this fall on steps to be taken in order to raise awareness among civil servants and its importance for whistleblower protection

In 2008 an evaluation has been carried out on whistleblower protection in the public sector. The Ministry of Interior and Kingdom Relations will report to Parliament this fall with suggestions how to deal with the outcome of this evaluation. Measures are envisaged to strengthen protection of the whistleblower.

The European Directive on Awarding Public Contracts obliges contract authorities to exclude a company from participation in a public contract in case a company has been convicted of corruption. In the new Dutch bill on awarding public contracts tenderers will be obliged to obtain a Certificate of Good Behaviour for Legal Persons in order to be allowed to participate. (Infringements concerning competition, collusion, will also be dealt with.) The Certificate of Good Behaviour for Legal Persons will be a new instrument for legal persons to

demonstrate their integrity. This certificate is issued by the Minister of Justice to confirm that there is no evidence that would preclude the legal person concerned from participation in public tendering procedures.

If no action has been taken to implement recommendation 1, 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 2b:

2. With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that the Netherlands:

b) implement guidelines for the personnel of diplomatic missions, export credit agencies, and other institutions who are in a position to have privileged contacts with Dutch enterprises active abroad on specific measures to be taken if suspicions of foreign bribery should arise. Guidelines should include specific reporting channels and a reminder of the applicable obligations to report serious offences (Revised Recommendation, Paragraph I)

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

The obligation of public servants to report suspicions of crimes, particularly foreign bribery, has been clearly outlined in a legally binding instruction of Public Prosecution (see Annex 1: Instructions on the Investigation and Prosecution of Corruption Offences in Public Office Committed abroad).

Awareness among the Foreign service has been raised by the issuance of a new addition to the Code of Conduct for the Foreign Service (see Annex 2: Annex to the BZ Code of Conduct on Bribery Abroad). The guidelines for diplomatic missions (see Annex 3: Guidance for Mission Staff) have been issued and are being implemented. In this document the reporting channels have also been outlined to diplomatic missions.

At the end of 2006, the Action Statement on Bribery and Officially Supported Export Credits was strengthened and transformed into an OECD Recommendation (TD/ECG(2006)24). The Netherlands has fully implemented the Recommendation in early 2007. All required statements have been included in application forms and insurance policies. In addition, the Ministry of Finance has issued a description of the procedures to be followed by Atradius DSB in carrying out the Recommendation. The Netherlands is in some respects more stringent than required. For instance, in case of agent commissions, due diligence is exerted in case of payments below 5 % of the total credit amount. In case agent commissions are over 5% of the total credit amount or more than €4.5 million, the amount will have to be specified and enhanced due diligence will applied. In the latter case, the transaction has to be submitted to the Ministry of Finance for review and approval. A formal procedure has been put in place for reporting credible evidence of bribery to Public Prosecution.

The Export Promotion Agency (EVD) has raised awareness within the organization of the obligation of each and every public servant to report any suspicion of crime, including bribery, to Dutch law enforcement or prosecution authorities. EVD has appointed a fraud coordinator who keeps contacts with prosecution authorities and who will investigate all fraud allegations independently.

If no action has been taken to implement recommendation 1, 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 2c:

2. With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that the Netherlands:

c) following the enactment of the new legislation prohibiting the tax deductibility of bribes in April 2006, develop clear guidelines and provide training for tax officials as a matter of priority in order to maximise the detection of potential criminal conduct relating to foreign bribery, and to promote the reporting of suspicions to law enforcement or prosecution authorities (Revised Recommendation, Paragraph I, II).

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

Tax Authorities organise regular meetings for tax officials on tracing (cross-border) corruption and how to deal with suspicions of corruption, including reporting to Public Prosecution. Organizational arrangements have been made to encourage reporting, sanctioning and collaboration. Furthermore, for reporting corruption a national contact person in the Tax Administration has been appointed. The new structure warrants that each fraud signal reaches the persons responsible for combating fraud. Thematic sessions, applications and examinations complete this structure

A special instruction has been written on the subject of bribes. This instruction is published in a Newsletter which is handed out to all the staff involved in supervision. The instruction is also included in the 'control set', a database accessible to all auditors in charge of risk assessment methods. Checking this database is part and parcel of each audit

If no action has been taken to implement recommendation 1, 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 2d:

2. With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that the Netherlands:

d) continue to take appropriate steps to improve the flow of information and feedback between the relevant actors in the anti-money laundering system (Revised Recommendation, Paragraph I).

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

FIU-Netherlands (Financial Intelligence Unit) provides recommendations to business sectors on introduction of proper procedures for internal control and communication. Preventive measures are also promoted for the business sector with a view to money laundering, financing of terrorism, and aiding and abetting. This is mostly done on a bilateral basis. Besides FIU-Netherlands organises at regular meetings with all parties concerned information sessions for groups of reporters with case studies. FIU informs reporters of unusual transactions in case Public Prosecution has been informed. Public Prosecution will in future keep reporters abreast of follow-up actions indicating which role the reporter has played. For better communication and information the website will be improved and expanded.

FIU-The Netherlands invests in a better cooperation with all reporting entities. Via the FIU website (www.FIU-Nederland.nl) information at a general level can be exchanged, e.g. new national as well as international laws- and regulations, anonymous case description which can serve as an example, etc., with the reporting entities.

FIU has organised two one day meetings with: a) the money transfer businesses as well as with b) the notaries. During these meetings the audience was informed about the way FIU-The Netherlands operates, the role of the supervisory authority, the relevant articles in the Penal Code and facts and figures on money laundering and terrorist financing. It is planned to have more meetings in the course of the coming years with other reporting entities e.g. the banking sector, accountants, lawyers. FIU reports back when information on an unusual transaction is received. Large financial institutions and casino's are also informed when a transaction, after analysis and investigation within the FIU, has been reported to Public Prosecution for further criminal investigation. The new IT-system, which will be operational in the course of 2009, will help FIU to collect data of use to reporting entities (the feedback).

During the last few years the number of reports FIU received was quite stable, between 170.000 – 180.000 unusual transaction reports yearly. In 2007 for the first time in the history FIU received more than 200.000 unusual transaction reports. This large number is due to the increased money transfers reported to FIU.

As far as the accountants are concerned comparing 2006 with 2007 FIU notices a slight increase in reports from accountants (2006: 76 unusual transactions, 2007: 85 unusual transactions). However, it is noteworthy that the number of unusual transactions which, after analysis within FIU, are reported as suspicious to Public Prosecution (2006: 15 suspicious transactions, 2007: 64 suspicious transactions) has increased remarkably.

If no action has been taken to implement recommendation 1, 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 2e:

2. With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that the Netherlands:

e) review, in the light of recent amendments to the Reporting Act and Identification Act, whether accountants in the Netherlands have adopted a restrictive application of their obligation to report STRs under the Unusual Disclosures Act, and assess whether further measures are required to ensure that accountants (and all reporting entities) in the Netherlands report unusual or suspicious transactions to the FIU Netherlands/MOT-BLOM in accordance with the Unusual Disclosures Act (Convention, Article 5; Revised Recommendation, Paragraph I).

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

From May 2006 legislation on reporting unusual transactions has changed. Owing to this amendment but at the same time due to growing publicity and promotion, the number of reports on unusual and suspicious transactions is on the increase. All qualified auditors (RA and AA) have been obliged to attend the course on fraud of the police academy. The Bureau for Financial Control supervises the accountants and has no indication that accountants have adopted a restrictive application of their obligation to report suspicious transactions. The number of reports from accountants has increased from 76 in 2006 to 85 in 2007. The corresponding amount has increased from € 1,5 million euros to € 7,2 million euros in 2007. More importantly, the number of unusual transactions which, after analysis within the FIU (Financial Intelligence Unit), are reported to Public Prosecution as suspicious transactions has increased remarkably (2006: 15 suspicious transactions, 2007: 64 suspicious transactions)

Note: During the last few years the number of reports the FIU (Financial Intelligence Unit) received was quite stable with between 170.000 – 180.000 unusual transaction reports yearly. In 2007 FIU received for the first time in the history of more than 200.000 unusual transaction reports. This increase is mainly due to large number of money transfers reported to the FIU.

