DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

THE NETHERLANDS: PHASE 2

REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 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 15 June 2006.

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EXECUTIVE SUMMARY

1. The Phase 2 Report on the Netherlands by the Working Group on Bribery evaluates and makes recommendations on the Netherlands' implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. In the wake of recent scandals involving fraud in the Dutch construction industry, awareness about domestic corruption is generally regarded as high in the Netherlands, although further efforts are required in relation to foreign bribery. No cases of foreign bribery have been tried in the Netherlands so far, a matter that the Working Group believes could be addressed if the Netherlands adopted a more proactive approach to the investigation and prosecution of this type of crime.

2. The Working Group recommended that the Netherlands ensure that sufficient training and resources, including specialised expertise are available to law enforcement and prosecution authorities, including the police, *Rijksrecherche* and the National Public Prosecutor for Corruption (NPPC) for the effective detection, investigation and prosecution of foreign bribery offences. The Report also raises the importance of the co-ordinating role of the NPPC in corruption cases, including foreign bribery. The Working Group urges Dutch authorities to ensure that law enforcement and prosecution authorities are aware of this role and that they report all suspected foreign bribery cases to the NPPC. The Report recommends reconsideration and amendment of the *Directive on Investigation and Prosecution of Corruption of Officials* to ensure that it does not provide misleading information about the offence of bribing a foreign public official, and to clarify the application of the Dutch law to the issue of small facilitation payments.

3. In view of the size and importance of many Dutch companies, the Working Group recommended that the Netherlands increase the maximum corporate fine for the foreign bribery offence to ensure that sanctions are effective, proportionate and dissuasive. Given the economic role of Aruba and the Netherlands Antilles, 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. The Group also highlights the importance of implementing the guidelines for personnel in Dutch diplomatic representations on reporting suspicions of foreign bribery to Dutch law enforcement and prosecution authorities.

4. The Report discusses a number of other elements of the Dutch system that should positively impact on the international fight against foreign bribery. A promising development has been the recent efforts of the National Police Internal Investigation Department (*Rijksrecherche*) to improve its expertise and methods for the detection and investigation of corruption. In addition, the Working Group welcomed the recent enactment of legislation to expressly prohibit the tax deductibility of bribes. However, given its recent entry into force, the Working Group will follow-up on its effective application. Areas where good working cooperation has been achieved between government and industry include export credit procedures applicable within the Netherlands and the Dutch anti-money laundering reporting system. The Working Group also viewed the general framework of corporate social responsibility and the Dutch "Platform on Fighting Corruption" as promising initiatives to raise awareness about foreign bribery within the public and private sectors and to develop strategies to combat it.

5. The Report and the recommendations therein, which reflect findings of experts from Ireland and Norway, were adopted by the OECD Working Group. Within one year of the Group's approval of the Report, the Netherlands will make a follow-up report on its implementation of the recommendations, and will submit a written report within two years. The Report is based on the laws, regulations and other materials supplied by the Netherlands, and information obtained by the evaluation team during its five-day on-site visit to The Hague in January/February 2006, during which the team met with representatives of Dutch government agencies, the private sector, civil society and the media.

A. INTRODUCTION

1. On-Site Visit

6. The Phase 2 on-site visit to the Netherlands was undertaken by a team from the OECD Working Group on Bribery in International Business Transactions (Working Group) from 29 January to 3 February 2006.[1] The purpose of the on-site visit, which was conducted pursuant to the procedure for the Phase 2 self and mutual evaluation of the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention) and the 1997 Revised Recommendation[2] (Revised Recommendation), was to study the structures in place in the Netherlands to enforce the laws and rules implementing the Convention and to assess their application in practice as well as monitor the Netherlands' compliance in practice with the Revised Recommendation.

7. The examining team was composed of lead examiners from Ireland[3] and Norway[4], and representatives of the OECD secretariat.[5]

8. During the on-site visit, meetings were held with officials from the following government (or related) bodies: the Ministry of Economic Affairs, Ministry of Foreign Affairs, Ministry of Justice, Ministry of Interior and Kingdom Relations, Ministry of Finance, National Police Internal

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1 The Phase 1 examination of the Netherlands took place in 2001. The purpose of the Phase 1 examination is to assess whether a Party's laws for implementing the Convention and the Revised Recommendation comply with the standards there under.

2 1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions.

3 In alphabetical order, Ireland was represented by: Detective Superintendent Eugene Gallagher, *Garda* Bureau of Fraud Investigation; and Henry Matthews, Professional Officer, Office of the Director of Public Prosecutions.

4 In alphabetical order, Norway was represented by: Elisabeth Frankrig, Senior Adviser, the Ministry of Finance; and Atle Roaldsoy, Senior Adviser, Ministry of Justice and Police.

5 The OECD Secretariat was represented by: Brian Pontifex, Legal Consultant, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs (DAF) OECD; France Chain, Administrator, Anti-Corruption Division, DAF, OECD; and Helen Green, Consultant, Anti-Corruption Division, DAF, OECD.

Investigation Department (*Rijksrecherche*); the Netherlands Public Prosecution Service (including the National Public Prosecutor on Corruption); the Prosecution Service Criminal Assets Deprivation Bureau (BOOM); the Dutch Financial Intelligence Unit (FIU Netherlands/MOT-BLOM); Tax Administration; Fiscal and Economic Intelligence and Investigation Service (FIOD-ECD); Authority for the Financial Markets (AFM); De Nederlandsche Bank (DNB); Atradius DSB (export credit agency); The Netherlands Development Finance Company (FMO); and the Bureau Screenings-*en Bewakingsaanpak*, *Directie Openbare Orde en Veiligheid*, *Gemeente Amsterdam*.

9. At the on-site visit civil society was represented by: Transparency International Nederland; *Maatschappelijk Verantwoord Ondernemen Platform* (MVO), the corporate social responsibility platform; a trade union official from the FNV; a journalist; and academics from the University of Amsterdam and the University of Rotterdam. The private sector was represented by the International Chamber of Commerce; the Confederation of Netherlands Industry and Employers (VNO-NCW); the Netherlands Bankers' Association (NVB); the Royal Institute of Registered Accountants (NIVRA); KPMG Integrity and Investigation Services; Good Company; and Eumedion (Corporate Governance Forum). The following companies participated: Shell International; Unilever NV; Sara Lee/DE, and Philips Electronics NV; Rabobank; and Fortis. The Dutch legal profession was represented by: three practicing lawyers with experience in corruption matters and international business transactions; and a representative from the Willem Pompe Institute for Criminal Law and Criminology. The judiciary was represented by two judges and the *Raad voor de rechtspraak*.

10. In preparation for the on-site visit, the Dutch authorities provided the Working Group with responses to the Phase 2 Questionnaire and responses to a supplementary questionnaire, which contained specific questions about the implementation of the Convention and Revised Recommendation in the Netherlands. The Dutch authorities also submitted relevant legislation and regulations, case law, statistical information and various government and non-government publications. The OECD team reviewed these materials and also performed extensive independent research to obtain non-government viewpoints. The on-site visit involved meetings for five days in The Hague. It principally focused on the implementation of the Convention and the Revised Recommendation from the perspective of the Dutch government, as well as the perspective of civil society and the private sector on the fight against foreign bribery in the Netherlands.

11. The Dutch authorities made impressive efforts to ensure the smooth running of the on-site visit through the preparation of a comprehensive agenda for the visit, and by making substantial efforts to provide access to all requested participants. Leading up to and following the on-site visit, the Dutch authorities responded to many requests for information and documentation. The examination team appreciates the high level of cooperation of the Dutch authorities at all stages of the Phase 2 process, and notes that the cooperative spirit was conducive to constructive discussions with regard to the implementation of the Convention and Revised Recommendation by the Netherlands.

2. General Observations

a. Economic system

12. With a population of 16 258 000, including 739 000 people in Amsterdam, the capital city, and 469 000 people living in The Hague, the seat of government,[6] the Netherlands is the second most densely populated country among OECD member states.[7] The country shares borders with Belgium

6 OECD Economic Surveys, The Netherlands, 2005.

7 OECD Main Economic Indicators, January 2006. pp. 260-263.

and Germany and has a 451 km coastline on the North Sea.[8] The Netherlands has an advanced economy, which is ranked as the 12th largest among 30 OECD economies.[9] In the 1990s the Netherlands had a record of steady economic growth reaching 3.9% in 1998-2000. The rate fell sharply in 2001 to 1.4% and declined to 1.1% in 2005. The economic forecasts however, state that growth rates are likely to rebound with the expected recovery in private consumption and investment.[10]

13. The country is self-sufficient in energy (natural gas) and the Netherlands has developed a strong services, manufacturing and agricultural sector. It is a large trading nation. Several Dutch multinational companies figure among the largest in the global marketplace. One survey identifies six Netherlands-based companies among the world's one hundred biggest companies measured by a composite of sales, profits, assets and market value.[11] The services sector amounts to just over 70% of economic activity, including a significant financial and business services sector. The Dutch manufacturing sector is relatively small, but is marked by the presence of Dutch multinationals in the oil, food and electronics industries. Although the agricultural sector contributes only around 3% of GDP, this is larger than most OECD countries, and includes the major export commodities of dairy products, meat, flowers and bulbs.[12]

14. The World Trade Organisation states that the Netherlands accounts for 3.91% of the world's export of goods and 3.36% of the world's import of goods.[13] The main destination of Dutch exports is the European Union (75.9%), followed by the United States (5.1%), Switzerland (1.6%); the Russian Federation (1.4%) and Turkey (1%). The major types of exports consist predominantly of merchandise, particularly machinery and transport equipment and chemical and agricultural products. Although a small percentage of overall Dutch trade, it is noted by the Stockholm International Peace Research Institute[14] that the Netherlands is internationally a significant trader of arms in the defence industry.

15. In relation to imports, the Netherlands is an important distribution centre for goods in Europe. The port at Rotterdam is Europe's largest. The principle Dutch imports in 2004 were from the European Union (52.7%), the United States (8.8%); China (7%); Japan (3.1%) and the Russian Federation (3%). The major commodities imported are manufactured goods, fuels and mining products and agricultural products.

16. Despite the recent sluggishness in the economy, the openness of the Dutch economy has enabled the Netherlands to remain as one of the most attractive destinations for Foreign Direct Investment (FDI) in the world.[15] For many years the Netherlands has been named by the Economist Intelligence Unit and the International Institute for Management Development as one of the most

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8 The World Factbook, www.cia.gov.

9 OECD Main Economic Indicators, January 2006. pp. 260-263.

10 Netherlands Country Profile, The Economist Intelligence Unit: Forecast, 3 May 2006.

11 Forbes 2000, The World's Leading Companies, 2005. www.forbes.com. Company (ranking): ING Group (12), Royal Dutch Shell Group (13), ABN-Amro Holding (48), Unilever (66), Fortis (96), Aegon Insurance Group (98).

12 The Netherlands Country Profile 2005, The Economist Intelligence Unit at pp. 25-26.

13 World Trade Organisation, Country Trade Statistics: www.wto.org.

14 www.sipri.org.

15 The Netherlands Country Profile 2005, The Economist Intelligence Unit at pp. 25-26.

attractive destinations for FDI. In 2003 foreign direct investment in the Netherlands amounted to EUR 600 million. The Netherlands is also a major direct international investor with FDI constituting about EUR 356 billion.[16] Notably, the Netherlands is also among the world's leading Official Development Assistance (ODA) donors. In fact, it is one of only five countries to exceed the United Nations target for ODA of 0.7% of gross national income.[17] The Dutch thus rank as the sixth largest donor nation in cash terms and the fifth most generous relative to GNP.

b. Political and legal systems

17. The Netherlands is a constitutional monarchy with a parliamentary system. The Dutch Constitution in known as the *grondwet* (basic law) which provides the framework for parliamentary democracy and ministerial responsibility. There is also a body of uncodified principles applicable in the Netherlands that have developed over time and play an important role in the functioning of the political system.[18]

18. The bicameral parliament, the *Staten Generaal,* is composed of: the first chamber of 75 members, the *Eerste Kamer* (Senate of the States General), elected by the 12 regional parliamentary assemblies in the provincial states (known as the *staten*); and the second chamber of 150 directly elected members, *Tweede Kamer* (House of Representatives of the States General). [19] Members of both chambers are directly elected for four year terms. Following an election, the monarch appoints the government and Prime Minister, based on the party (or parties) that command the support of a majority of members in the second chamber of parliament. The Council of Ministers, chaired by the Prime Minister, is responsible to the *Staten Generaal*. Ministers can introduce bills and speak in parliament, but they are not permitted to be members of either chamber. All bills must be introduced into the Second Chamber, which has the right to amend them. The First Chamber can only pass or reject a bill.

19. The Netherlands does not have a constitutional court. The *Raad van State* (Council of State) must be consulted on all bills and draft proposals. Its rulings are not formally binding, but are nonetheless authoritative. In general, once a law has been enacted by the parliament, it cannot be invalidated by the judiciary on constitutional grounds, but it can be wholly or partly invalidated when it is contradictory to international public law (including treaties). The courts have an important role in developing the law through the interpretation of legislation. With regard to the legal interpretation of legislation, explanatory notes drafted for the purpose of the parliamentary reading of the Bills are an important source for the interpretation of the provisions.