If no action has been taken to implement recommendation 1, 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 3a:

3. With respect to the investigation and prosecution of foreign bribery and related

offences, the Working Group recommends that the Netherlands:

a) investigate proactively foreign bribery allegations and monitor and evaluate on an on-going basis the performance of law enforcement authorities, including the *Rijksrecherche*, the National Public Prosecutor for Corruption (NPPC), and other relevant agencies, with regard to the initiation and conduct of investigations, as well as concerning decisions whether or not to prosecute foreign bribery cases (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraph I, II).

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

The Project Group Foreign Corruption of the Rijksrecherche has finished its work in December 2007. In accordance with the results of the project, the Rijksrecherche has decided to implement the fight against foreign bribery in the regular procedures which are used for the intake of all types of cases by the Rijksrecherche. The Coordination Committee Rijksrecherche is now responsible for the intake of foreign bribery cases.

In 2008 the capacity of the Rijksrecherche has been expanded with 6 FTE (Full Time Equivalent) investigation officers for the investigation of financial and economical crime, including (foreign) bribery. The Rijksrecherche has also started a strategic analysis with regard to the bribery of public servants in the Netherlands. In due course this study will be broadened to other areas in the world, for instance Aruba and the Netherlands Antilles.

Furthermore, the public prosecutor for the Rijksrecherche started screening international investigations which are conducted at the national level ('Nationale Recherche') on signs of foreign bribery. In some cases this has resulted in investigation of foreign bribery.

Rijksrecherche sees it as its task to submit serious signals of corruption, including foreign bribery, to the Central Coordination Committee. This process takes place in the context of intelligence led policing.

From January 2007, as far as the Office of Counsel for the Prosecution (Parquet) is concerned, as regards foreign bribery:

12 feasibility investigations

3 preliminary investigations

4 outgoing requests for mutual legal assistance

6 incoming requests for mutual legal assistance were conducted on foreign bribery.

In this context the Prosecution Department reports that it has concluded financial transactions (out of court settlements) with 7 companies for violating sanction legislation by paying kickbacks when implementing the Oil for Food Programme. Criminal gains have also been confiscated. In July 2008 a press release has been issued about these settlements. Together with the names of the companies (Alfasan International B.V., N.V. Organon, Flowserve B.V. , OPW Fluid Transfer Group Europe B.V., Prodetra B.V. Solvochem Holland B.V., Stet Holland B.V.) the settlements have been made public.

For the following Oil-for-food transactions out-of-court settlements have been reached:

1. Alfasan International BV Woerden, fine: € 31.800,-- and confiscation € 10.183,55

2. NV Organon Oss, fine: € 381.602

3. Flowserve bv te Etten-Leur, fine: € 76.274 and confiscation €180.260

4. OPW Fluid Transfer Group Europe BV, Nieuw Vennep, fine € 57.204 and confiscation € 24.600

5. Prodetra bv, Wadinxveen, fine: 64.751 and confiscation € 34.485,95

6. Solvochem Holland bv, Rotterdam, fine € 136.000 and confiscation € 144.592

7. Stet Holland bv, Emmeloord, fine € 119.712 and confiscation € 54.458

If no action has been taken to implement recommendation 1, 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 3b:

3. With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that the Netherlands:

b) clarify the competence of the Rijksrecherche and of the NPPC over foreign bribery cases, as well as ensure that other law enforcement agencies are aware of the coordinating role of the NPPC in this regard, and accordingly duly report all cases of foreign bribery to the NPPC (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraph I, II).

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

After centralising the organisation and introducing the Coordination Committee Rijksrecherche in 2001 virtually all cases were referred to Rijksrecherche. However, in case of foreign bribery the mechanism did not always operate as desired. In the beginning cases tended to be classified as fraud and in this case the inquiry was often conducted by the fiscal department (FIOD/ECD). This goes for requests for mutual legal assistance as well. Appropriate measures have meanwhile been taken for a better work division by means of new instructions and a covenant with FIOD/ECD. The competence and coordinating role of Rijksrecherche has been made clear to all parties concerned. Within Public Prosecution the Public Prosecutor for Corruption has a central role.

If no action has been taken to implement recommendation 1, 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 3c:

3. With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that the Netherlands:

c) ensure that sufficient training and resources, including specialised expertise, are made available to law enforcement authorities, including the Police, the *Rijksrecherche* and the NPPC for the effective detection, investigation and prosecution of foreign bribery offences (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraph I, II).

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

Cross-border bribery constitutes part of the training course on combating corruption that is

conducted twice yearly. Recently an expert on economic crime and criminal liability has conducted a workshop for Rijksrecherche and Public Prosecution. Similar workshops will also be conducted in the future.

At the Rijksrecherche trained officers both financially and otherwise are at disposal for investigation as soon as an inquiry in a case has progressed sufficiently. Moreover Public Prosecution can call upon the services of various specialised departments.

Within the context of the Programme “Reinforcing the measures for combating financial-economic crime” of the Ministry of Justice, The Rijksrecherche has received in 2008 an increased 1,2 million euros for the combat of corruption, including foreign bribery. This money will be invested in hiring more investigation officers and developing special expertise and training to strengthen the information position and the implementation of additional criminal investigations. In this context, the collaboration between the Rijksrecherche, Public Prosecution Service and the FIOD-ECD (Fiscal Information and Investigation Service / Economic Investigation Service) will be further enhanced

If no action has been taken to implement recommendation 1, 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 3d:

3. With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that the Netherlands:

d) encourage law enforcement authorities to make full use of the broad range of investigative measures available to Dutch investigative authorities to effectively investigate suspicions of foreign bribery (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraph I, II).

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

No deficiencies have been detected. All investigative measures for crimes in the category concerned are at disposal for inquiry and investigation. As the need arises they are fully utilised. The authorities make full use of all available investigative measures as appropriate.

If no action has been taken to implement recommendation 1, 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 3e:

3. With respect to the investigation and prosecution of foreign bribery and related

offences, the Working Group recommends that the Netherlands:

e) encourage Dutch authorities to request MLA to obtain and assess evidence available abroad of allegations of foreign bribery over which the Netherlands has jurisdiction, and ensure that this is reflected in the 2002 *Directive on Investigation and Prosecution of Corruption of Officials* (or subsequent Directives) and is underpinned by renewed efforts to raise awareness and, where necessary, training of police and prosecutors in relation to the need to obtain MLA (Convention, Articles 5, 9; Commentary 27; Revised Recommendation, Paragraph I, II).

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

The Netherlands has a national network of 6 regional centres for mutual legal assistance. These centres together with the Ministry of Justice advise on the requests for mutual legal assistance (MLA). In cooperation with the National Police Services Agency (KLPD) an online computer programme has been developed that facilitates drafting of requests for legal assistance abroad. This programme provides a format that traces treaties that are applicable and indicates which conditions apply to mutual legal assistance. The National Public Prosecutor for Corruption and the Ministry of Justice work together to ensure a smooth process for both incoming and outgoing requests for legal assistance. These developments facilitate and encourage staff to make use of MLA.

If no action has been taken to implement recommendation 1, 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 3f:

3. With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that the Netherlands:

f) review and amend the 2002 *Directive on Investigation and Prosecution of Corruption of Officials*, issued by the Dutch Board of Procurators General, to ensure that the information contained therein may not be interpreted contrary to the Convention and the bribery offences in the Dutch Penal Code (Convention, Article 5; Commentary 7; Commentary 27; Revised Recommendation, Paragraph I, II).

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

As stated earlier a new directive (see Annex 1: Instructions on the Investigation and Prosecution...) has been issued on foreign bribery in complete conformity with the OECD Convention.

If no action has been taken to implement recommendation 1, 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 4:

4. With respect to the offence of foreign bribery, in order to prevent misinterpretations of the offence that are contrary to the Convention, the Working Group recommends that the Netherlands take appropriate measures to further clarify the application of the law in relation to small facilitation payments and the information in the 2002 *Directive on Investigation and Prosecution of Corruption of Officials*. (Convention, Articles 1, 5; Commentary 9).