20. The Kingdom of the Netherlands comprises three countries: the Netherlands, the Netherlands Antilles (Curacao, Bonaire, Saba, Saint Eustatius, and a part of Saint Maarten), and Aruba. Relations between the countries are governed by the Charter for the Kingdom of the Netherlands. The 1954 Charter states that the Netherlands, the Netherlands Antilles, and Aruba are equal partners in the Kingdom. Each partner is autonomous in internal affairs. There are separate competencies for Kingdom affairs, which are specified in the Charter as "safeguarding fundamental human rights and freedoms, legal securities and good governance; maintenance of independence and the defence of the Kingdom; foreign affairs; Dutch nationality; regulation of the nationality of ships and related

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16 Agency for International Business and Cooperation: see http://www.hollandtrade.com.

17 2005 *Development Co-operation Report,* OECD 2006, p.72.

18 The Netherlands Country Profile 2005, The Economist Intelligence Unit at pp 9-10.

19 Ministry of Foreign Affairs website, www.minbuza.nl.

regulations of the standards of safety and navigation of sea-going vessels that fly the flag of the Kingdom; and extradition." The Netherlands Antilles and Aruba both have Constitutions, based on the Charter, that are comparable to the Dutch constitution. The Netherlands Antilles and Aruba have their own governments: a governor is appointed by the Crown, who in turn appoints ministers. Both countries have directly elected parliaments, advisory councils, general auditors and their own judicial systems, the members of which are appointed by the Kingdom (Netherlands Antilles and Aruba are discussed in more detail in section C.8.).[20]

21. Civil and criminal justice within the Netherlands is administered in nineteen district courts, five courts of appeal, and the Supreme Court of the Netherlands, the *Hoge Raad*. The Supreme Court, located in The Hague, is the Netherlands' highest court for both civil and criminal cases and is also the final court of appeal for the Netherlands Antilles and Aruba.[21]

c. Implementation of the Convention and Revised Recommendation

22. In compliance with the Convention and the Revised Recommendation, the Netherlands has enacted comprehensive laws to combat bribery of foreign public officials in international business transactions. The Ratification Bill, to ratify the Convention by the Netherlands (in Europe), came into force on 1 February 2001. On the same day, the Implementation Bill, which amended the Dutch Penal Code to criminalise the bribery of foreign public officials, also came into force. As will be discussed further below, the lead examiners have formed the view that the changes to Dutch criminal law are in accordance with the standards established under Article 1 of the Convention. That said, this Report does identify some key areas related to the legal framework that require further attention.

23. It is evident from the Phase 2 examination that the level of awareness of domestic corruption issues, and efforts by authorities to combat it, has been significantly increased following high profile corruption allegations involving the Dutch construction industry. This tumultuous affair resulted in a well publicised Parliamentary inquiry and report in 2002, and subsequent prosecutions and court proceedings. It was evident to the lead examiners that many of the anti-corruption strategies, key initiatives and much of the research presented during the on-site visit had been spawned by the, so called, "Construction Fraud Case." In relation to foreign bribery however, the lead examiners detected only limited evidence to suggest that there has been any concerted effort by Dutch authorities to uncover and combat bribery of foreign public officials in international business transactions. Although the Transparency International bribery index which measures perceptions of bribery, and not actual bribery, has ranked the Netherlands as having a low propensity for foreign bribe paying,[22] it was the view of the lead examiners that a more proactive approach to investigating and prosecuting this type of crime is required. Addressing this issue forms a major component of this Report.

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20 Ministry of Interior and Kingdom Affairs, www.minbzk.nl.

21 Ministry of Foreign Affairs website, www.minbuza.nl.

22 The Transparency International Bribe Payers Index ranks leading exporting countries in terms of the degree to which international companies with their headquarters in those countries are likely to pay bribes to senior public officials in key emerging market economies. A perfect score in the ranking is 10. A ranking of 10 would indicate that there is zero perceived propensity to pay bribes. The Netherlands obtained a score of 7.8, and thus was seen to have a low propensity for foreign bribe paying.

d. Cases involving the bribery of foreign public officials

(i) Investigations, prosecutions and convictions

24. At the time of the on-site visit, the Netherlands had not recorded any convictions for the offence of bribery of foreign public officials. In addition, the Dutch authorities did not report any ongoing or terminated investigations regarding the offence of bribing a foreign public official in the context of international business transactions pursuant to the Convention. The Dutch authorities did report one ongoing preliminary investigation into a suspected (attempted) bribery of a foreign public official, although this case was not related to any international business transactions. Following the on-site visit the Dutch authorities indicated that this investigation had been terminated. They also informed lead examiners of one new criminal investigation pursuant to the Convention initiated after the on-site visit.

25. Given the size of the Dutch economy, its level of exports, its business interests including significant foreign direct investment abroad, along with its involvement in international business transactions in sectors and countries that are at high risk of corruption, it was somewhat surprising that, at the time of the on-site visit, no company or individual had been the subject of an investigation or prosecution by Dutch authorities for foreign bribery since the ratification of the Convention by the Netherlands.

26. The lead examiners did learn from various sources during the on-site visit however, that foreign bribery has been an issue for Dutch citizens and companies. In those circumstances, it could reasonably be expected that Dutch authorities would have adopted a more proactive approach towards the phenomenon of foreign bribery. On the information provided, this was not apparent. Indeed, it was clear from information shared during the on-site visit that, at the very least, Dutch companies and individuals engaged in business abroad are being confronted with the issue of bribery, including the vexed issue of facilitation payments. Representatives from the Dutch legal profession indicated that they have provided legal advice to some clients on this issue. In relation to Dutch companies, instances of company disclosure of integrity and corruption related breaches involving company employees, agents or contractors (including conduct described as bribes offered or paid to third parties) has so far resulted, in only informal enquiries by Dutch authorities.

27. Concerns about the absence of investigations of the bribery of foreign public officials in international business transactions are also due to indications of alleged offences perpetrated by Dutch interests. Two important sources of information regarding possible foreign bribery offences had not been pursued—one regarding a foreign bribery conviction involving Dutch interests and another regarding a domestic bribery case with possible foreign bribery links. Moreover, some allegations had been made in the press. Although the lead examiners recognise that the press does not necessarily report this kind of information correctly, they were surprised that it did not appear that even initial steps to verify potentially important information in the media had been undertaken. The overall picture presented to the lead examiners suggested that combating this problem requires sharper focus and demands a more proactive approach by the authorities in order to uphold Dutch law, including the legal standards established by the Convention.

(ii) Response to the Report of the Independent Inquiry Committee into the UN Oil-For-Food Programme

28. The Independent Inquiry Committee into the United Nations Oil-for-Food Programme (IIC) was established in April 2004 through the appointment by the United Nations (UN) Secretary-General of an independent, high-level inquiry to investigate and report on the administration and management

of the UN Oil-for-food Programme. On 27 October 2005, the IIC published its fifth and final substantive report ("IIC Report"). The IIC Report focused on the transactions between the former Iraqi government and companies and individuals to whom it chose to sell oil and from whom it bought humanitarian goods. The IIC Report documented a complicated and vast network of alleged illicit surcharges paid to the Iraqi government in connection with oil contracts. It also documented the payment of alleged kickbacks in the form of after-sales-service fees and inland transportation fees in relation to contracts for the sale of humanitarian goods to the Iraqi government. Companies from many countries, including the Netherlands, are referred to in the IIC Report, although it is not alleged that all the companies mentioned have been involved or implicated in corrupt transactions.[23]

29. Following the publication of the IIC Report, the UN Secretary-General issued a statement calling on national authorities to take steps to prevent the recurrence of the companies' alleged activities documented in the Report, and take action, where appropriate, against companies falling within their jurisdiction. The IIC Report only describes the alleged activities, and does not presuppose how national laws would apply to them. With respect to the allegations in the IIC Report concerning Dutch interests, the lead examiners are satisfied that the relevant authorities are giving them serious consideration.

3. Outline of Report

30. This report is structured in four parts. Part A provides background information on the Dutch economic, legal, and political system. Part B examines prevention, detection and awareness of foreign bribery in the Netherlands. Part C develops issues related to the investigation, prosecution and sanctioning of foreign bribery and related offences. Part D sets out the recommendations of the Working Group and identifies issues for follow-up.

B. PREVENTION, DETECTION, AND AWARENESS OF FOREIGN BRIBERY

1. General Efforts to Raise Awareness

31. In the wake of recent scandals in the Netherlands involving fraud in the construction industry, general awareness about corruption is high. In recent years, domestic corruption cases have been the focus of extensive media coverage and parliamentary discussions; and have been at the centre of public debate. Integrity of public officials is the focus of growing public attention, and perceived breaches of integrity spark increasing indignation in Dutch society.

32. Awareness and receptiveness to matters related to social responsible business are well-anchored in Dutch society, as corporate social responsibility issues have been consistently promoted by both public and private interests for several years.[24] As such, some participants during the on-site

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23 See '*Response to Report of Independent Inquiry Committee ('IIC') into United Nations Oil-for-food Programme',* OECD (DAF/INV/BR/WD (2005) 25), 5 December 2005, p. 4.

24 Corporate Social Responsibility: A Dutch Approach, *Sociaal-Economische Raad* (SER) (Netherlands' Social and Economic Council), Royal Van Gorcum, 2001.

visit noted a shift in the public's view that places responsibility for corrupt acts not only on the individuals who commit them, but also on the companies who employ these individuals.

a. Government initiatives to raise awareness

33. The Platform on Fighting Corruption, formed at the end of 2004, was presented as one of the two main pillars in the Netherlands' approach to raising awareness of the foreign bribery offence. Chaired by the Ministry of Justice, the platform's aim is to promote common actions in the fight against national and international corruption by optimising the exchange of knowledge and information among its participants. Representatives from the Ministry of the Interior and Kingdom Relations, the Ministry of Foreign Affairs, the Ministry of Economic Affairs take part in the Platforms activities. The Fiscal Intelligence and Economic Investigation Service (under the Ministry of Finance), the National Public Prosecutor for Corruption, and the police are also represented. The platform also includes municipal and provincial authorities—through the participation of the VNG (Association of Netherlands Municipalities) and IPO (Inter-provincial Consultations). Civil society, represented by Transparency International Nederland, and the private sector—Association for Chamber of Commerce, VNO-NCW (Confederation of Netherlands Industry and Employers) and the Platform for Professional Probity and Crime Prevention, a co-operative venture between the business sector, professions and government organisations focussing on addressing and preventing crime—are also involved in the Platform. The lead examiners were favourably impressed with this diverse range of expertise and experience, and commend the efforts of the Dutch authorities in the their inclusive approach to designing the Platform. The Platform meets 3 to 4 times a year and discusses issues of common interest.

34. The Dutch Corporate Social Responsibility (CSR) Assessment Framework is the second of the government's major initiatives to increase awareness of international corruption. The aim of introducing a CSR assessment framework as part of the financial instruments for foreign enterprise was to encourage businesses that are active internationally to develop and implement international corporate social responsibility policies that take into account the OECD Guidelines for Multinational Enterprises, as well as other requirements related to environmental and social aspects and bribery. In addition, the CSR assessment framework sets a minimum CSR standard for projects that benefit from government support.[25]

(i) Awareness raising and training for civil servants and public agencies

35. As reported in the Memorandum on preventing corruption,[26] government personnel take part in programmes to develop or increase their awareness of integrity risks among civil servants. As part of the induction programme, new personnel are informed about the duties and responsibilities involved in being a civil servant, including honourable and ethical behaviour, and an oath of office is taken. Further learning, including 'dilemma training', increases awareness of integrity risks that civil servants may encounter in their day-to-day activities. The Ministry of the Interior and Kingdom Relations is currently developing a new multimedia dilemma training instrument, to be made available in 2006.

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25 Memo date 20 June 2005 from the *Ministerie van Economische Zaken* to the President of the Lower House, The evaluation of the CSR assessment framework as part of the financial instruments for foreign enterprise.

26 The Memorandum on preventing corruption is the main document developed by Dutch authorities that provides their insight into the methods for tackling corruption. It describes the concrete action items and the five policy lines (integrity, registration, signs of corruption, criminal law enforcement and the Platform on Fighting Corruption) that the Dutch government will pursue in the coming years.

The competent authority of the individual government organisation is responsible for the implementation of these awareness-raising programmes.

36. Public agents working in the fields of law enforcement, judiciary, tax authorities, official development assistance, export credit, and foreign diplomatic representations benefit from awareness-raising initiatives and training directly relevant to foreign bribery as it relates to their duties. These matters are described in further detail in the parts of this report specific to each of these fields.

(ii) Awareness raising and training for the private sector

37. The Netherlands Foreign Trade Agency (EVD) and the *Maatschappelijk Verantwoord Ondernemen Platform* (MVO Nederland), the agency in charge of corporate social responsibility have undertaken activities to raise awareness of Dutch companies. The agencies have contacted over half of all Dutch companies active abroad to provide them with information on CSR and on foreign bribery—on how to avoid becoming involved in bribery and that it is illegal. A 20-company awareness-raising programme on international CSR issues has recently been concluded and the English-language version of the results is forthcoming. The agencies are currently preparing CSR toolkits for six countries (Brazil, China, India, Indonesia, Russia, and South Africa) by collecting data on how companies try to implement CSR guidelines, and providing them with useful CSR tools. These toolkits will address the concerns of small and medium-sized enterprises (SMEs) particularly. Issues related to foreign bribery are raised in these materials, however the content focuses, to a significant degree, on other CSR-related issues including social aspects, employment policies, and environmental policies.

38. The Ministry of Economic Affairs has sponsored the development of a step-by-step guidebook by the Global Reporting Initiative (GRI) that instructs companies how to measure and report their CSR and sustainability performance. Among the economic, environmental, and social performance indicators is a description of the policy, procedures/management systems, and compliance mechanisms for organisations and employees addressing bribery and corruption, including "a description of how the organisation meets the requirements of the OECD Convention on Combating Bribery." This tool specifically targets small and medium-sized enterprises (SMEs), which most often lack the time and resources to undertake sustainability reporting, by clarifying and simplifying the process.

39. Agents from the *Rijksrecherche*, the specialised police agency responsible for the investigation of foreign bribery,[27] have recently met with representatives of the International Chamber of Commerce and have interviewed over 50 major Dutch companies in several business sectors to inform them of on-going work to fight corruption, including in the framework of a major international anti-corruption project. A representative of the *Rijksrecherche* reported however, that in their efforts to make contact with businesses, they were not always welcomed in discussion forums where companies spoke openly about situations that may have involved foreign bribery.

b. Private sector initiatives to raise awareness

40. The business sector is active in conducting programmes to raise awareness and train employees and managerial staff on integrity-related issues. In addition to government efforts to promote CSR, many companies have implemented CSR programmes that encompass corruption and foreign bribery, and report regularly on the results of these programmes.

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[27] The *Rijksrecherche* is described in further detail in C. 1. (iii.).

41. Many companies' programmes are based on the Tabaksblat Code, the Dutch Corporate Governance Code. The code establishes a set of principles and concrete provisions which personnel (notably members of the (supervisory) board) and other parties (notably institutional investors) involved in a company must observe in relationship with each other. Proper entrepreneurship, including sound and transparent conduct by the board, as well as proper supervision of the board, is one of the pillars of this code. The Confederation of Netherlands Industry and Employers (VNO-NCW) offers material to help companies develop and implement integrity policies, based on the Dutch Corporate Governance Code.

(i) Business organisations

42. The VNO-NCW has over 175 member associations and represents 115 000 Dutch enterprises from almost all sectors of the economy. Its membership includes over 80% of all Dutch companies employing between 10 and 100 staff; over 95% of companies employing between 100 and 500 staff; and all companies in the Netherlands employing more than 500 staff.[28]

43. Upon the introduction of amendments in the Dutch Penal Code criminalising foreign bribery in 2001, the VNO-NCW undertook an awareness-raising campaign about the OECD Convention in the Netherlands. At that time, it was noted that while the majority of companies were pleased overall at the prospect of an international convention against bribery, some business expressed reservations because the Convention would necessitate changes in their practices. The VNO-NCW is less active in awareness raising now, as they consider the level of awareness of businesses adequate at this stage. A meeting for SMEs, which contributed to raising awareness, was held in March 2006. Following the on-site visit, the Dutch authorities indicated that this meeting had focused on discussions of foreign bribery, with approximately 50 SMEs attending. While the discussions and outcomes of these discussions are confidential, the Dutch authorities underlined that participants had expressed interest in holding further meetings on the issue, and that the Dutch SMEs Employers' Union had indicated that it would pay more attention to the issue of foreign bribery in its future relations with its constituents.

(ii) Major enterprises

44. The presence of Dutch multinational corporations in the global business arena is notable. Given the size of the country, a relatively large number of the largest companies in the world find their headquarters in the Netherlands. Geographic regions of activity span all continents and all major business sectors are represented. Major Dutch companies appeared to benefit from a high level of awareness of foreign bribery and the OECD Convention. Many of the companies represented at the on-site visit had developed codes of conduct that make specific mention of foreign bribery and the Convention, and that prescribe a zero-bribery policy. In many cases, these policies explicitly forbid facilitation payments, as well. Companies' representatives explained that it was simpler to categorically prohibit facilitation payments than to try to establish functional definitions and thresholds that clearly differentiate them from bribery.

45. Major Dutch banks have developed policies and mechanisms and training that contribute to raising awareness of foreign bribery, including due diligence mechanisms and "know-your-customer" policies.

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[28] VNO-NCW website, www.vno-ncw.nl/web/show/id=96470, consulted on 2 March 2006.

(iii) Small and medium-sized enterprises

46. According to a Ministry of Economic Affairs publication entitled "Foreign corruption can now be prosecuted in the Netherlands: implications for small and medium-sized enterprises", in a survey of 23 large and 17 small companies from various branches, 17% were familiar with the definition of bribery just prior to the implementation of the OECD Convention in the Netherlands. Among small companies, 37% were familiar with the forthcoming changes in the law concerning foreign bribery at that time. The Dutch authorities considered the survey to be non-representative. While precisely comparable figures were not available, a Dutch consultancy reported that a recent study found that at least 12 SMEs out of 60 were not aware of laws against foreign bribery. It was suggested that one of the possible obstacles in raising awareness about foreign bribery and ensuring comprehension of the relevant legislation was the fact that SMEs often do not have a dedicated legal team or department, as would be the case in a large company. Generally speaking, participants at the on-site visit thought that SMEs often lack the personnel and/or time needed to take part in awareness-raising activities. Representatives from SMEs were not in attendance at the on-site visit.

47. According to representatives of some ministries and other organisations, entrepreneurs from SMEs have expressed interest in increased support in addressing foreign bribery issues. A meeting, organised by the Ministry of Justice, the Ministry of Foreign Affairs, and others, was held in March 2006 which brought together SMEs to address issues of foreign bribery.

(iv) Civil society and trade unions

48. The *Maatschappelijk Verantwoord Ondernemen* (MVO) *Platform*, or CSR Platform, brings together 35 Dutch nongovernmental organisations to advocate for business conduct that complies with a set of internationally agreed upon standards for corporate social responsibility. These standards, as laid out in the CSR Platform document, "CSR Frame of Reference"[29] include fighting foreign bribery, explicitly mention the OECD Convention and Article 1 of the Convention, and guide the reader to other sources of related information (the OECD Guidelines for Multinational Enterprises and the United Nations Declaration against Corruption and Bribery in International Commercial Transactions, A/RES/51/191).

49. Transparency International Nederland participates in the multidisciplinary Platform on Fighting Corruption, particularly in the Platform's efforts to raise public awareness about foreign bribery. A representative of a nongovernmental organisation present at the on-site visit thought that this approach of raising public awareness about bribery in the hopes of effecting change in companies' behaviour might be a "slow road."

50. The *Federatie Nederlanse Vakbeweging* (FNV), the Netherlands' largest trade union is active in raising awareness, with a particular emphasis on advocating more effective whistleblower provisions.

Commentary

The lead examiners welcome efforts to harness momentum triggered by domestic corruption cases to create a multi-disciplinary framework within which to address issues and raise awareness about corruption and were particularly pleased with the inclusive nature of the Dutch authorities' approach to composing the Platform on Fighting Corruption. The lead examiners encourage the Netherlands to take steps to increase the

[29] http://www.mvo-platform.nl/mvotekst/CSR%20frame%20of%20reference.pdf .

focus given to bribery of foreign public officials specifically within this framework and within government awareness-raising strategies in general. Steps should be taken to encourage closer co-operation among related government agencies and further work in awareness-raising activities aimed at the private sector should seek to improve links and cooperation between the police and the private sector.

2. Reporting Foreign Bribery Offences and Whistleblower Protection

a. General sources of reporting

51. There are means for the general public to report of suspicions of foreign bribery and other crimes anonymously in the Netherlands—including phone lines and web-based interfaces. It is not clear the extent to which suspicions of bribery are reported using these means. As concerns sources of information on bribery cases, there are four main possibilities: anonymous tips, informers, whistleblowers, and "normal" witnesses. Of these sources, the *Rijksrecherche* most often works with informers, whose identities are kept secret.

52. Investigators had thought that competitors would be an important source of information in corruption cases, but found that companies maintained a "closed circuit." Instead other sources emerged. For example, in the recent construction industry-related corruption case, the main sources of information according to the Parliamentary Inquiry and reports in the media were former employees of companies involved. An investigative journalist present at the on-site visit was of the opinion that in general whistleblowers were not particularly good sources as they too were sometimes involved in the corruption they report. A trade union representative pointed out that potential whistleblowers in large, complex cases of fraud and corruption had different interests and motivations than "clean" employees who become aware of relatively small, but widespread, long-term corruption.

b. Duty to report crimes

53. Pursuant to Article 162 of the Code of Criminal Procedure, all public servants have an obligation to report serious offences committed by a public servant, which are discovered in the course of their duties, to the Public Prosecutor. This obligation does not extend to serious offences committed by persons who are not public servants. Among the participants of the on-site visit, it was widely held that this obligation was ineffective. Police officers present knew of no cases of a public servant reporting a crime under the provisions of Article 162. In addition, there is no sanction for failure to report. However, failing to report can be construed as a neglect of duty, for which disciplinary measures can be imposed.

c. Whistleblowing and whistleblower protection

54. For public servants, there is a procedure by which a public servant can report suspected unethical conduct, by using the whistleblower's procedure, as defined by the Central and Local Government Personnel Act. Civil servants can report irregularities to their direct supervisor, or if this is not possible, to a confidential adviser. The supervisor or the adviser notifies the competent authority, who begins an inquiry. Within eight weeks of the report, the employee is informed of the competent authority's view. If the person who originally brought forward the report is not satisfied with the outcome, or after a certain period of time has elapsed, a report can be filed to the *Commissie integriteit rijksoverheid* (CIR), the Central Government Integrity Committee. This committee investigates the case and makes recommendations to the competent authorities. In 2004, five such reports were made; seven in 2003, and two in 2002.

55. The Central and Local Government Personnel Act offers legal protection to civil servants who report suspected unethical behaviour using this procedure, in good faith (*i.e.* the civil servant was not involved in the alleged misdeed). These civil servants (and the confidential adviser) are not put at any disadvantage whatsoever as regards their professional position. In the course of 2006, the impact and effectiveness of this regulation is to be assessed.

56. If a civil servant submits a report by virtue of article 162 of the Code of Criminal Procedure, the whistleblower's procedure does not have to be followed. The obligation to report takes precedence over the whistleblower regulation. An amendment to the whistleblower regulation is being prepared, so that the regulation itself includes a stipulation which clarifies the relationship between article 162 of the Code of Criminal Procedure and the whistleblower regulation. Representatives from the Ministry of Justice and the Ministry of the Interior and Kingdom Relations explained that research into civil servants' understanding of the obligations and possible methods for reporting serious offences is ongoing. Efforts to raise awareness about the obligation to report and to clarify procedures are underway, and a brochure covering these issues is currently being developed.

57. Private sector employees also benefit from established whistleblower procedures. A whistleblower is protected by the requirement of "good employership and employeeship" contained in the Netherlands Civil Code (Article 7:611). A whistleblower who reports in accordance with a companies established procedure can be regarded as acting in good faith. He acts as a good employee and must therefore be protected against dismissal as a result of his whistleblowing.

58. Since the Dutch Corporate Governance Code's entry into force in December 2003, Dutch companies must report on their compliance with the code, and in cases where requirements have not been met, the company must explain why, according to the code's "comply or explain" rule. Among the best practice provisions of the Dutch Corporate Governance Code is a provision stating that "the management board shall ensure that employees have the possibility of reporting alleged irregularities of a general, operational and financial nature in the company to the chairman of the management board or to an official designated by him, without jeopardising their legal position. Alleged irregularities concerning the functioning of management board members shall be reported to the chairman of the supervisory board. The arrangements for whistleblowers shall in any event be posted on the company's website." The lead examiners were informed that a recent study showed that 10% of Dutch companies did not comply with this provision. Of these companies, one-third reported that whistleblowing procedures were still in the development phase. The ministries of Economic Affairs, Social Affairs and Employment, and Justice have committed to studying practices and legislation concerning whistleblowers in the United Kingdom and the United States and to inform the Lower House of their findings in the course of 2006.

59. There are no immunity programmes for whistleblowers who are themselves involved in the corrupt acts about which they provide information. The prosecutor can request that sanctions against them be reduced by one-third; the ultimate decision is made by the judge.

Commentary

The lead examiners noted the total absence of public servants' reports of serious offences committed by public servants, under the provisions of Article 162 of the Code of Criminal Procedure; and noted that the two distinct mechanisms to report crimes available to public servants may potentially create confusion or duplication, and may even be counterproductive. The lead examiners encourage Dutch authorities to undertake efforts to clarify reporting and whistleblowing mechanisms and to take measures to raise awareness among public servants about the obligation and mechanisms available to report crimes.