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

Strictly speaking facilitation payments are as a matter of fact also liable to punishment. The Public Prosecution Department, however, deems it not expedient to pursue a stricter investigation and prosecution policy on tackling bribery of foreign public servants than the policy required under the OECD Convention. This means that acts which can be qualified in terms of the OECD Convention as 'facilitation payments' will not be prosecuted. The factors that can be taken into account to decide whether or not to initiate a case, have been adjusted and reduced for reasons of clarity. Factors that count against prosecution:

- *It concerns acts or omissions which the public servant in question was already obliged to perform by law. The payment may not interfere with competition in any way whatsoever.*
- *It concerns, in absolute or relative sense, small amounts.*
- *It concerns payments to junior public servants.*
- *The gift must be entered in the company's records in a transparent way, and must not be concealed.*
- *The making of the gift must be the initiative of the foreign public servant.*

If no action has been taken to implement recommendation 1, 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 5a:

5. With respect to adjudication by courts and sanctions for foreign bribery, the Working Group recommends that the Netherlands:

a) increase the maximum levels of monetary sanctions for legal persons, and compile statistical information on fines imposed by the courts to allow for adequate assessment of whether sanctions are proportionate, dissuasive and effective in practice (Convention, Article 3.1).

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

Shortly before the OECD examination of the Netherlands in 2005 the applicable fines have been increased. In view of the fact that additional punitive means (i.a. confiscation of all proceeds,

sanctions including imprisonment of natural persons involved the same case) are at the disposal of judges, it is for the time being considered that sanctions are sufficiently effective, proportionate and dissuasive.

In addition a draft bill has been sent to parliament on 20 March 2008, which will raise the fine applicable to the corruption offences of Sections 177a and 178a, first paragraph, of the Penal Code from the fourth (€16,750) to the fifth category (€67,000) (see Kamerstukken II, 2007/08, 31 391, no. 2). The draft bill also broadens the possibility of imposing a professional disqualification in the event of active bribery of public officials (Sections 177, 177a, 178 of the Penal Code). Although there is no denying that for all crimes the level of sanctions in the Netherlands is generally lower than in many other OECD Member States with the above changes sanctions are proportionate, dissuasive and effective in practice.

If no action has been taken to implement recommendation 1, 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 5b:

5. With respect to adjudication by courts and sanctions for foreign bribery, the Working Group recommends that the Netherlands:

b) ensure that judges are trained to deal with foreign bribery offences, and draw their attention to the importance of applying sanctions that are sufficiently effective, proportionate and dissuasive for foreign bribery offences (Convention, Article 3.1; Revised Recommendation, Paragraph I).

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

Training for judges in the above areas is provided for by the Council for the Judiciary (Raad voor de Rechtspraak). In 2007 two trainings on dealing with foreign bribery took place. 43 members of the public prosecution service attended these trainings. In 2008 one training took place. 21 members of the public prosecution service and 5 judges attended this training.

If no action has been taken to implement recommendation 1, 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:

6. With respect to the related money laundering offence, the Working Group recommends that the Netherlands continue to compile statistics on the offence, including the level of sanctions

and the confiscation of the proceeds of crime (Convention Article 7).

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

The Netherlands continues to keep statistics on legal proceedings regarding criminal investigations on money laundering.

Regarding the level of the sanctions it is to be noted that in general accumulation of similar sanctions is excluded in The Netherlands. By consequence it is not possible to distinguish in case of multiple crimes which part of a sanction applies to which particular article in the Criminal Code. Consequently when a verdict is pronounced for money laundering and bribery it cannot be established which part of the sanction is applicable to bribery.

Within the Programme “Reinforcing the measures for combating financial-economic crime” of the Ministry of Justice , the confiscation of criminal assets will be given an additional impulse over the next few years. The aim is to also deploy other instruments that can be used to take away the profits of crime, such as taxation measures and forfeiture orders.

The Prosecution Service Criminal Assets Deprivation Bureau (Bureau Ontnemingswetgeving Openbaar Ministerie, BOOM) will be further strengthened. It will be further expanded to become the EU point of contact for international confiscation cases. In its annual report, BOOM stated that it confiscated 22 million euros in confiscation cases in 2007.

<i>Year</i>	<i>Unusual Transactions</i>	<i>Suspicious Transactions</i>
<i>2005</i>	<i>181.623</i>	<i>38.481</i>
<i>2006</i>	<i>172.865</i>	<i>34.531</i>
<i>2007</i>	<i>214.040</i>	<i>45.656</i>

Source: FIU yearly reports

In 2007 FIU received 214.040 unusual transactions and presented 45.656 suspicious transactions Public Prosecution. The numbers have increased steadily over years.

<i>Year</i>	<i>Cases awaiting decision by the Public Prosecutor</i>	<i>Public Proscutor decisions to take cases to court</i>
<i>2005</i>	<i>16</i>	<i>271</i>
<i>2006</i>	<i>71</i>	<i>593</i>
<i>2007</i>	<i>196</i>	<i>756</i>

Source: Public Prosecutor

The figures above show a impressive increase of cases that have been brought to court. For technical reasons FIU does not have statistics on convictions.

If no action has been taken to implement recommendation 1, 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 7:

7. Given the economic role of the Netherlands Antilles and Aruba, the Working Group strongly recommends that the Netherlands in Europe continue to encourage Aruba and the Netherlands Antilles to adopt the necessary legislation in line with the principles of the Convention and Revised Recommendation, and assist them in their efforts, within the rules governing their relationship, and report to the Working Group on these processes on an ongoing basis (Convention Article 1).

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

The relationship of the various parts of the Kingdom of the Netherlands is presently under discussion at a political level. In 2009 Bonaire, St. Eustatius and Saba will become public bodies of the Netherlands, while on the other hand Curacao, St. Maarten and Aruba will each become independent countries within the Kingdom of the Netherlands. In this process of political rebuilding, special attention is being paid in programmes of good governance and strengthening of security, to (international treaties on) integrity and fighting corruption.

The Netherlands offer (financial) assistance in order to strengthen good governance in the Netherlands Antilles. In this framework the islands strengthen their 'checks and balances', conduct integrity programmes and improve financial management and control. Recently in the Netherlands Antilles, corruption cases have been brought to court which have led to convictions, This demonstrates the willingness of authorities in Netherlands Antilles to combat corruption.

If no action has been taken to implement recommendation 1, 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 June 2006, the government of Aruba informed the Minister of Justice that the implementing legislation for the OECD Convention had almost been finalised. The Minister of Justice will bring this recommendation to the attention of his colleagues of the Netherlands Antilles and Aruba in the Council of Ministers for the Kingdom of the Netherlands. The adoption of legislation to ratify the OECD Convention, remains an autonomous affair of both Netherlands Antilles and Aruba.

Part II: Issues for Follow-up by the Working Group

Text of issue for follow-up:

8. The Working Group will follow up on the issues below, as practice develops in order to assess:

a) given the recent entry into force of the new law prohibiting the tax deductibility of bribes to foreign public officials, whether its application in practice allows for the effective implementation

of the 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials (Revised Recommendation, Paragraph I, II and IV; 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials).

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

See above sub 2c

Text of issue for follow-up:

8. The Working Group will follow up on the issues below, as practice develops in order to assess:

b) whether the Netherlands can effectively rely on its territorial or nationality jurisdiction to prosecute foreign bribery offences, notably (1) where a Dutch legal person uses a non-Dutch national to bribe a foreign public official while outside the Netherlands²; (2) where the bribing of the foreign public official occurs in a third country where there is no foreign bribery offence; and (3) where the foreign bribery offence is committed by a company incorporated in the Netherlands Antilles or Aruba (Convention Articles 2 and 4; Commentary 25, 26).

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

No jurisprudence has been traced indicating that there is a problem that needs to be addressed. It goes without saying that a link with the Netherlands (in Europe) is required.

² The Working Group notes that this is a general issue for many Parties.

Text of issue for follow-up:

8. The Working Group will follow up on the issues below, as practice develops in order to assess:

c) recent amendments that allow for greater flexibility to suspend the statute of limitations, to confirm whether the statute of limitations in the Netherlands allows for an adequate period of time for the investigation and prosecution of foreign bribery cases (Convention Article 6).

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

See reply above sub 7

Text of issue for follow-up:

8. The Working Group will follow up on the issues below, as practice develops in order to assess:

d) the prosecution of legal persons for foreign bribery cases, to review how the jurisprudence developed by the *Hoge Raad* broadening possibilities to trigger liability of legal persons is applied by the courts in practice, and to evaluate whether this allows for the effective prosecution of legal persons (Convention Article 5; Commentary 27, Revised Recommendation, Paragraph I, II).

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

At the time of the examination it was stated that effective prosecution of legal persons is very well possible. There are no developments to report that point to the contrary.