3. Officially Supported Export Credits

a. Awareness-raising efforts

60. The export credit agency in the Netherlands is Atradius DSB, which was established in 2004. Atradius DSB administers a number of programmes for the Netherlands that aim to assist exporters with the view to promoting Dutch exports. The largest of these programmes is the EKV (normal export credit insurance). The reinsurance agreement for this programme is based on the principle that the state only supplements the market. Another important entity that provides assistance to Dutch companies is the Netherlands Development Finance Company (FMO), which is a development Bank in the Netherlands, and not an export credit agency. Both the FMO and Atradius DSB state that they abide by the OECD Action Statement of the Working Party on Export Credits and Credit Guarantees (Action Statement). In relation to export credits in particular, Atradius DSB deals with a number of Dutch companies that participate in the international market and, like export credit agencies in many other countries, is uniquely placed to not only raise awareness about the Convention with client companies but also to detect foreign bribery cases.

61. Representatives from Atradius DSB stated that it is their application form, for official export credit support, that serves as the basis for raising client company awareness about the offence of bribing foreign public officials. In accordance with the requirements of the Action Statement, the application form explains the legal consequences under Dutch law of committing bribery in the course of international business transactions. The application form states that the applicant "will at all times refrain from bribery as referred to in question 10f. of the application form and the related notes and from inciting bribery or complicity therein." The related notes to 10f provide that "…bribing a foreign public official is expressly prohibited by article 177 and article 177a in conjunction with article 178a of the Penal Code. Should Atradius suspect that bribery has taken place, it reserves the right to notify the Dutch investigative authorities of its suspicions." The general conditions of contract also incorporate similar text. Further, the application form invites exporters to declare and give an undertaking that "they, nor anyone acting on their behalf, have not been engaged in, will not engage in bribery, the provocation of bribery or that they were an accessory to bribery related to the acquisition and/or the execution of the transactions." This declaration and undertaking is a prerequisite for obtaining official support in the Netherlands. The application form, the general conditions and a description of its anti-bribery policy are all available on the Atradius website, together with links to the social responsibility website of the Ministry of Economic Affairs and the OECD Guidelines for Multinational Enterprises.

b. Detection of foreign bribery

62. The lead examiners were informed that a particular area of training for staff of Atradius DSB is to examine agent's commissions associated with official support. The Netherlands has promoted the view in the OECD Working Party on Export Credits and Credit Guarantees that more has to be done in the field of officially supported export credits to obtain more detailed information on agent's commissions, which it is argued are often common practice and justified, but can also be used as a vehicle for bribery.

63. Atradius DSB asserts that its requirements and enquiries go much further than many other export credit agencies and that this approach is an important aspect of its policy of preventing bribery. In that regard, client companies are required to explain all commissions, and must disclose the amount of the commissions, together with their purpose, and the details to be provided in respect of the agents to whom commissions are paid. It remains then for Atradius DSB to assess whether the level of commissions is consistent with standard business practice. Atradius DSB states that this assessment

takes into account information about buyers and agents (in the buyer country) provided by Dutch embassies and missions. These matters are all undertaken and considered before the final decision to provide support is made. In the case of the Netherlands, any commission exceeding 5% of the contract price or EUR 4 538 000 will automatically lead to enhanced due diligence. In a recent evaluation of the Dutch CSR Assessment Framework, which is applicable to Atradius DSB, the difficulty of assessing whether bribery occurs in relation to official export support and other projects was acknowledged. It was stated that 'in assessing requests for finance, the implementing organisations can only base their decisions on concrete indications.'[30] To date, Atradius DSB has not identified any cases of bribery.

c. Duty to report bribery of foreign public officials

64. Representatives from Atradius DSB informed the lead examiners that in circumstances where official export credit support has been provided, or even before the decision to provide support has been made, Atradius DSB requires its employees to report instances of foreign bribery or suspicions of bribery to investigative authorities. It is evident however, that the application form for official export credit support (and the general conditions) are not so definitive in that it is stated that *"...*should Atradius suspect that bribery has taken place, it reserves the right to notify the Dutch investigative authorities of its suspicions" [underlining added]. There is no specific obligation under law for Atradius DSB employees to report instances of foreign bribery to investigative authorities, nor are there any sanctions for failing to report. In general, a strong suspicion would generally suffice to refer cases to appropriate authorities. At the on-site visit representatives explained that Atradius DSB is not an investigative agency and it would not therefore, investigate irregularities or suspicions of a criminal offence. In practice, Atradius DSB does not report any instances of foreign bribery to investigative authorities, but in the case of a suspicion, it will report to the Ministry of Finance, who will decide whether or not to notify the investigating authorities. Dutch authorities report that in two cases (in or around 2004) the Ministry of Finance found reason to conduct further inquiries, on the basis of articles in the press, of which one case was subsequently notified to the investigating authorities. Nevertheless, the lead examiners formed the view that efforts to detect bribery may be enhanced through improved information exchange on suspicions of bribery, between Atradius DSB the Ministry of Finance, and Dutch missions in those countries where Dutch recipients of official export credit support are operating. A closer working relationship could benefit all three bodies in their efforts to combat the bribery of foreign public officials in international business transactions.

Commentary

Processes and procedures introduced by Atradius DSB to detect and combat the bribery of foreign public officials by applicants for, and recipients of, official export credit support are of a high standard. In particular, the efforts to obtain detailed information about the nature of agents' commissions are welcomed. Further efforts are required to enhance the information exchange between Atradius DSB, the Ministry of Finance, and Dutch missions in those countries where Dutch recipients of official export credit support are operating. Guidelines applicable to all three bodies (Atradius DSB, the Ministry of Finance, and Dutch missions) on reporting suspicions of foreign bribery should also be elaborated.

30 Minute on the CSR Assessment Framework, p 10.

4. Official Development Assistance

65. The Netherlands is among the world's leading official development assistance (ODA) donors, giving about 0.73% of its gross national income (about USD 4.2 billion in 2004) annually in development assistance, a ratio maintained as a firm policy target. The Netherlands thus rank as the sixth largest donor nation in cash terms and the fifth most generous relative to GNP.[31]

66. In the Netherlands, ODA can take the form of budget support, support for particular sectors or programmes, or support for particular projects. The assistance can be given directly to the government of the partner country, or through nongovernmental and international organisations: The top recipients by country (USD million): 1. Democratic Republic of Congo (140), 2. Ghana (109), 3. Iraq (107), 4. Tanzania (17), 5. India (92), 6. Afghanistan (84), 7. Indonesia (82), 8. Uganda (64), 9. Bangladesh (61), and 10. Ethiopia (57).[32]

67. The Netherlands' ODA programme is administered by the Ministry of Foreign Affairs.

a. Awareness-raising efforts

68. There are anti-corruption clauses in aid-funded project agreements. In response to the Recommendation on Anti-Corruption Proposals for Aid-Funded Procurement issued by the OECD Development Assistance Committee (DAC), the following anti-corruption clause was introduced in Dutch aid contracts:

> "The contracting party shall neither offer or give to a third party nor seek, accept or get promised directly or indirectly for himself of for another party any gift or payment, consideration or benefit of any kind which would or could be construed as an illegal or corrupt practice. Any such practice will be grounds for annulment of the contract or part thereof".

Other clauses stipulate that contracts can be terminated or stalled if suspicions of bribery arise.

69. While there have been awareness-raising activities and information provided to embassy staff about combating corruption, including foreign bribery, these initiatives were not discussed in detail at the on-site visit. Information about training programmes and other educational materials that address the risks of foreign bribery particular to ODA were presented after the visit. Embassy staff in countries where ODA is delivered are regularly invited to participate in the Utstein (U4) training activities in the field of anti-corruption policies. The Ministry of Foreign Affairs organises annual courses (*Terugkomdagen*) for embassy staff on good governance in general and on anti-corruption policies in particular, during which the implications of the OECD Convention for their activities are addressed explicitly. In 2005, the heads of embassies' Development Sections spent part of their annual meeting to discuss anti-corruption policies in general, and the implications of the OECD Convention for their work. Considering their interest in the subject matter, it is expected that in the 2006 meeting, anti-corruption policies will be addressed further. Anti-corruption policies are also touched upon during some of the annual conferences for ambassadors. The Task Force Anti-Corruption within the Dutch Ministry of Foreign Affairs is currently preparing a communications and training strategy to further increase awareness among embassy staff. In this context, an internal website has been created to keep embassy staff informed of the latest developments in the field of anti-corruption policies. The

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31 2005 *Development Co-operation Report,* OECD 2006, p.16.

32 2005 *Development Co-operation Report,* OECD 2006, p.91.

Handbook on Good Governance, which is the leading reference document for embassy staff in this area, contains a specific, detailed guideline on anti-corruption policies.

70. Awareness-raising activities and information concerning the prevention of corruption in ODA for partner country representatives, private sector partners, or multilateral donors who may work together with the Dutch Ministry of Foreign Affairs, were not explored in depth at the on-site visit, but were brought to the attention of the lead examiners subsequently. The Netherlands funds many programmes and projects in partner countries in the field of anti-corruption, and actively pursues donor co-ordination in this field. In major donor countries discussion and co-operation forums (including Nordic+ and DAC) the Netherlands has contributed to donor co-ordination on anti-corruption efforts, *inter alia* by submitting discussion papers on the subject.

b. Detection of foreign bribery

71. In project aid, which accounts for about half of all official development assistance, audits are incorporated into contracts, as part of the project costs. The type and frequency of audits depends on the financial situation of the contracting organisation. Audits will be required on an annual basis, if there are any indications with regard to the financial stability of the organisation. Otherwise, audits are normally required once, as part of the final review of the project. ODA in the form of budget support and support for particular sectors is reviewed more regularly.

72. Dutch authorities reported that in addition to the role of Dutch diplomatic representations and other relevant Ministry of Foreign Affairs staff to prevent corruption in ODA-funded transactions, monitor ODA-funded projects, and detect and report suspicions or incidents of corrupt behaviour, Dutch nongovernmental organisations also contributed to these tasks.

73. The lead examiners have formed the view that efforts to detect foreign bribery may be enhanced by closer cooperation between the *Rijksrecherche* and relevant personnel of the Dutch Ministry of Foreign Affairs.

c. Duty to report bribery of foreign public officials

74. Concerning public servants involved in the allocation or delivery of ODA, or in monitoring the use of ODA in partner countries, no specific mechanisms nor legal obligations to report foreign bribery or suspicions of foreign bribery to law enforcement or prosecution authorities were identified by Dutch authorities. It was clarified after the on-site visit that embassy staff are required to report any irregularities in projects or programmes funded by the Netherlands to superiors within the Ministry of Foreign Affairs, which is reiterated in the new addition to the Ministry of Foreign Affairs code of conduct. Currently, a stock-taking exercise is taking place among all ODA-budget holders to identify those cases in which corrupt practices have occurred involving Dutch ODA-funding. So far, the results of this verification exercise indicate that all known cases have been reported to the central authorities within the Ministry of Foreign Affairs and that the staff involved in these projects or programmes are well aware of their obligation to report any such irregularities. The number of subsequent reports to law enforcement and prosecution authorities, if any, have not been confirmed.

75. The Task Force Anti-Corruption within the Dutch ODA agency is responsible for reviewing internal procedures and instruments used to identify potential risks for corruption and helps build safeguards against leakage of funds, due to corrupt and fraudulent practices involving Dutch ODA-projects and programmes. Currently the Task Force Anti-Corruption is reviewing procedures and formulating recommendations for improvement in existing anti-corruption policies, capacity building in partner countries, and integrity of civil servants. The adequacy of reporting obligations form part of

this review. Outcomes of this study are to be released in July 2006. In this context, an addition to the integrity code for ministry staff which includes a special article devoted to bribery of foreign public officials by Dutch nationals or by or on behalf of Dutch-based companies was adopted after the on-site visit.

Commentary

Measures to raise the level of awareness of the foreign bribery offence among employees of the Dutch Ministry of Foreign Affairs responsible for ODA so that they can better identify and report suspicions or evidence of foreign bribery, and promote awareness of the offence with other actors in ODA (partner country officials, private sector, other donors) are essential to the prevention and detection of foreign bribery. Information specific to the OECD Convention should be integral to anti-corruption training and awareness programmes conducted for ministry staff involved in delivering ODA.

It is not clear whether, if suspicions arose, staff of the Dutch Ministry of Foreign Affairs are aware of the procedure by which they can report them to law enforcement authorities, whether in the Netherlands or the local jurisdiction where the alleged bribery took place. Steps to establish procedures to be followed by staff for reporting credible evidence of the bribery of a foreign public official and to raise awareness about these procedures should be taken.

Further efforts are required to enhance the information exchange and promote closer ties between the Dutch Development Programme and the Rijksrecherche.

5. Foreign Diplomatic Representations

a. Awareness-raising efforts

76. Diplomatic missions abroad have an important role to play in enhancing the awareness of enterprises that seek advice when they consider or conduct international business transactions. They can also be an important source of guidance and support to enterprises faced with solicitation of bribes. Representatives of the Ministry of Foreign Affairs explained that embassy staff had a particularly important role in raising awareness about foreign bribery and providing support to SMEs. Ministry representatives were of the general view that SMEs bore a heavier burden than large companies in terms of facing demands for facilitation payments, and that overall they had less leverage to refuse making payments than large companies. They stated that in some cases SMEs had "no other choice in order to conduct business;" and identified facilitation payments specifically as an area where embassies play a role to support businesses.

77. Concerning awareness of the staff of diplomatic missions, the Ministry of Foreign Affairs reported that it was developing an addition to the code of conduct for embassies, which would address foreign bribery, along with relevant training. Embassy staff currently receive training at least once a year within the Ministry on issues including good governance and development aid. After the on-site visit, ministry representatives informed lead examiners that the addition to the code of conduct had been completed and that specific related training would take place in the second half of 2006.

b. Detection of foreign bribery and the duty to report bribery of foreign public officials

78. Another responsibility of diplomatic mission staff is to promote trade between Dutch companies and host country enterprises. As such, they enjoy a privileged relationship with Dutch

companies active abroad. In addition, Dutch embassy personnel play an important role in the oversight of implementation of ODA-funded projects, and have a responsibility to intervene in cases of suspected corruption. Thus, they are well-placed to be aware of past cases of foreign bribery, future transactions that might potentially pose risks of foreign bribery, or specific conditions in the host country that might facilitate corrupt acts.

79. Pursuant to Article 162 of the Code of Criminal Procedure, embassy staff are obliged to report serious offences, which would include foreign bribery, committed by embassy personnel or other public servants to the Public Prosecutor. However, as mentioned in section 2.b., to the knowledge of those present at the on-site visit, this mechanism has yet to be used to report allegations of foreign bribery by any public servant. Lead examiners were informed that in cases where bribery was detected in transactions involving public funds, including ODA-funded projects, embassy staff were bound by a legal obligation to report.

80. At the time of the on-site visit, there appeared to be no systematic approach to ensure that cases of foreign bribery detected by embassy staff are reported to authorities. A representative of the Ministry of Foreign Affairs stated that if embassy staff became aware of corruption between a Dutch company and a public official, there would be a "moral obligation" to report, and that reports of this type had been made in the past. It would appear that, in the first instance, such reports would be made to superiors within the Ministry of Foreign Affairs. If facilitation payments were detected, there was "leeway" on whether or not to report. Guidelines on reporting requirements and on how to deal with foreign bribery are currently being clarified. These guidelines will incorporate several international organisations' regulations on such matters.

81. Lead examiners were informed that embassy staff had reported concerns about the inherent conflicts in promoting trade on one hand, and playing a role in detecting foreign bribery on the other. Representatives of Dutch businesses echoed this concern and stated that if embassy staff were subject to a reporting obligation, communication between companies and embassies would be hampered and that clarity on when embassies would or would not report would be desirable. One business sector representative was of the view that "embassies should be an open and confidential counsellor and source of information. They should not be the foreign arm of the Dutch prosecutor." The Ministry of Foreign Affairs has commissioned a study of companies' attitudes and expectations with regard to embassies (and other government representatives and agencies), the results of which are forthcoming in March 2006.

82. Embassy staff also reported difficulties with respect to facilitation payments. It was the view of a Ministry of Foreign Affairs representative that the Directive on the Investigation and Prosecution of Corruption of Officials (described in more detail in C.2.iii.) was unclear. While it gave indications related to facilitation payments, definitions were not absolute; and that it was not reasonable to expect embassy staff to interpret such a directive in order to advise a company on what a prosecutor would or would not prosecute.

Commentary

Personnel in Dutch diplomatic representations abroad have experienced difficulty in reconciling their duties to promote trade and to detect wrongdoing in international transactions. Clear guidance, possibly including case studies, on what constitutes foreign bribery, and specific instructions concerning measures to be taken when there are presumptions that a Dutch enterprise or individual has bribed or attempted to bribe a foreign public official, should be developed and disseminated widely and regularly. Unambiguous policies on the legal obligations of embassy personnel and other staff of

foreign diplomatic representations to report suspicions or occurrences of foreign bribery should be developed and regular information circulars and training activities should remind staff of these obligations. The new addition to the code of conduct developed after the on-site visit is a potentially important step towards reaching these goals.

Efforts to resolve the discrepancies that exist in the Dutch legal system concerning facilitation payments should be undertaken in consultation with the Ministry of Foreign Affairs, including representatives from Dutch missions.

6. The Tax Authorities

a. Tax treatment of bribes

(i) Legislation prohibiting tax deductibility

83. In 2001 the Phase 1 Review revealed that Dutch tax laws did not expressly deny the tax deductibility of bribes to foreign public officials. The laws denied the tax deductibility of expenses related to "crimes" (which would have included the bribery offences under articles 177, 177a and 178 of the Penal Code) where there had been a conviction by a Dutch court or an out-of-court settlement with the prosecutor to avoid criminal prosecution. Even where there had been a conviction, the Phase 1 Report noted that a deduction was only prohibited retroactively under these statutory tax provisions for up to 5 years following the submission of an expense. Accordingly, with the longer statute of limitations for bribery offences, it appeared feasible to the Working Group that certain bribes, in relation to which a conviction had been obtained, would in effect be permanently deductible. In summary, the Working Group, in 2001, considered that the law on non-tax deductibility of bribes was not in conformity with the spirit of the 1996 OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials (1996 Recommendation), nor was it in line with the situation of the other Parties to the 1996 Recommendation.

84. Although at the time of the on-site visit, the tax treatment of bribes described in the Phase 1 Report had not yet changed, the Netherlands enacted legislation in April 2006 to expressly prohibit the tax deductibility of bribes. The legislation amended all three laws regulating the non-tax deductibility of expenses related to crimes, namely the Law of Income Tax 2001, the Law on Wage Tax 1964, and the Law on Corporate Tax 1969. The Dutch authorities have provided the following excerpts from the text (regarding entrepreneurs) in the Law on Income Tax 2001 to illustrate how this new provision will apply:

> "In determining the operating profits, expenses related to the following items are not deductible:…h. expenses relating to donations, promises and services, if it is established that they relate to a criminal offence referred to in articles 126, para 1, 177, 177a, 328 *ter*, par or 328*quater*, para 2, 177, 177a and 178 of the Penal Code." [underlining added]

85. At the time of the on-site visit, the new Bill was still under consideration by Parliament. Officials from the Dutch tax administration stated that the new provisions removed the requirement for a conviction in order to deny the tax deductibility of expenses. Furthermore, Dutch tax officials stressed that the amendments reflected comparable provisions that have been adopted by some other Parties to the OECD Convention and that these similar provisions were used as a reference point for the amendments enacted by the Dutch Parliament.

86. It should be noted that the legislative proposal initially sought to introduce a prohibition on tax deductibility, based on a "strong assumption" that expenses related to bribery. The Senate of the

States General however insisted on the text, subsequently enacted, imposing the higher standard of proof, thereby limiting the prohibition on deductibility to those circumstances where there was more concrete evidence to "establish" that a payment constituted a bribe. This formulation was also intended to reflect the intention of the Senate of the States General to more closely align the requisite burden of proof with the approach taken in some other OECD countries.

87. The lead examiners raised concerns that the new provisions may not necessarily address the true nature of some bribe payments. For example, where bribes are disguised as regular business expenses, they may be justified to tax authorities by presentation of invoices and receipts that *prima facie* appear legitimate, but in reality mask the real intent of the payment. In these circumstances if the tax inspector, seized of a suspicion of a bribe, could only deny deductibility "if it is established" that the expenses sought to be deducted related to a bribe, then this standard may prove to be too high. The option for the tax inspector under the original government proposal would have been to deny deductibility in circumstances where he/she had manifested a "strong assumption" that the expenses sought to be deducted related to a bribe. This is self evidently a lower standard, and would have aligned more closely to the reporting requirements of tax inspectors, which is triggered following detection of a "suspicion" of a crime. An important safeguard however, is that Dutch taxation system requires taxpayers to substantiate legitimate business expenditures. Dutch officials argued that jurisprudence has imposed a heavy burden of proof on individual taxpayers in order for deductions to be acceptable. In that regard, expenses must be shown by the taxpayer to have been incurred in the ordinary course of the taxpayer's business or trade. Accordingly, Dutch tax authorities point out that bribes disguised as business expenditures are not readily accepted as deductible expenses by tax inspectors. Furthermore, under the new tax provisions, claiming deductions for illegitimate business expenses related to bribery constitutes the filing of a misleading and untruthful tax return, which is a criminal offence.

88. Another area of concern for the Working Group in the Phase 1 evaluation of the Netherlands was the rule prohibiting deductions of crime related expenditures (including bribes) retroactively for up to 5 years following the submission of an expense. This approach reflected the former tax provisions which required a criminal conviction to be recorded before a deduction could be disallowed. The new law however, enables tax officials to disallow deductions straight away, provided that it can be established that the expenses claimed relate to a bribe. Dutch officials report that there is no longer any specific limitation to the retroactive effect when a tax official establishes that a payment constitutes a bribe and, therefore, the new legislative provisions have addressed the concerns expressed in Phase 1.

89. The lead examiners acknowledged that giving effect to the prohibition on the tax deductibility of bribes, pursuant to the 1996 Revised Recommendation, has proven to be a difficult area of the law to reform in the Netherlands, and has generated significant political debate. This debate, in itself, has been in many ways a positive development. Nevertheless the lead examiners were concerned to ensure that the Netherlands not only implemented legislation that expressly prohibited the tax deductibility of bribes made to foreign public officials, but that it also ensured that the standard of proof required to be met in order for the prohibition to take effect was not set so high as to render the administration of the law too difficult. In that regard, it is noted that the Dutch Parliament used examples of similar tax provisions from various other OECD countries as a reference point in choosing the appropriate burden of proof. Accordingly Dutch officials have argued that if there are any ongoing concerns expressed about the appropriate burden of proof, then this is a horizontal issue that affects other Parties to the Convention.

(ii) Tax treatment of small facilitation payments

90. In relation to the tax treatment of bribes, Dutch authorities informed the lead examiners that there is no exception under Dutch law that would permit tax deductions for small facilitation payments. Tax officials stated that there is a zero tolerance policy concerning the tax deductibility of facilitation payments, with the consequence that every bribe has to be reported to the Justice Department.

b. Detecting and reporting by the tax authorities

91. When a tax inspector suspects bribery of a foreign public official, pursuant to the offence in the Penal Code, the tax inspector has a duty to report this observation to the criminal law enforcement authorities. The report has to go through official channels of the Tax Administration in accordance with a detailed internal procedure. Since 1 January 2004, tax authorities are also required to report money laundering "suspicions" to the FIU Netherlands/MOT-BLOM. It is also noted that tax officers, pursuant to legislative guidelines, are obliged to report all bribes paid to public officials and they are strongly recommended to report bribes paid to other parties. Moreover, the outcome of a tax audit is always verified by another tax officer (i.e. a double check). If, even with those safeguards, a tax official deliberately fails to report a bribe, the normal rules for professional omission apply.

92. Records indicating the number of reports made to authorities by tax administration officials are not kept. Assurances were given to the lead examiners that the tax administration does report suspicions of crimes to authorities, although they were not aware of any reports relating to the offence of bribery of foreign public officials. Senior prosecutors from the Netherlands also confirmed that there has not been any information related to this offence provided by the tax authorities to police or prosecution authorities. The prosecutors indicated that the likely explanation for this is that the tax authorities are not specifically seeking to detect this type of crime, but are primarily focused on identifying tax evasion.

c. Awareness and training

93. Representatives from the Dutch tax administration confirmed that they conduct training and awareness programmes for tax inspectors that include reference to the offences in the Penal Code and the detection of bribery of domestic and foreign public officials. It is clear however, that the principle focus in this area of the criminal law has been domestic corruption. The most significant programme, initiated in 2004, is a special project on fraud in the construction industry started in all regions of the Netherlands Tax Administration, prompted by the Construction Fraud Case. The strategy on what to examine for this project was laid down in a memorandum for tax auditors. Special attention has been given to the discovery of bribes. During the project over 500 companies were examined. Authorities in the Netherlands state that in total, 78 signals of possible bribes (largely relating to domestic bribery) were reported over a period of three years. The special project is still running and the outcomes are not yet finalised. Although limited to one industry, the experience of tax officials with this project may prove helpful in ascertaining techniques, training and skills that have been developed to identify bribe payments. During the on-site visit, the lead examiners were informed that the awareness of the offence of bribery (in this case domestic bribery) has been raised, particularly amongst those companies involved in the construction industry. Tax officials maintain however, that there is also a growing realisation in the private sector that the risk of detection of suspicious transactions for bribery and related crimes by the tax administration has also grown following the Construction Fraud Case. Dutch tax officials confirmed that the OECD Bribery Awareness Handbook for Tax Examiners is used as a source for awareness-raising and training of tax officials in relation to the detection of bribery of

domestic and foreign public officials. It was not clear however, that the Handbook had been used in developing guidelines for tax inspectors.[33]

Commentary

The lead examiners welcome recent legislation enacted in the Netherlands to expressly prohibit the tax deductibility of bribe payments to foreign public officials. In that regard the lead examiners urged the Netherlands to monitor in practice whether the standard of proof required to be met in order for the prohibition to take effect is appropriate and has not been set so high as to render the administration of the law too difficult. The lead examiners recommend that the Working Group on Bribery follow up on this issue.