Text of issue for follow-up:

8. The Working Group will follow up on the issues below, as practice develops in order to assess:

e) the new provisions governing special confiscation introduced by the Act of Parliament of 8 May 2003, to ensure that full use is made of these measures in the enforcement of foreign bribery legislation, particularly in view of the low level of criminal sanctions for legal persons for foreign bribery in the Netherlands. To allow for this assessment, the Netherlands could usefully compile statistical information illustrating the use of confiscation measures by the prosecution and the courts

(Convention, Article 3).

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

There is no statistical information readily available right now. Anecdotal evidence indicates that more and more use is being made of confiscation measures (see also above sub 3a)

Text of issue for follow-up:

8. The Working Group will follow up on the issues below, as practice develops in order to assess:

f) the use of out-of-court transactions for foreign bribery offences, as governed by article 74 of the Dutch Penal Code, to ensure that they result in the imposition of effective, proportionate and dissuasive sanctions (Convention, Article 3.1)

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

See above notably sub 3a.

Text of issue for follow-up:

8. The Working Group will follow up on the issues below, as practice develops in order to assess:

g) the application in practice of false accounting offences. To this end, the Netherlands could usefully provide information on the number of prosecutions and sanctions imposed under article 1.4 of the Economic Offences Act for contravention of article 361, et seq. of Book 2 of the Civil Code; article 225 of the Penal Code; and article 336 of the Penal Code (Convention, Article 8, Revised Recommendation, Paragraph V).

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

All available useful statistical information has been made available above.

Annex 1

Instructions on the Investigation and Prosecution of Corruption Offences in Public Office Committed abroad

Category: Investigation, prosecution.

Legal nature: Instructions within the meaning of Section 130(4) of the Dutch Judiciary (Organization) Act (Wet op de rechterlijke organisatie)

From: the Board of Procurators General

To: the Heads of the Public Prosecutor's Offices, the Director of the National Police Internal Investigations Department Registration number: 2007A005

Date of adoption: 11 June 2007

Effective date: 01 August 2007

Valid until: 31 July 2011

Published in the Dutch Government Gazette: PM

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Relevant policy rules: Instructions on the Investigation and Prosecution of Corruption Offences in Public Office Committed in the Netherlands (2007A004) Statutory provisions: Sections 177, 177a, 178, 178a, 362, 363, 364 and 364a of the Dutch Penal Code and Section 162 of the Dutch Code of Criminal Procedure

Background

The Penal Code provides in Sections 177, 177a and 178 that those bribing public servants and judges are liable to punishment (active bribery). Sections 362, 363 and 364 of the Penal Code provide that public servants or judges soliciting bribes are liable to punishment (passive bribery). Since 1 February 2001, the legislation concerning bribery of public servants and corruption in public office has changed drastically. The most important changes are:

- Increasing the severity of punishment in order to better reflect the seriousness of this kind of offence. As a result, the range of available means of coercion and powers of investigation has been increased in some cases;
- Widening the scope of the descriptions of the offence by introducing 'service' as a means to bribe someone;
- Making receiving a gift at a later date, and situations in which the public servant has not acted contrary to his duty punishable by law;
- *Widening the scope of the jurisdiction of the Dutch courts for corruption offences committed abroad (in brief also referred to as 'foreign corruption'): anyone who bribes a Dutch public servant abroad can be prosecuted in the Netherlands; the same applies to Dutch citizens bribing a public servant from another country outside Dutch territory (Section 178a Penal Code).*

The legislative amendment was required, among other things, as a result of a number of international conventions, concluded with a view to a more efficient way of fighting fraud and corruption, i.e. the Convention on the protection of the European Communities' financial interests in Brussels on 26 July 1995 (Treaties Series 1995, 289), the (first) Protocol to this Convention dated 27 September 1996 (Treaties Series 1996, 330) and the OECD³ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions signed on 17 December 1997 in Paris (Treaties Series 1998, 54). These Conventions aim to harmonize the criminal provisions regarding fraud and corruption of the various countries with the aim of effective international collaboration. The approach chosen in the OECD Convention is that of international business transactions. The preamble to this Convention

³ OECD: Organization for Economic Co-operation and Development

explicitly considers that bribery is a widespread phenomenon that undermines good governance and economic development and has disastrous consequences for international competition.

The tools provided by criminal law have a wide scope of application. Those offering a public servant a gift with the aim of inducing them to perform or omit any official act and those public servants accepting a gift, whereas they know or reasonably should suspect that something is expected in return, can fall under the operation of the criminal statutes. The law does not provide any distinguishing criterion for gifts that are deserving of punishment and those that are not. The legislative branch has decided to leave it to the discretion of the Public Prosecution Department to set limits, as it is able to have a controlling function⁴ by availing itself of its right to exercise prosecutorial discretion and/or by 'promulgating guidelines, which can be more easily adjusted to society's reality which is constantly changing' (House of Representatives, 1998-1999, 26469, no. 3, pp. 4-5).

Summary

These instructions further specify the scope of the penalization in relation to the jurisdiction of the Dutch courts and the factors that must be taken into account in assessing the expediency of prosecuting individual cases of foreign corruption in public office. It goes without saying that the factors are also relevant to the assessment of the expedience of any investigations preceding prosecution. In addition, these instructions describe the decision-making process for the selection procedure of the cases.

Investigation and prosecution of corruption committed in the Netherlands is addressed in the Instructions on the Investigation and Prosecution of Corruption Offences in Public Office Committed in the Netherlands.

Penalization and jurisdiction

Until 1 February 2001, the Dutch courts only had limited jurisdiction in respect of corruption in public office committed abroad. Thanks to the legislative amendment of 1 February 2001, the jurisdiction of the Dutch courts has widened significantly for cases of corruption in public office committed abroad. At present, the following suspects can be prosecuted in the Netherlands:

- Any Dutch public servant bribed outside Dutch territory (Section 6(1) of the Penal Code);
- Any employee of a Dutch-based international institution bribed outside Dutch territory (Section 6(2) of the Penal Code);
- Anyone bribing a Dutch public servant, committing the offence outside Dutch territory (Section 4(10) of the Penal Code);
- Any Dutch citizen bribing a Dutch or foreign public servant outside Dutch territory (Section 5(1) of the Penal Code);
- Any Dutch public servant or another person in public office of a Dutch-based international organization violating Section 177 or Section 177a of the Penal Code (Section 4(1) of the Penal Code) outside Dutch territory.

A foreign public servant bribed outside Dutch territory by a Dutch citizen cannot be prosecuted in the Netherlands, unless that public servant is employed by a Dutch-based international organization.

Jurisdiction

The standard rules on jurisdiction laid down in Sections 4 et seq. of the Penal Code apply to liability to prosecution, the general rule being the requirement of double punishability. However, a number of variations to corruption committed outside Dutch territory have been elaborated on in the following way:

-Section 4 (10) of the Penal Code explicitly provides that anyone, apart from their nationality, committing the offences set out in Sections 177 and 177a of the Penal Code, outside Dutch territory but vis-à-vis a

⁴ In this context, the Dutch Minister of Justice also considered that a statutory distinction between gifts deserving of punishment and gifts not deserving of punishment could have the unwanted effect that situations in which relatively minor advantages for official acts that definitely must be regarded as undesirable, would by definition fall outside the scope of the criminal provisions (House of Representatives, 1999-2000, 26469, no. 5, p. 6).

Dutch public servant, can be prosecuted in the Netherlands, provided that the offence in question is also liable to punishment in the country where it was committed.

- Section 4 (11) of the Penal Code explicitly provides that a Dutch⁵ public servant or person holding a public office of a Dutch-based international organization, regardless of their nationality, committing the offences set out in Sections 177 and 177a of the Penal Code outside Dutch territory, can be prosecuted in the Netherlands, provided that the offence committed is also liable to punishment in the country where the offence was committed. For example, a non-Dutch employee of the International Criminal Court, which is based in The Hague, conducting an investigation into evidence for specific offences and bribing public servants outside Dutch territory with a view to obtaining information or collaboration, can be prosecuted in the Netherlands.

- Section 5 provides for an exception to the requirement of double punishability for Dutch citizens that have violated Sections 177, 177a and 178 of the Penal Code. In these cases, it is irrelevant whether or not the country where the offence was committed has a similar criminal provision.