With the enactment of the amendments by the Dutch Parliament prohibiting the tax deductibility of bribes, clear guidelines should be developed and training given to tax officials as a matter of priority in order to maximise the possibility of detection of potential criminal conduct relating to the bribery of foreign public officials and to promote the reporting of this information to law enforcement authorities as required under law.

7. Accounting and Auditing

a. Accounting and auditing standards

94. In the Netherlands there are general regulations concerning accounting requirements in articles 361, 362, et seq of Book 2 of the Civil Code. These provisions include the obligation to draw up the annual accounts containing a balance sheet, profit and loss account and notes on the accounts. The profit and loss account must be drawn up in a manner that will allow a reasonable judgement to be made with regard to the pattern of income and expenditure. There is also an obligation, except for small companies, not to adopt and approve the annual accounts before an independent auditor has issued a report regarding the true and fair view of the annual accounts. The Civil Code regulations in this respect are based on EU Directives. Another major source of accounting standards is the Guidelines for Annual Reporting, issued by the Dutch Accounting Standards Board. As prescribed by an EU-Regulation the Netherlands authorities state that Dutch listed companies apply the International Financial Reporting Standards (IFRS/IAS). The Dutch accounting standards and IFRS are the two main sets of accounting standards to be applied in the Netherlands.

95. In Phase 1 the Dutch authorities stated that disclosure and publication requirements vary depending on the nature and size of a company. Small and medium sized companies are exempted or are not required to provide full disclosure in respect of certain publication requirements (for example, balance sheet specifications, profit and loss account and management report). A company qualifies as "small" if it meets at least two of the following criteria: (1) The total value of assets does not exceed EUR 3,65 million; (2) Turnover does not exceed EUR 7,3 million; and (3) The average number of employees is less than 50. A company qualifies as "medium" if it meets at least two of the following criteria: (1) The total value of the assets does not exceed EUR 14,6 million (2) The turnover does not exceed EUR 29,2 million (3) The average number of employees is less than 250.

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[33] After the on-site visit, Dutch officials informed the lead examiners that, during deliberations on the legislation in the parliament, the State Secretary had indicated that it would be important to equip local tax offices within the Netherlands with practical guidelines on how to put the new tax law provision into effect. Furthermore, he had expressly mentioned that, through training, the local tax office would be more aware of the political priority given to the detection of bribes given to foreign public officials.

96. In relation to auditing obligations, all companies within the scope of article 361 of the Civil Code are subject to an external audit, with the exception of small companies (article 396) and group companies for which the parent company has issued a declaration of full responsibility (in accordance with article 403). The external auditing requirements are made pursuant to the 4th and 7th EU Directives.

97. Supervision of accountants and auditors is undertaken by two professional bodies, Royal NIVRA and the NOvAA. Sanctioning is in the hands of the independent *Raad van Tucht* (Court of Discipline). In relation to ensuring the independence of external auditors, Dutch authorities referred the lead examiners to a new Act on Audit firms (*Wet toezicht accountantsorganisaties*). The Act entered into force in February 2006, and is based on the revised 8th Company Law Directive on Statutory Audit. The Act strengthens provisions dealing with auditor independence. Under the new arrangements, the Netherlands Authority for Financial Markets will perform an oversight role. Audit firms will need to have adequate quality control systems in place that will be checked before a licence to perform statutory audits is awarded, and these will also be the subject of periodic review. Sanctioning of audit firms, for breaches of auditing obligations, will be the role of an Administrative Court, while sanctioning of individual auditors will be in the hands of the Audit Chamber (*Accountantskamer*) at a Court of Law.

b. Reporting obligations

98. Reporting requirements for accountants and external auditors in the Netherlands are based on the International Standards on auditing and the detection of fraud (ISA 240) and the auditor's consideration of laws and regulations in an audit of financial statements (ISA 250). A Directive prepared by Royal NIVRA, incorporating ISA 240, requires that when auditing a company's annual accounts auditors are obliged to hold an additional investigation 'upon suspicion of fraudulent actions with regard to the annual accounts'. If the investigation strengthens or confirms the auditor's suspicions, the auditor must report these suspicions of fraud to the company's management. The auditor is obliged to check whether management takes adequate action. If the company takes appropriate action, the suspicion of fraud need not be reported. If the fraud is material to the financial statements and adequate action is not taken, the auditor is obliged to report the suspicions of fraud to the Dutch Police (KPLD) after which the public prosecutor will take appropriate action. There is also an obligation to report unusual transactions, pursuant to anti-money laundering requirements.[34]

99. The Dutch Government's Memorandum on the Prevention of Corruption states that the Dutch Minister for Justice has called for clearer guidelines with regard to corruption. During the on-site visit, it was noted that the Memorandum did not mention explicitly the application and incorporation of ISA 250 within the Netherlands which requires auditors, when performing an audit of an entity, to recognise non-compliance with laws and regulations that may materially affect the financial statements. In general, this obligation would apply to the contravention of bribery offences under the Dutch Penal Code. The lead examiners welcomed the intention of the Minister for Justice.

100. As mentioned above, in February 2006 a new law entered into force that includes provisions for reporting and new supervision arrangements. Dutch authorities explained that where auditors detect suspected fraud, bribery or other offences that may be material to the financial statements of a company, the reporting procedure under the law will remain essentially the same as described above.

101. Whilst there is not any responsibility on auditors to look specifically for instances of foreign bribery when conducting an audit, representatives from the Dutch accounting and auditing profession

[34] *Memorandum on the Prevention of Corruption*, p. 17.

stated that the methods used by companies to make or conceal bribe payments, including the use of false or poorly described invoices and the use of agents, all form part of the regular methodologies that auditors apply when conducting audits. It was acknowledged that there have been very few reports made by auditors to the law enforcement authorities, although a reason identified for this was that the reporting process provides an avenue for redress. The two important consequences that ordinarily flow from a failure by a company to take remedial action, themselves act as a powerful incentive to take action, namely: (1) non-compliance is required to be reported to the police by the auditor; and (2) the auditor must withdraw from the engagement. In response to questions about what would constitute a "material effect" on the financial statements, thereby giving rise to an auditors' obligation to report, members of the profession responded that this can only be judged based on the circumstances of each individual case.

102. In giving effect to ISA 250 within the Netherlands, the lead examiners are concerned to ensure that accountants and auditors are aware of the offence of foreign bribery within the Dutch Penal Code, given that the reporting requirement (to management, and then where necessary, to authorities) covers contraventions of all laws and regulations that may materially affect the financial statements. Members of both professions indicated that there are a number of training sessions that are organised for auditors in particular, which have included sessions on recognising money laundering type transactions. It was intended to specifically cover the offence of bribery of foreign public officials in future training sessions to be undertaken in 2006. It is noted, that payments to foreign public officials are included in the Dutch translation of ISA 250 as an indication of non compliance.

Commentary

The new reporting and supervision arrangements for accountants and auditors under legislation recently enacted by the Dutch Parliament are welcomed. The Dutch authorities are encouraged to work closely with the accounting and auditing professions to develop initiatives to raise awareness of the offence of bribery of foreign public officials and thereby help facilitate a more active role by the profession in detecting the offence. The initiatives should ensure that the offence of foreign bribery and the accounting and auditing requirements under the Convention are covered in training programmes and guidelines (or directives) in order to maximise the opportunities for detection and prevention within the business community.

8. Money Laundering

a. Suspicious transaction reporting

103. The function of the Dutch Financial Intelligence Unit was, until recently, exclusively carried out by the Office for the Disclosure of Unusual Transactions (MOT, *Meldpunt Ongebruikelijke Transacties*), within the Department of Justice. It was the central national institution responsible for the process of receiving, analysing, and disseminating transactions. If unusual transactions were found suspicious by MOT, they were then forwarded as suspicious transactions to all police forces, including a specialised investigative police unit, BLOM. [35] At the time of the on-site visit, new administrative arrangements were being implemented by the Netherlands with the merger of the MOT and the BLOM to create the FIU Netherlands/MOT-BLOM which is integrated into the National Police

[35] Response by the Netherlands to Questions Concerning Phase 2, 22 November 2005, p. 5.

(KPLD).[36] It combines an administrative function that receives, analyses, and disseminates the unusual transaction reports and a police function that serves as point of contact for law enforcement.[37]

104. Unusual transactions become suspicious transactions if FIU Netherlands/MOT-BLOM, following analysis, determines that a transaction is suspicious; if the transaction and police records match in some way; or if there is a request by the public prosecutor or police authorities to FIU Netherlands/MOT-BLOM for a search of the database relating to a particular matter. A suspicious transaction can concern money laundering, but it can also be based on a suspicion of a possible link between the unusual transaction and any other crime, including corruption. Suspicious transactions are placed in an internal police internet system, and can then be accessed by police units for any investigation, including corruption.

105. In relation to reporting obligations, the Disclosure of Unusual Transactions Act determines the entities (on the basis of services they provide) that are subject to the duty to report unusual transactions. Entities subject to reporting obligations include banks, insurance companies**,** credit card companies**,** securities institutions**,** currency exchange organisations**,** money transfer institutions**,** casinos, gatekeepers such as dealers in expensive goods (*e.g.* cars, ships, jewellery, diamonds, art and antiques) and persons in professional capacities such as lawyers, notaries, estate agents, tax consultants, chartered accountants, and company managers.[38] The Dutch reporting system has developed a range of indicators, relevant to each entity, which determines when a transaction must be reported. There are objective indicators, describing situations where a transaction must be reported; and subjective indicators, describing situations where it is left to the discretion of the entity to file a report, irrespective of whether the transaction is suspicious or not.[39]

106. In 2004 there were 174,835 unusual transactions reported to FIU Netherlands/MOT-BLOM. It disseminated about 40,000 transactions marked suspicious to the police services. There have not been any suspicious transactions linked to the offence of bribery of foreign public officials that have been detected so far, although it is stated that this cannot be answered definitively because the Dutch reporting system is not based on reports of any particular predicate offence. The large volume of unusual and suspicious transactions handled by the FIU Netherlands/MOT-BLOM has caused difficulties in the effectiveness of the system. Representatives from the banking industry acknowledged that there has been a high level of criticism about the objective indicators initially used to identify and determine the nature of transactions. Dutch authorities responded to concerns by commissioning an in-depth evaluation of the functioning of the reporting act ("FABER Report" or "Uit onverdachte bron"). After finalisation of this Report in 2004, action has been taken to address the large number of reports handled by the FIU Netherlands/MOT-BLOM. It was following this Report that the decision was also taken to merge the MOT and the BLOM in order to raise the quality of the reports referred to the police, and the list of reporting indicators was also revised in order to limit the quantity of reports to the FIU. Dutch authorities have confirmed that these changes have had the desired result of reducing both the volume of reports being filed with FIU Netherlands/MOT-BLOM and improving their quality. This in turn has helped to ease pressure on the police who, according to a

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36 Response by the Netherlands to the Questions Supplementing Phase 2 Questionnaire, 22 November 2005, p. 3.

37 Response by the Netherlands to the Questions Supplementing Phase 2 Questionnaire, 22 November 2005, p. 3.

38 Response by the Netherlands to Questions Concerning Phase 2, 22 November 2005, pp. 4-5.

39 Response by the Netherlands to Questions Concerning Phase 2, 22 November 2005, p. 5.

2005 GRECO report that pre-dated the changes, had been overburdened by the large number of reports that they received and were unable to deal with them all in an effective and timely manner.[40]

107. An issue of particular concern to the lead examiners was a suggestion by members of the legal profession that accountants in the Netherlands had adopted a restrictive application of the definition of "financial service" under article 9(1) of the Unusual Disclosures Act, thereby seeking to narrow the scope of their reporting obligation, with the result that fewer reports were being made by accountants to the FIU Netherlands/MOT-BLOM. It was suggested that when an accountant was "going through the books" of an entity, this did not constitute the performance of a "financial service" and thereby precluded the obligation to report unusual transactions to the FIU Netherlands/MOT-BLOM. Representatives from the FIU Netherlands/MOT-BLOM cast some doubt on whether the accountants had actually construed the provision in this way. They noted that their experience with the accounting profession had been quite positive, and that the only resistance that they had encountered from the accounting profession (and legal profession) to reporting requirements was when the scheme was first introduced. The FIU Netherlands/MOT-BLOM representatives pointed to recent reporting guidelines which had been drafted with the full cooperation and input of both the legal and accountancy professions. The 2004 Annual Report of the MOT notes that 145 unusual (accountancy) transactions were reported to the Dutch FIU and 75 of them were transferred as suspicious. Nevertheless it is the view of the lead examiners, that the law in this area may require clarification.

b. Exchange of information

(i) Information exchange with Dutch law enforcement authorities

108. Dutch authorities confirmed that information held on unusual transactions are, in general, only available to the FIU Netherlands/MOT-BLOM staff and similar FIU's abroad (on the basis of an MoU), and only those deemed suspicious are available to national and foreign law enforcement authorities. In that regard, representatives from the FIU Netherlands/MOT-BLOM stated that the safeguards in place are designed to ensure that the unusual transactions data base is not used for "fishing expeditions." Access is however, facilitated through a special unit established by the FIU Netherlands/MOT-BLOM that includes nominated law enforcement officers, who are permitted to search for specific information on the data base containing unusual transactions. The National Public Prosecutor for Money Laundering may also request or order information that is contained in the unusual transactions database. The Dutch law enforcement authorities are entitled to make requests through the same Public Prosecutor. Further exchanges of information occur through the dissemination of information by the FIU Netherlands/MOT-BLOM to law enforcement on a daily basis about subjects that are in the Dutch Criminal Intelligence Subject Index.