- Finally, Section 6 of the Penal Code provides that Dutch public servants and persons in public office of a Dutch-based international organization, (for both categories), regardless of their actual nationality, can be prosecuted for the offences set out in Sections 362 to 364a of the Penal Code, wherever committed. The requirement of double punishability does not apply to this form of passive corruption.

In respect of whether legal entities can be prosecuted, the rule concerning nationality (in particular important for the provision of Section 5 of the Penal Code stated above) is that a legal entity can be regarded as a Dutch legal entity when it was incorporated under Dutch law and/or has its registered office in the Netherlands⁶. According to the law, the latter applies in any case to all Dutch legal forms⁷, but it will be particularly relevant for all informal legal entities and partnerships put on a par with legal entities as well as to acknowledged European partnerships. The actual registered office, e.g. the principal place of business, is not relevant for the issue of jurisdiction set out in Section 5 of the Penal Code.

Investigation

It is true for corruption - in general, but specifically for corruption committed abroad – that the National Police Internal Investigations Department is primarily entrusted with investigating such offences. Given the expertise available at this department, the Instructions on duties and deployment of the National Police Internal Investigations Department also give an important role to this department in respect of cases of bribery of public servants. The National Police Internal Investigations Department has set up a special unit that is responsible for investigations (which may be pro-active) into trends, compiling crime pictures and collating and refining tangible leads.

Leads

There are a number of sources available from which information can be obtained on possibly suspicious situations of bribery of public servants outside Dutch territory.

- Open sources such as the international press and the internet.

- Requests for mutual legal assistance from countries that conduct an investigation into a public servant guilty of accepting bribes from a Dutch business or representatives of such a business.

- Cases that are reported on a regular basis by the OECD secretariat to the relevant parties to the Convention. This concerns information that is gathered by the OECD Working group on Bribery from open sources and that contains leads of possible cases of corruption in public service committed in the context of international business transactions.

⁵ The term ‘Dutch’ in this respect does not relate to Dutch nationality, but to the fact that someone is working in Dutch public service.

⁶ See extensive information in Asser’s *handleiding tot de beoefening van het Nederlands Burgerlijk Recht, Vertegenwoordiging en Rechtspersoon*, (Manual to practice Dutch Civil Law, Representation and Legal Entity) Chapter II, par. 4, 56/68 and specifically on the Dutch private limited company (BV) and company limited by shares (NV), Chapter III, par. 4, number 26/30

⁷ See for instance on the NV and the BV: Sections 66 and 177 of Book 2 of the Dutch Civil Code

- Reports from whistleblowers.
- Reports from diplomatic officers.
- Offences reported, on the basis of Section 162 of the Code of Criminal Procedure or otherwise.

The obligation to report offences under Section 162 of the Code of Criminal Procedure

Public bodies, public servants and independent administrative authorities can learn of offences in the performance of their duties, without being in charge of the investigation of such offences. In respect of a number of those offences, those public bodies and public servants have an obligation to report them. This (special) obligation to report offences is provided for in Section 162 Code of Criminal Procedure. The obligation to report offences applies to the offences described in Sections 362, 363, 364 and 364a of the Penal Code (c.f. Section 162 (1)(a) of the Code of Criminal Procedure), among others. Strictly speaking, this obligation does not apply to the bribery provisions of Sections 177, 177a, 178 and 178a of the Penal Code, as Section 162 of the Code of Criminal Procedure does not explicitly refer to them. However, this concerns the active variant of passive corruption in Section 362 et seq of the Penal Code. As it is not required to know which public servant it actually concerns, where there is an obligation to report bribery, it is hard to image that one would know about an offence as referred to in Section 177 et seq of the Penal Code, but not in Section 362 et seq of the Penal Code.

Section 162 of the Code of Criminal Procedure does not mention the condition for specific jurisdiction for the offences in question, which would limit the scope of application. This would not be logical, because an assessment of the same cannot be required from the person obliged to report the offence. To that person, the reasonable assumption that one of the offences listed has been committed is the only thing that matters. The purpose of the provision is to protect the government's integrity and increasing faith in it (and therefore not the integrity in the business community). As it is fair to assume that it does not make any difference whether it concerns the government in the Netherlands or elsewhere, especially since Section 178a of the Penal Code now also covers the liability to punishment of bribery of non-Dutch public servants. Boards and government bodies may, in addition, implement additional policies, entailing that suspicions of offences such as bribery must be reported to the police; c.f. for example internal instructions from the Ministry of Foreign Affairs or the Tax Authorities' Information Provision Regulations (*Voorschrift informatieverstrekking Belastingdienst*)⁸.

Investigation of corruption committed abroad As to 'corruption committed on Dutch territory', it similarly applies to corruption committed abroad that – apart from the foreign investigation department, - investigation services other than the National Police Internal Investigations Department can be put in charge of the investigation. It makes sense, for example where bribery is discovered in the context of pending criminal investigations with international aspects (consider for example an investigation into a Dutch person active in exporting XTC, who has bribed a Czech customs officer), that the team in charge of the XTC case also investigates the bribery. It is also conceivable that the Fiscal Information and Investigation Service/Economic Investigation Service (FIOD/ECD) can do such an investigation further to leads given to the tax authorities, or thanks to the involvement of Dutch companies. However, corruption committed outside Dutch territory need not be revealed in the course of criminal investigations (consider for example the situation in which a Dutch business man bribes a foreign public servant in order to land an order). In such a case, it is plausible that the National Police Internal Investigations Department Coordinating Committee (CCR) puts the National Police Internal Investigations Department in charge of the investigation, despite the fact that the person under investigation is not a Dutch public servant, but a Dutch citizen or Dutch company. People can notify the Foreign Corruption Unit of the National Police Internal Investigations Department of information on possible corruption offences committed abroad. This unit manages and maintains the relevant database.

⁸ C.f. Articles 6.3.2 and 6.3.3 of these Regulations

Mutual legal assistance

In the investigation of corruption offences committed abroad, one will have to bear in mind that the foreign public servant bribed outside Dutch territory usually cannot be prosecuted in the Netherlands. Therefore, efforts made by the Dutch investigation services aimed at prosecution in those cases will (primarily) focus on the role of the person who gave the bribe that can be prosecuted in the Netherlands, whereas the investigations regarding the foreign public servant will have to be performed by the foreign counterpart. The ordinary rules on mutual legal assistance apply to the collaboration between both investigation services. It should be borne in mind that obtaining evidence of the Dutch briber's criminal act in general requires an investigation abroad. It seems obvious that a request for mutual legal assistance is made to that end to the country involved. If necessary, the national anti-corruption prosecutor of the Foreign Corruption Unit can be asked for help. See more thereon below.

Prosecution

The prosecuting service: the Public Prosecution Department

Given the complexity of the cases that may arise in this context, it is necessary that the Public Prosecution Department guarantees sufficient expertise. Possibly suspicious situations are analysed by the Foreign Corruption Unit and the intelligence, where possible, refined. If there are enough leads to be investigated by the National Police Internal Investigations Department, the Coordinating Committee decides on whether a case is taken on and which unit will be made responsible for the investigation. If the Coordinating Committee decides that a case is not eligible for further investigation, it will give a reasoned decision to that end, which may be forwarded to the party who reported the offence/suspicious situation.

The following criteria are relevant in assessing whether situations are eligible for investigation and prosecution:

- The amount received as a bribe, in absolute or relative sense (e.g. a substantial percentage of the contract sum);
- Involvement of senior (foreign) public servants or politicians;
- Investigation and prosecution efforts on the part of the country involved (e.g. the case has caused a major scandal and prompted investigations in the country in question);
- The bribe is directly or indirectly charged to the Dutch central funds (e.g. state aid, credit insurance, grant etc.);
- The potential impact on the reputation in respect of Dutch trading and political interests, if a suspicious case is not investigated and, where possible, the perpetrator(s) prosecuted;
- The extent of unfair competition;
- The possibilities of further investigation and the chance of successful prosecution.

Facilitation payments

The OECD Convention does not regard the payment of small amounts in order to 'facilitate' matters as payments 'to acquire or maintain a commercial or other unauthorized advantage'. This kind of 'facilitation payments' therefore falls outside the scope of the obligation arising from the Convention to the provision that bribing foreign public servants is an offence. According to the joint explanation to the Convention, such payments made in some countries with a view to inducing government officials to do their job, e.g. the issue of licences, are in general punishable in the other country. The individuals drawing up the Convention did not believe it was useful to support this form of corruption by making 'facilitation payments' by other countries liable to punishment, which assumes the necessary efforts in terms of investigation and prosecution.

The ultimate aim of bribing a public servant is irrelevant to criminal liability under Sections 177a and 177 of the Penal Code. Strictly speaking, 'facilitation payments' are therefore also liable to punishment. The Public Prosecution Department, however, deems it not expedient to pursue a stricter investigation and prosecution policy on tackling bribery of foreign public servants than the policy required under the

OECD Convention. This means that acts which can be qualified in terms of the OECD Convention as 'facilitation payments' will not be prosecuted. Some factors that provide the framework for this prosecution policy are listed below. In that context, it may be necessary to initiate investigations to answer the question whether one or more of these factors are a reason to drop the charges.

Factors that count against prosecution:

- It concerns acts or omissions which the public servant in question was already obliged to perform by law. The payment may not interfere with competition in any way whatsoever.
- It concerns, in absolute or relative sense, small amounts.
- It concerns payments to junior public servants.
- The gift must be entered in the company's records in a transparent way, and must not be concealed.
- The making of the gift must be the initiative of the foreign public servant.

In international commercial transactions, it must be absolutely clear that the mere involvement of a local agent/ representative/ consultant, may also be liable to punishment. It is widely known that such persons are often used to pay bribes abroad. Dutch institutions may therefore be expected to take a critical attitude toward the nature and scope of the work of such a person. For example: one may only rely on recommendations from a person or institution which can be attributed such authority that the soundness of the recommendations may reasonably be trusted. In a potential criminal investigation, this aspect must be explicitly focused on in order to assess whether the payment in question must be considered an offence.

Finally

Confiscation of the illegally obtained assets

Section 177 of the Penal Code is, contrary to Section 177a, carries a fine of the fifth category; the confiscation order therefore fully applies to this offence. The starting point is that a demand for a confiscation order is made when the assets illegally obtained are estimated at least at €500. The profits of a business being awarded a contract in a tendering procedure by paying a bribe abroad, may be regarded as illegally obtained assets. Section 36e of the Penal Code aims to confiscate the illegally obtained assets that the convict has obtained by violating a statutory rule. Imposing the measure does not preclude that the convict could have obtained similar assets without violating such provision (Dutch Caselaw, NJ 1993, 12). In light of the complexity of these matters, taking advantage of the expertise of BOOM (Prosecution Service Criminal Assets Confiscation Bureau) is recommended.

The national anti-corruption prosecutor

The National Prosecutor's Office in Rotterdam appointed a national anti-corruption prosecutor. This public prosecutor has expertise in the fields of investigation and prosecution of cases of corruption. He/she makes sure that this expertise is also accessible to other members of the Public Prosecutor's Department. At his/her own initiative and upon request, the national anti-corruption prosecutor assists the local public prosecutor's office in the investigation and prosecution of corruption and has a coordinating role in tackling corruption committed by Dutch natural persons/legal entities committed outside Dutch territory. This national prosecutor is also responsible for preparing projects, screening leads, and studying the crime picture, as done by the National Police Internal Investigations Department. As the occasion arises, the national anti-corruption prosecutor also supervises investigations into corruption offences. Moreover, he/she takes the initiative in developing or amending the relevant legislation and policy.

Transitional Law

The policy rules in these instructions have effect as of the effective date.

Annex 2

Annex to the BZ Code of Conduct on Bribery Abroad

Background

In 2001 the Netherlands ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Under this Convention, Dutch citizens or businesses established in the Netherlands that bribe foreign officials can be prosecuted in the Netherlands. In other words, the Convention gives Dutch criminal justice authorities the power to try defendants for an offence committed outside Dutch territory. Embassies and consulates have a major role to play in the implementation of the OECD Convention and the relevant provisions of the Criminal Code. They are the eyes and ears of the Netherlands abroad, and they may well be the first to pick up signals about the possible involvement of Dutch nationals or Dutch businesses in bribery offences abroad. At the same time, embassies and consulates are supposed to support the Dutch business community as part of their efforts to promote good economic relations. In other words: on the one hand, it is necessary to maintain good relations with the corporate world, while on the other, it can be difficult to gain a business's trust on account of the obligation to report suspected corruption. It is important for embassies and consulates to work with businesses to prevent corruption.

Providing active aid to businesses contributes to effective anti-corruption policy. In addition, foreign missions can also help companies by supplying them with useful information. Such a system also benefits the missions themselves, by giving them a better sense of where corruption is occurring and what form it takes. This knowledge will give them a better handle on how to combat it. In the 'Guidance for mission staff' you will find a number of tips on how embassies can work with the business community to prevent corruption as well as some examples of successful teamwork.

This code of conduct explains what to do in the case of suspected corruption, addressing the following questions:

1. What facts are important? Distinguishing between indications and hard evidence.
2. What sorts of things is the Public Prosecution Service (OM) concerned about? What is bribery, and does it include facilitation payments?
3. In what circumstances should the available information be disclosed, and to what extent are BZ staff obliged to report their suspicions to the authorities?
4. What should you do in cases of suspected corruption, and who can you talk to?

What facts are important? Distinguishing between indications and hard evidence

The responsibility for investigating and prosecuting corruption offences lies with the Public Prosecution Service (OM), specifically the special anti-corruption prosecutor at the National Public Prosecutor's Office. This means that it is *not* the job of senior embassy staff to determine whether a Dutch national or a business based in the Netherlands has engaged in bribery. The sole concern of embassy staff is whether they are in possession of information that might be of interest to the criminal justice authorities. This information could come in the form of a series of newspaper articles or a phone call from a local, well-organised NGO. Isolated rumours or suspicions from a less than reliable source do not qualify. In borderline cases it is always advisable for embassy staff to come forward with their suspicions (see: who can you talk to?).

What sorts of things is the Public Prosecution Service (OM) concerned about?

It is up to the criminal justice authorities to decide whether to bring charges. A corruption investigation may involve the participation of the National Police Internal Investigations Department.

In its ‘Directive on Investigating and Prosecuting Official Corruption Abroad’, the Board of Procurators General discusses a number of issues relevant to assessing cases of this nature. These issues may also be applicable to you, particularly the information on facilitation payments. In the past there had been some confusion about how they should be classified.

Although facilitation payments are not unlawful under the OECD Convention, they do constitute an offence under Dutch criminal law. According to the Directive cited above, ‘The underlying motive for bribing a public official has no bearing on the question of criminal liability pursuant to articles 177a and 177 of the Criminal Code.’ Strictly speaking, then, facilitation payments are unlawful. However, the OM is reluctant to adopt a more stringent investigation and prosecution policy for the bribery of foreign officials than the one prescribed by the OECD Convention. This means that transactions that would constitute facilitation payment under the OECD Convention will not be prosecuted.’ The following scenarios are factors that would tend to militate against prosecution:

- Even without the payment, the official concerned was obliged by law to perform (or not to perform) the act in question. Under no circumstances should the payment distort competition.
- The amount in question is small, in either relative or absolute terms.
- The payment was made to low-ranking officials.
- The gift is accounted for in the firm’s records; it is not concealed in any way.
- The initiative for the gift came from the foreign official.

The existence of one or more of these factors would tend to discourage prosecution. It should be noted, with respect to the final point, that it is not easy to prove that the foreign party initiated the gift; it should be possible to make a plausible case, for instance because corruption is widespread in the country in question and bribery is commonplace.

The Directive also clearly states that international corporations should realise that the mere act of hiring a local agent/representative/consultant could render them criminally liable. It is common knowledge that these people are often used to facilitate the payment of bribes in foreign countries. Dutch institutions are therefore expected to monitor the nature and scope of the work done by such intermediaries with a critical eye. The Directive goes on to say that recommendations provided by an individual or institution should only be trusted if that individual or institution is authoritative enough that said recommendations can reasonably be assumed to be reliable. It is important to bear in mind that the eventual selection of an agent or intermediary is always the responsibility of the business and never of the mission. If you have reason to believe that a transaction may constitute facilitation payments, you should discuss the matter with the Ministry (see below, ‘what to do and who to talk to’).

In what circumstances should the available information be disclosed, and to what extent are BZ staff obliged to report their suspicions to the authorities?