109. The representatives from the FIU Netherlands/MOT-BLOM indicated that about one quarter of unusual transaction reports are classified as suspicious, and are then referred to law enforcement authorities. Although there are managers within the FIU Netherlands/MOT-BLOM who deal with particular police regions, the FIU Netherlands/MOT-BLOM is not informed as to whether the information it disseminates is being used by police in their investigations. The merger of the MOT and BLOM is seen as one strategy of bringing the police and the FIU closer together. A desired aim of the new FIU Netherlands/MOT-BLOM is to provide better feedback to reporting entities about the reports they are making and how suspicious transaction data is being used, thereby enhancing the responsiveness of the system.

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[40] Second Evaluation Round: Evaluation Report on the Netherlands, adopted by GRECO at its 25th Plenary Meeting, Strasbourg, 10 – 14 October 2005 [Greco Eval II Rep (2005) 2E]. para. 27.

(ii) Exchange of information with international authorities

110. The Netherlands states that it applies a very low threshold for international co-operation and that there is generally no requirement for treaties or even Memoranda of Understanding (MoU) in order for the FIU Netherlands/MOT-BLOM to exchange information with its counterparts abroad. That said, the FIU Netherlands/MOT-BLOM for example has entered into MoUs or letters of agreements with a few countries including Belgium, the Netherlands Antilles and Australia. The Ministry of Justice has entered into treaties with the US and the UK on sharing of confiscated assets. The Netherlands has also signed, ratified, and implemented the Vienna and Palermo UN conventions, which enables the entry into of MoUs. Dutch authorities have also established the FIU-NET, an EU sharing mechanism for FIUs which is administered by the FIU Netherlands/MOT-BLOM.

(iii) Obtaining information from financial institutions

111. The FIU Netherlands/MOT-BLOM has the power to request any additional information from financial institutions and, for that matter, any of the reporting institutions that have filed a report. The Dutch authorities stated unequivocally that the Netherlands "is not a banking secrecy jurisdiction". Dutch law enforcement authorities have wide powers to request information from financial institutions equivalent to information that can be requested from any other person or legal entity. A special power of investigation under the Code of Criminal Procedure also entitles law enforcement authorities to order any information from any financial institution if necessary for any investigation, even if that investigation is not directed against that /any particular person /entity, but is for general intelligence purposes (no particular investigation).[41]

c. Sanctions for failure to report

112. If a reporting entity fails to report unusual transactions in accordance with its reporting obligations, supervisory authorities may refer a breach to law enforcement authorities. Sanctions can include punitive damages, the imposition of fines, and the issuing of demands to reporting entities to take particular action. The penalty for not reporting unusual transactions is a maximum penalty of EUR 11 000 and a month imprisonment. A new Act entered into force on 1 May 2006, amending the Reporting and Identification Act, which enables supervisory bodies to impose administrative sanctions (penal sums and fines) on reporting entities that fail to report in accordance with their obligations. There are four separate supervisory bodies each responsible for a special group of reporting entities. The supervisory bodies are the Central Bank (De Nederlandsche Bank DNB), The Authority for the Financial Markets (Autoriteit Financiële markten, AFM), Fiscal and Economic Intelligence and Investigation Service (FIOD-ECD), and the Bureau of Financial Supervision (Bureau Financieel Toezicht Bft) The Minister of Finance can determine a fine. The amount of the fine depends on the circumstances and the gravity of the non complying entity. A system of categories has been developed. The minimum fine used as a base penalty is EUR 5 445 which can then be multiplied several times according to a formula. Representatives from the banking industry and also the supervisory bodies indicated that sanctions have been imposed for non-compliance with reporting requirements on financial institutions, although these related to breaches of an administrative nature, and not a failure to report unusual transactions linked to money laundering.

113. The Banking industry applauded the broader role of the supervisory authorities with regard to monitoring the performance of reporting entities. It was noted that the auditing process for financial institutions on the implementation of money laundering provisions, performed by the central bank, De Nederlandsche Bank, commonly resulted in positive recommendations that not only enhanced the

[41] Article 126nc of the Code of Criminal Procedure.

process, but assisted to raise awareness about detecting and reporting money laundering within the banking sector. The De Nederlandsche Bank supervises a number of other reporting entities including insurers, trusts casinos and money remitters. The Authority for the Financial Markets (AFM) supervises Dutch securities firms, investment firms, financial services and insurance brokers. The AFM stated that since 2004 it had conducted about 250 audits relating to insurance brokers, and has had occasion to refer some previously undisclosed suspicious transactions to MOT. Bureau Financial Supervision (Bft) supervises lawyers, notaries and similar juridical professions, auditors, tax consultants and other professionals working in this area of corporate and fiscal affairs. FIOD-ECD supervises brokers and dealers in high value goods (vehicles, ships, antiques, jewellery). With the enactment of recent amendments the AFM, like other supervision bodies in the Netherlands, now has the power to sanction reporting entities itself. It is also the intention that the reporting entity will be informed of the follow-up by the supervisory bodies.

Commentary

The continuing efforts of government and industry within the Netherlands to establish and fine tune the Dutch anti-money laundering reporting system is acknowledged and welcomed. It is evident that there is a high level of cooperation and information exchange between the authorities and reporting entities. In that regard, the FIU Netherlands/MOT-BLOM is encouraged to take further steps to improve the flow of adequate information and feedback on how the information in unusual transactions and suspicious transactions is and can be used by law enforcement between the relevant actors in the anti-money laundering system.

An issue of particular concern to the lead examiners was the suggestion that accountants in the Netherlands had adopted a restrictive application of the definition of "financial service" under article 9(1) of the Unusual Disclosures Act, and had thereby unilaterally narrowed the scope of their reporting obligation. This issue must either be addressed through amendment to the law, through guidelines or other appropriate measures to ensure that those accountants (and other reporting entities) in the Netherlands that detect unusual or suspicious transactions, report them to the FIU Netherlands/MOT-BLOM in accordance with the intention and spirit of the Unusual Disclosures Act. The conclusion on this issue, raised by a representative of the Dutch legal profession, is not shared by the authorities. However, the Dutch authorities have stated that should this problem indeed exist, this problem would have been solved by the amendments to the Reporting Act and Identification Act that introduce fines, punitive damages and binding instructions by supervisors, next to the already existing possibility to prosecute non-reporting institutions under the Criminal Code.

C. INVESTIGATION, PROSECUTION, AND SANCTIONING OF FOREIGN BRIBERY

1. Investigation

a. Investigative bodies

114. Under the Dutch system, a number of investigative authorities are responsible for detecting and investigating bribery offences: (i) the Police, (ii) the Fiscal and Economic Intelligence and Investigation Service (FIOD-ECD) and (iii) the National Police Internal Investigation Department (*Rijksrecherche*). The Dutch authorities state that every police service can open an investigation in a criminal offence, including corruption, but the main responsibility for the investigation of foreign bribery has been attributed under the law to the *Rijksrecherche*.

(i) The police

115. The Dutch Police is composed of 25 regional police forces and the National Police Services Agency (KLPD), consisting in total of 52 000 police officers. The KLPD also has a network of liaison officers in a number of foreign countries.[42]

116. Each of the Netherlands' 25 police regions is headed by a regional police board, consisting of mayors and a chief public prosecutor. The KLPD is headed by the Minister of the Interior and Kingdom Relations (since 1 January 2000), who is responsible at central government level for the maintenance of public order and security. Where the Police are enforcing criminal laws or carrying out duties for the justice authorities, they act under the responsibility of the public prosecutor; when acting in this capacity, they are thus under the responsibility of the Minister of Justice.[43]

117. Within the KLPD, a National Criminal Investigation Service has been set up, with a staff of approximately 800 operating in several units located around the Netherlands. Its role is to investigate organised and other serious crimes which extend across regional and national boundaries. The Service notably provides intelligence gathering, investigation and advice to the regional police, and also plays an important role in dealing with mutual legal assistance requests, in such areas as people trafficking, terrorism, or drug trafficking, but also major fraud and white-collar crimes.

118. During the on-site visit, the examining team did not have the opportunity to meet with representatives of the Police to assess their awareness of foreign bribery issues, and their capacity to identify and report, as appropriate, such offences. The Dutch authorities explained that the *Rijksrecherche* is the main investigative body responsible for dealing with foreign bribery cases. Furthermore, while all police bodies are capable of dealing with foreign bribery, the regional police would be more interested in regional issues, and would not necessarily have the financial and human resources to deal with complex foreign bribery cases, which often involve the collection of elements abroad. For these reasons, notably, no specific training has been provided to the regional or national police on foreign bribery.

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42 As of February 2006, the Netherlands have liaison officers in China, Columbia, France, Hungary, Morocco, Poland, Russia, Serbia, Spain, Thailand, Turkey, the United States, and Venezuela.

43 See the Dutch Police website at http://www.politie.nl.

119. This raises some concern regarding the ability of the police to properly identify foreign bribery instances which they may come across. Indeed, although the *Rijksrecherche* will, in most cases, be the authority responsible for the investigation of foreign bribery cases, the police are likely to uncover bribe payments to foreign public officials in the course of their work. Furthermore, there may be instances where the police will be in charge of the foreign bribery investigations or may be called upon by the *Rijksrecherche* to provide support in investigating foreign bribery cases (see below part (iv) for further discussion on coordination between the *Rijksrecherche* and other investigative bodies). Thus, it is essential to ensure that police forces at the regional and national level are properly aware of the importance of investigating and prosecuting foreign bribery offences, and are trained to detect them.

(ii) The FIOD-ECD

120. The Fiscal Intelligence and Economic Investigation Service (FIOD-ECD) is a special investigation service of the Tax and Customs Administration, consisting of approximately 1100 officers. The FIOD-ECD is in charge of the preliminary investigation of economic and tax crime reported by tax authorities.

121. Tax authorities have a legal obligation to report to the Head of the FIOD-ECD when they discover possible instances of bribery in the course of their work. However, where money laundering suspicions are concerned, tax authorities must report directly to the Dutch financial intelligence unit, the FIU Netherlands/MOT-BLOM. Following the major Construction Fraud case, and subsequent Parliamentary Committee Inquiry into Construction Fraud, tax authorities are carrying more investigations in relation to potential payments of bribes by construction companies. A prosecutor however reported that the tax authorities have not reported much information related to foreign bribery as, in his view, they are more focused on tax evasion (see also discussion on reporting by tax authorities in part B.6.b.).

(iii) The Rijksrecherche

122. The Police Act of 1993, in its article 3, recognises the National Police Internal Investigation Department (*Rijksrecherche*) as "special police officers". As indicated in the *Rijksrecherche* Directive on Tasks and Deployment of 8 January 2002,[44] the *Rijksrecherche* focuses on "the detection of punishable crimes committed by (semi-) government officials. *Rijksrecherche* officials interviewed indicated that half the work of the *Rijksrecherche* concerns investigations of the Police (police shootings, jail deaths, etc.), while the other half concerns offences involving public servants. Out of approximately 130 cases investigated by the *Rijksrecherche* each year, an average of 30 involves domestic bribery offences. As previously indicated, there have not been any completed foreign bribery cases to date, in the context of the Convention.

Resources and training

123. Where resources are concerned, at the time of the on-site visit, the *Rijksrecherche* had a staff of 115 persons, of which 90 were detectives, including, *inter alia*, two financial detectives, four crime analysts, seven intelligence detectives, and one digital investigator. Given that foreign bribery cases are likely to involve large, complex corporate structures and financial systems, concerns were raised about the adequacy of dedicated resources within the *Rijksrecherche* to effectively investigate

[44] Under the Dutch legal system, and according to the Supreme Court, Directives are a secondary source of legislation and are binding (see also explanations on the value of Directives under part C.2.a.(ii) on the Directive on Investigation and Prosecution of Corruption of Officials).

potential foreign bribery cases. However, the *Rijksrecherche* informed the lead examiners that they can also draw upon external, specialised expertise from other agencies, such as the police or FIOD-ECD, as necessary.

124. As regards training, representatives of the *Rijksrecherche* interviewed during the on-site visit indicated that no formal training exists with regard to the foreign bribery offence. *Rijksrecherche* officials felt that knowledge of domestic corruption issues would provide sufficient training to also deal with foreign bribery cases, as this has lead *Rijksrecherche* officers to look into the functioning of businesses and business practice. Furthermore, they pointed out that *Rijksrecherche* officers, notably those working in the anti-corruption team, have international experience.