Under article 162 of the Code of Criminal Procedure, embassy personnel who learn of a bribery case, past or present, involving Dutch nationals or businesses established in the Netherlands are obliged to report this information immediately. Officials who encounter certain offences – including the bribery of foreign or other officials – in the exercise of their duties must inform the relevant authorities. As article 162 points out, this is only necessary in cases where the official has a reasonable suspicion that bribery is in fact taking place. There must also be a link between the suspected offence and the Netherlands. If you, as a member of the embassy staff, suspect a company of bribing an official, the company must have ties to the Netherlands. These ‘ties’ might consist of nothing more than the practice of using the services of a Dutch bank or a Dutch agent. Bribery is often motivated by a company’s desire to boost its competitive advantage. Embassy personnel – both local staff and staff posted from The Hague – who fail to report relevant information, including information that is

necessary for proper criminal law enforcement, will be considered in dereliction of duty and may be subject to disciplinary measures. The Netherlands is committed to the full implementation of the OECD Convention, in letter and in spirit.

What to do and who to talk to

A. Preventive measures

1. Talk to businesses – and not only Dutch ones – about the level of corruption in the country in question. Wherever possible, offer assistance to prevent bribery and blackmail/extortion. Refer to the annexe for suggestions about preventing corruption. **[hyperlink]**
2. Make your obligations clear, and discuss relevant Dutch and local law. Companies that have already been in touch with the Ministry of Economic Affairs will have been briefed about these matters. Informational material provided to companies abroad by the Ministry of Economic Affairs and other government agencies draws attention to the relevant legislation and to the obligations resting on companies. Even so, it is your responsibility to inform them of your obligations.
3. If you discover evidence of possible corruption or bribery, ensure that careful records are kept of all relevant material. As always, files should be well organised and easy to consult. This applies equally to instances of suspected or actual bribery involving Dutch government funds and instances of suspected or actual bribery or other corrupt practices not involving Dutch government funds. You are not expected to gather information actively on your own. This is the job of the criminal justice authorities.

B. Who to talk to

1. Embassy personnel, both local staff and officials posted from The Hague, should keep their superiors, whether at the mission or in The Hague, apprised of the situation. You should never report your suspicions directly to the criminal justice authorities.
2. The mission will then inform the corrupt practices reporting office in writing. The reporting office, which comes under the Financial and Economic Affairs Department (FEZ), can be reached either by phone (at +31 (0)70 348 6241) or by email (FEZ or malversaties-sancties@minbuza.nl).
3. The corrupt practices reporting office is your first point of contact. This is true whether or not a case of suspected corrupt practices/bribery involves Dutch government funds. You should provide as much information as possible. Be sure to mention whether government funds were involved.
4. The reporting office will then decide what, if any, action should be taken.
5. You may contact the reporting office or the central integrity coordinator for advice.

C. What does the reporting office do with the information it has received?

1. The reporting office immediately informs the relevant regional director and the Consular Affairs Department (DCZ). The regional director is responsible for handling reports of possible or actual corrupt practices not involving Dutch government funds. If Dutch government funds are involved, the complaint is investigated by FEZ. In that case the budget holder remains responsible for dealing with the matter. In accordance with the Policy Document on Management and Supervision, reports of possible or actual corrupt practices involving Dutch government funds are recorded in a database. Proved instances are included in the annual accounts and presented to parliament. Only cases involving Dutch government funds are entered in the database.

2. The regional director decides whether the information is specific enough to be passed on to the Ministry of Justice. If it is, the regional director informs DCZ of this fact. DCZ is BZ's liaison to the Ministry of Justice in instances where the Dutch criminal justice authorities believe that a case warrants cooperation with their counterparts abroad. DCZ then forwards the information to the Ministry of Justice, which, in turn, informs the OM and/or the National Police Internal Investigations Department, if necessary.
3. The OECD Convention states that the investigation and prosecution of bribery cases 'shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved' (article 5). In determining whether the Dutch criminal justice authorities should exchange information with their foreign colleagues, BZ first considers whether such a move could lead to human rights violations or necessitate additional protection for embassy staff.
4. In making this assessment the regional director is advised by an expert group, consisting of:
 - the head of the Dutch delegation in the OECD working group on bribery (representative of the Directorate-General for Foreign Economic Relations of the Ministry of Economic Affairs (EZ-BEB));
 - the Central Integrity Coordinator (chair);
 - a representative of the Legal Affairs Department (DJZ);
 - a representative of the Human Rights and Peacebuilding Department (DMV),
 - a representative of DCZ.
5. The regional director informs the mission if and when the information is passed on to the Ministry of Justice and stays in contact with the mission to keep the channels of communication open.
6. If the criminal justice authorities decide to open an investigation (including an investigative mission), the embassy may be asked to provide support in the context of a request for legal assistance. As a matter of principle, a mission is not expected to conduct an investigation itself; that remains the sole responsibility of the Ministry of Justice. The mission will be instructed on how to proceed by DCZ.

Annex 3

Guidance for Mission Staff: Working With Businesses To Prevent Bribery

Introduction

In ‘Working Together, Living Together’, the Policy Programme of the Fourth Balkenende Government, the government pledges to improve its service to citizens and businesses in close cooperation with its partners abroad. To this end, everyone must have a clear picture of the services that citizens and businesses may expect of government, which may also prevent disappointment. One of the tasks of both ministries in the Netherlands and Dutch missions abroad is to promote bilateral economic relations. This naturally requires the missions to build and maintain good relations with Dutch businesses abroad. Providing businesses with useful information is only one element. It is also important that Dutch ministries and missions inform entrepreneurs about anti-corruption policies and the Dutch government’s obligations under international agreements.

The Annex to the BZ Code of Conduct on Bribery Abroad explains the role of embassies and consulates in reporting suspected bribery by Dutch businesses. The Annexe also explains the distinction between facilitation payments – which are an offence under Dutch criminal law but are not prosecuted – and other types of bribery. In reporting suspected bribery, embassy staff are acting in the interests of bilateral economic relations, as by preventing corrupt businesses from gaining an unfair competitive advantage, they are helping to maintain a level playing field. It is of course better to prevent corruption altogether and embassy staff are therefore asked to work with Dutch businesses and entrepreneurs and to help them avoid bribery. These guidelines supplement the Annexe to the BZ Code of Conduct and give suggestions about how missions and the business sector could tackle bribery together. While these guidelines are intended for mission staff, a separate brochure is being prepared for businesses.

The business community is keen to work with missions to prevent corruption, as they would benefit directly in terms of fairer competition and lower costs and risks. Missions, in turn, would also benefit from working with the business community, which is generally better informed about pitfalls and sectors where corruption is rife. Their information can be used to gear anti-corruption policy to the reality of corruption and can contribute to an informed policy dialogue between the Dutch government and local authorities. Missions can support and work together with the business community to curb bribery by:

1. **Providing general information** about corruption and more specific information about the corruption situation in the host country;
2. **Providing assistance to individual businesses** that encounter bribery (e.g. preventive advice and, possibly, démarches);
3. **Facilitating contacts between businesses** to promote collective action;
4. **Working with other embassies and partners** to prevent corruption and help create a level playing field for the international business community;
5. **Educating mission staff** about corruption.

1. Providing information about corruption

- Missions can tell businesses about the Business Anti-Corruption website (see hyperlink at the end of this text) which provides general information and country-specific information about corruption. VNO-NCW (Confederation of Netherlands Industry and Employers), ICC (International Chamber of Commerce) Netherlands, the Ministry of Economic Affairs and the Ministry of Foreign Affairs are writing a brochure about anti-corruption for small and medium-sized Dutch businesses, which

will include references and websites. When completed, it will be posted on the Ministry's intranet and available by order from DVL.

- Missions can draw attention to relevant local and Dutch legislation on bribery (including facilitation payments) and the role of government agencies.
- Missions can explain the most common forms of corruption and local customs, for example with regard to gift-giving and hospitality, which could raise concerns about corruption.
- Missions can tell businesses about the anti-corruption activities of local authorities, Dutch missions and partners, and about relevant events such as privatisation processes or changes in procurement regulations in the host country.
- Missions can give information about reliable commercial agents, consultants and law firms. In view of the sensitive nature of this type of information, missions should pay close attention to the legal aspects of making such lists. Businesses should be aware that they retain sole responsibility for the organisations they choose to do business with.

Ask any entrepreneur to name their primary contact when they want to do business in a foreign country and they will almost unanimously say, the Agency for International Business and Cooperation (EVD). Embassies and missions should therefore maintain close contact with the EVD about matters concerning corruption, so that both parties can give businesses up-to-date information. Trade delegations are excellent opportunities for the mission, the Ministry of Economic Affairs and the EVD to provide information about local bribery practices. In The Hague, the Ministry of Foreign Affairs works closely with a broad range of government ministries and sector organisations that are or could be involved in information provision to businesses. Specifically, the Ministry's partners are the Ministry of Economic Affairs, the Ministry of Defence, the Ministry of Agriculture, the Ministry of Transport, employers' organisations, trade associations and the Chambers of Commerce.

Providing information to businesses in Indonesia

A Dutch company reports that there has been a shift in corruption practices in Indonesia since 2006. Where once there used to be no way around paying a bribe, a firm 'no' is now more frequently accepted. Last year, the Indonesian authorities arrested and tried a number of senior civil servants for demanding and accepting bribes. Some government agencies were reorganised and salaries raised. More and more civil servants are afraid of being 'caught', which is an important step in the right direction. Mission staff can help businesses by passing on this kind of news about the business climate and anti-corruption developments in the host country.

Combating corruption in Eastern Europe

The governments of Bulgaria and Romania have proactive anti-corruption policies. They receive support from the Netherlands, which urges tangible results. In consultation with Dutch and local NGOs, the authorities have publicly raised the issue of corruption, and the need for preventive measures and enforcement. One of the tangible effects of this policy is the substantial improvement in affairs at Bulgaria's borders, thanks also to assistance from the Dutch Royal Military and Border Police, periodic supervision by the Embassy and public pressure from interest groups like the Dutch automobile association ANWB and the Turkish Community Advisory Association (IOT). The Embassy expressly advises businesses not to give in to corruption and to report back on any incidents that may occur. The Embassy assists and advises Dutch citizens and businesses who come up against corruption, and discusses specific cases with the local authorities.

Services provided by missions in China

Missions in China work with lists of consulting companies and law firms with which Dutch businesses have had positive experiences, or which have a general reputation for reliability (not just as regard corruption). One of the services provided by missions is passing on these lists to other Dutch businesses.

2. Assistance in individual cases

Businesses have high expectations of missions when it comes to helping prevent bribery in individual cases. The emphasis is on giving preventive advice and answering individual businesses'

questions. Having a member of mission staff present when Dutch companies meet with local authorities can also help. If more than one business reports that particular government departments are asking for bribes, a mission can use its contacts to report what is happening higher up the hierarchy. Sometimes a mission, acting alone or with other embassies, may need to present a *démarche*.

Bribes at the border

A company has a consignment waiting at the border. It looks as if it will not cross the border unless a bribe is paid. The company therefore calls the embassy for help. The embassy contacts the civil servant in charge of border control. Within a few hours the consignment has cleared customs, without further comment. In another case a member of embassy staff goes to the border crossing in person, and achieves the same result.

Assistance in Ghana

A business has been awarded a contract for laying grass in four stadiums. The email notifying the award comes from the Ghanaian ‘Vice-Minister for Education and Sport’. The business asks the embassy for some general information and sends a representative to Ghana without delay. In its information request the business attaches the email from the ‘Vice-Minister’, stating that it is customary for gifts to be brought for the ‘Vice-Minister’ in the form of two laptops and €10,000 in cash. The embassy’s suspicions are aroused, because this type of ‘gift’ is not customary in Ghana and, moreover, there is no official documentation. The ‘Vice-Minister’ has proposed that the contract be signed in the hotel room of the Dutch company representative. The embassy, on the other hand, suggests that the contract be signed in the presence of a member of embassy staff, at the ministry. The ‘Vice-Minister’ rejects this: it is now clear that there is no ‘Vice-Minister’ and that this is a case of attempted fraud. On the embassy’s advice, the representative leaves Ghana earlier than planned. The embassy, which has remained in close contact with the Ministry of Foreign Affairs throughout the episode, then informs the local authorities of the situation.

3. Facilitating contacts between Dutch businesses and organisations

The mission can be of service to businesses by helping them to establish contacts with other businesses and with NGOs, or by supplying information about Dutch organisations active in the host country and their contacts. The mission can also help by organising information meetings, enabling companies to share information and experiences on the anti-corruption measures they have taken and their effectiveness. Information meetings can result in joint action on the part of businesses, for example in the form of drawing up a code of conduct for an economic sector, or for the small and medium business sector in a particular country; organising joint anti-corruption training for small and medium-sized businesses; jointly hiring in clerical staff who are in a better position to apply to local authorities for permits; or entering into dialogue with the authorities as a group.

Case Integrity Pact

The Integrity Pact (IP) tool has been developed by Transparency International as a means of helping governments, business and NGOs to combat corruption in public contracting. It constitutes an agreement in which businesses and governments pledge to be completely open about activities and earnings related to the award of public contracts, and not to tolerate corruption. An independent monitoring system is also being set up, and sanctions can be imposed if the rules are breached. The Dutch embassy can encourage businesses to enter into an IP with the local authorities. If, for example, there is a wave of privatisation, an IP can be a useful way for businesses and the authority in question to ensure that the process remains free of corruption.

4. Working with other embassies and partners

Embassy staff are expected to promote trade links and the competitive position of the Dutch business community. It is therefore important that they work with local authorities and other embassies (of EU countries or otherwise) to ensure a level playing field. This means, for example, that in cases of suspected bribery by non-Dutch EU businesses, EU consultations or a joint *démarche* can be initiated. At the same time, EU partners can make a joint effort to deal with corruption in the host country, for

example by raising the matter in political dialogue with local authorities and by organising meetings with businesses, bi-national chambers of commerce, members of parliament and the media, thereby putting the issue of accountability firmly on the national agenda.

Working with EU partners in Costa Rica

In the light of a number of corruption scandals involving European businesses, the ambassador in Costa Rica called for greater recognition of anti-corruption legislation, such as the OECD Convention on Combating Bribery of Foreign Public Officials. As a result local authorities, colleagues at other EU embassies and businesses were informed of the legislation currently in force. The Netherlands thus made it clear that it wanted to combat not only the corruption involving European businesses but, as an OECD member country, corruption in general. The officials involved in these scandals are currently being prosecuted under Costa Rican law, while the businesses in question are no longer eligible for public contracts and are being prosecuted in their own countries.

5. Educating mission staff

Knowledge of recent developments relating to corruption in the host country and, equally, knowledge of current legislation on bribery are vital if embassy staff are to help the Dutch business community. The most important sources are local media, international knowledge institutes and embassy staff's own experiences. Workshops or training courses run by specialist organisations (such as Transparency International) can also be useful for staff at Dutch (and other) embassies, and for local officials and entrepreneurs. The Dutch government is currently considering more, or more specialised, training courses on anti-corruption measures and the private sector for embassy staff. It is important that knowledge is renewed when staff are transferred.

Transparency International in Ethiopia

At the request of the Dutch embassy, Transparency International ran a number of training courses for, and gave a number of presentations to, staff at various embassies in Ethiopia. This led to the start of a new relationship between a number of donors and Transparency International, which works with the business community to fight corruption. The embassy supports both Transparency International and the Federal Ethics and Anti-Corruption Commission in their work in Ethiopia. As a result more than 90 people have been arrested and convicted for corruption, including illegal distribution of land, falsified ownership registration and tax evasion. By setting up the Commission, the Ethiopian government is making it very clear that fighting corruption is a priority. Although there is still a long way to go, businesses will now be more inclined to invest in Ethiopia.

Further information

www.business-anti-corruption.com

A detailed portal for SME businesses, providing general and country-specific information.

www.evd.nl

The Agency for International Business and Cooperation, providing general information on corruption and corporate social responsibility (CSR). Includes a number of detailed CSR toolkits.

www.internationaalondernemen.nl

Country-specific information on corruption and related legislation.

www.transparency.org

Research, league tables, country-specific and sector-specific information.

www.worldbank.org

Standard code of conduct for businesses, country information, blacklist of ineligible firms.

www.globalcompact.org/Issues/transparency_anticorruption/index.html

CSR business network.

www.iccwbo.org

International Chamber of Commerce anti-corruption guidelines.

www.oecd.org

Treaty texts and country studies.

www.u4.no

Other donor's experiences with fighting corruption.

www.eitransparency.org

Extractive Industries Transparency Initiative.