Competence over foreign bribery issues

125. In June 2004, a team was set up within the *Rijksrecherche* to specifically deal with corruption issues. Representatives of the *Rijksrecherche* indicated that the three mains objectives pursued by this special team are:

- To elaborate a database with country information (in cooperation with local authorities), as well as Dutch companies operating abroad;
- To increase *Rijksrecherche* expertise in foreign corruption, and possible correlations with domestic corruption; and
- To set up a risk analysis method through a "funnel" approach, identifying first vulnerable countries, then vulnerable sectors, sensitive processes, and finally civil servants likely to be involved in corruption. This latter objective, carried out with the help of the consulting firm, Deloitte & Touche, has resulted in the establishment of a pilot project in Romania. The *Rijksrecherche*, despite initial difficulties in identifying interlocutors, set up a pilot programme with local authorities in order to identify cases.

126. It was made clear repeatedly in the Phase 2 responses, as well as during the on-site visit, that responsibility for the investigation of foreign bribery cases lies with the *Rijksrecherche*, notably with the newly founded anti-corruption team. One of the main basis repeatedly quoted by participants at the on-site visit for competence of the *Rijksrecherche* over foreign bribery issues is the above-mentioned *Rijksrecherche* Directive on Tasks and Deployment. Yet, this Directive is very weak with regard to reference to foreign bribery. For instance, in principle, the three cumulative conditions for deployment of the *Rijksrecherche* require that *Rijksrecherche* investigations focus on officials working for the government, on crimes which could affect the integrity in which the government functions, and in order to avoid any semblance of partiality. While these points are logical where domestic integrity issues are concerned, it is difficult to envisage how foreign bribery would fit these criteria. The Dutch authorities explained that these cumulative conditions would not apply for foreign bribery. While this interpretation may be correct, and the Rijksrecherche indeed best placed to investigate foreign bribery instances, this exception regarding foreign bribery cases is not expressed in the Directive, which may lead to confusion. Furthermore, foreign bribery is mentioned only once in the document, where the Directive points out that "as a departure from the general starting points, the deployment of the *Rijksrecherche* can be indicated […] in connection with combating foreign corruption". The Directive includes no further mention of foreign bribery, explanations on how it could be detected or examples of foreign bribery offences (although the Directive does give such examples for other offences mentioned therein). Admittedly, the Directive was issued prior to the creation of the special anti-corruption team within the *Rijksrecherche*. Nonetheless, the fact that no correction has been brought to this text to date, particularly taking into account the legal value of Directives in the Dutch legal system, raises concern with regard to the clear attribution of competence with respect to foreign bribery, the priority given by the Dutch authorities to foreign bribery investigations, and how this may undermine the effective detection, reporting and investigation in foreign bribery matters. Additionally,

the Directive, as well as information provided by panellists interviewed during the on-site visit, show that the original and main purpose of the *Rijksrecherche* is to investigate domestic integrity offences, including cases of domestic bribery. The *Rijksrecherche* was set up as a body independent from the Police, under the responsibility of the Minister of Justice (and not the Minister of Interior and Kingdom Relations), and able to impartially look into police corruption. Its role evolved to include integrity issues concerning government officials as well. As the Directive indicates, "typical" *Rijksrecherche* cases will involve crimes related to a function and permitting pre-trial detention committed by investigating, prosecuting or judicial officials (police shootings, jail deaths, etc.), and political and administrative office holders, while "possible" *Rijksrecherche* cases would cover other suspected crimes by such officials (breach of confidentiality, death in prisons, etc.).[45] Foreign bribery, as an economic crime, may require different expertise than the one necessary to investigate such offences. Without additional training on the foreign bribery offence, it is possible that the necessary expertise will not be available for effective investigations into foreign bribery instances. After the on-site visit, the Dutch authorities indicated that a new *Rijksrecherche* Directive would come into force in July 2006.

127. Furthermore, given that the *Rijksrecherche*'s role is to investigate the Police, there were some interrogations regarding the state of relations between the *Rijksrecherche* and the Police, the willingness of the Police to cooperate with the *Rijksrecherche*, and whether the Police will be willing to pass on information in foreign bribery cases. This could create structural issues in placing the responsibility of foreign bribery within the *Rijksrecherche*. These concerns were somewhat alleviated by assurances from the Rijksrecherche, which informed the evaluation team that the cooperation between Rijksrecherche and Police is excellent. According to the Rijksrecherche, the Police for instance, puts 25 % extra police officers at the disposal of the Rijksrecherche, to assist it in its investigations, and also shares willingly information about foreign bribery cases. The Rijksrecherche also maintains good relations with the internal investigation bureaus of the Police.

(iv) Coordination between law enforcement authorities in corruption cases

128. The National Police Internal Investigation Department Coordination Committee (CCR) is the authority responsible for the attribution of foreign bribery cases to the *Rijksrecherche*. The CCR is composed of the holder of the *Rijksrecherche* portfolio within the Board of Procurators General, the Chief Public Prosecutor of the National Public Prosecutor's Office, and the Director of the *Rijksrecherche*. The National Public Prosecutor for Corruption acts as Secretary of the CCR, and is its main contact point. The National Public Prosecutor for Corruption explained that every investigation involving domestic or foreign bribery would be systematically reported by the Police, FIOD-ECD, or local prosecutors to the CCR. Decisions by the CCR on the deployment of the *Rijksrecherche* are taken on a case by case basis, taking into account the *Rijksrecherche* Directive on Tasks and Deployment. The CCR may also require the *Rijksrecherche* to take on a case, in cooperation with the local police.

129. *Rijksrecherche* officers explained that they were overall satisfied with the degree of cooperation with the local police, although cooperation may be more difficult if it involves another public agency. The main issue raised was the differing priorities that are likely to exist within local police forces, who will often have as a first priority the investigation of public order offences (such as homicides, thefts, etc.). *Rijksrecherche* representatives stated that they may sometimes need to wait for

[45] Use of firearms resulting in death or injury, or death or injury of persons held in custody are examples taken from the Rijksrecherche Directive on Tasks and Deployment of "typical" Rijksrecherche cases. Breach of official confidentiality, abuse of a foreigner during deportation procedures, or death in penitentiary institutions are examples of "possible" Rijksrecherche cases.

six months to begin investigations due to lack of availability of local staff. However, following the on-site visit, *Rijksrecherche* representatives stated that foreign bribery cases would be given appropriate priority, and that they considered the issue of coordination with prosecution authorities to be a more pressing matter.

Commentary

The lead examiners acknowledge and welcome the high motivation of Rijksrecherche officers in charge of the investigation of foreign bribery offences. However, they are concerned that the existing resources dedicated to foreign bribery investigations and the level of training, both at the Rijksrecherche and Police level, may not be sufficient for adequate detection of foreign bribery offences and may create undue delays in investigations. This could generally hamper the effective enforcement of the Dutch foreign bribery legislation. Thus, they recommend that the Dutch authorities ensure that sufficient resources be made available, and that training is provided to the Police and the Rijksrecherche for the effective detection and investigation of foreign bribery offences. This could include ensuring that skilled financial investigators, as well as investigators with adequate experience and training in conducting international investigations are available to those units in charge of the detection and investigation of the foreign bribery offence.

Furthermore, the lead examiners are of the view that the 2002 Rijksrecherche Directive on Tasks and Deployment does not clearly set out the competence of the Rijksrecherche for the investigation of foreign bribery offences, which may undermine the Rijksrecherche's authority as well as its ability to set priorities in this area, and could create confusion and difficulties in co-operation with other law enforcement authorities. Consequently, they recommend that any new or revised Directive assign appropriate priority to the foreign bribery offence, clarify the Rijksrecherche's competence over foreign bribery instances, and provide explanations and guidance on how such instances should be dealt with. They also recommend that the Netherlands ensure coordination among law enforcement authorities at the investigative and prosecutorial level in order to allow for the effective and efficient enforcement of the foreign bribery offence.

b. The Conduct of investigations

(i) Commencement of proceedings

130. To date, no full or completed investigation has been initiated in the Netherlands into foreign bribery offences in international business transactions. Undeniably, investigation of foreign bribery is intrinsically complex, notably because of the difficulty of detecting an offence which neither party (briber and person receiving the bribe) has any interest in uncovering, and of the almost systematic necessity of obtaining evidence abroad. Indeed, the *Rijksrecherche* and a prosecutor explained that launching an investigation would be more likely for a purely domestic affair, as it would be easier with both parties (briber and person receiving the bribe) in the country. However, on-site discussions revealed that Dutch investigative authorities appeared to be taking a passive stance, and could potentially be more proactive in initiating foreign bribery investigations.

131. Under the Dutch legal system, the pre-trial investigation is initiated by investigative bodies where there exists a reasonable suspicion of a criminal offence.[46] During pre-trial investigations,

[46] Article 132a, Code of Criminal Procedure.

information is gathered on the offence and the suspect in order to prepare a written record of allegations for decision by the prosecutor on possible prosecution. If a decision to prosecute is made, the written record established by the police may be used as evidence by the courts.

132. Representatives of the *Rijksrecherche* and the prosecution authorities explained to the examining team that, in practice, investigative authorities may decide to begin investigations based not solely on complaints, but on other sources of information such as substantiated allegations in the press, corporate reports (including publicly available annual reports), mutual legal assistance requests, or foreign court decisions. Yet, as noted earlier, at the time of the on-site visit, no investigation into foreign bribery matters in international business transactions had been initiated in the Netherlands. This raises some concern in view of the importance of the Dutch foreign trade and the involvement of Dutch corporations abroad, but also given the reaction of the Dutch law enforcement authorities in several specific instances. Several examples were discussed with investigative and prosecutorial authorities during the on-site visit:

- A journalist interviewed at the on-site visit mentioned serious allegations of foreign bribery reported in the press, which so far have not given rise to any investigations.
- An important Dutch multinational reported, in its publicly available annual report, on some bribe payments made by company employees to third parties. Representatives of this Dutch company were interviewed at the on-site visit and expressed willingness to discuss these instances with investigative authorities. The reported instances have, so far, been addressed internally by the company. The Dutch authorities did not indicate that criminal proceedings in relation to any of these reported instances were being contemplated.
- A public official of a foreign country was convicted in that country of having been bribed by a Dutch company. This case had been the subject of some media attention. The Dutch law enforcement authorities did not indicate that criminal proceedings in relation to the conviction were being contemplated. In addition, they did not indicate that they contemplated taking steps, through for instance a request for mutual legal assistance from the foreign country, to verify the facts of the case, including whether the Dutch company had been convicted of bribery.

133. These apparent weaknesses in proactive investigations on the part of investigative authorities into alleged foreign bribery instances raise further concern when read in conjunction with existing flaws in the reporting system. Clearly, reporting mechanisms could be clarified and improved to enable police investigations; it should then be up to the prosecutor to decide whether there is sufficient evidence to warrant prosecution.

Commentary

The lead examiners are concerned about the apparent lack of proactivity of investigative bodies in initiating investigations of potential foreign bribery cases. They recommend that the Dutch authorities remind the Police and the Rijksrecherche of the importance of actively looking into possible sources of detection of foreign bribery. They also urge the Dutch authorities to strongly encourage Dutch officials or Dutch staff employed by public agencies to forward any suspicion of foreign bribery to the law enforcement authorities.

Furthermore, the lead examiners encourage the Dutch authorities to monitor and evaluate the performance of the Rijksrecherche and other relevant agencies with regard to foreign bribery allegations on an on-going basis, including with regard to decisions not to open investigations. They recommend that the Working Group on Bribery follow-up on this issue.

(ii) Investigative techniques

134. Overall, the Dutch Code of Criminal Procedure allows for a wide range of investigative methods. The Special Powers of Investigation Act (Wet BOB), which came into effect on 1 February 2000, introduced amendments to the Dutch Code of Criminal Procedure (articles 126 g to 126z of the Code of Criminal Procedure). The Wet BOB provides for under cover powers, including covert investigations (infiltration),[47] pseudo purchase or pretending to provide a service,[48] and systematically obtaining intelligence about suspects.[49] These powers involve situations in which an investigating officer is active in the milieu of the suspected persons without his identity as investigating officer being known. In addition, the Wet BOB covers all types of surveillance,[50] entering and looking into premises,[51] as well as recording of confidential communications.[52]

135. The Wet BOB also confirms that the public prosecutor is the appropriate official to lead the criminal investigation. Every special power of investigation can be used once the public prosecutor has issued a warrant. Prior authorisation of the examining magistrate is only required if confidential communications or telecommunications are to be recorded, and in the case of the search of someone's home.[53]

136. The availability of these special investigative tools depends on the imprisonment terms carried under a particular offence. For foreign bribery offences, special investigative techniques are available for investigations on the basis of offences under article 177 (where the purpose of the bribe is to obtain a breach of the foreign public official's duties), 178(1) (where the purpose of the bribe is to influence a judges' decision), and 178(2) (where the purpose of the bribe is to obtain a criminal conviction), as these offences carry a maximum penalty of at least four year imprisonment. Special investigative techniques may not however be used in investigations on the basis of article 177a (where the purpose of the bribe is not to obtain a breach of the foreign public official's duties). However, the Dutch authorities underlined that, as at this early stage of the criminal investigation it may be difficult to determine whether the foreign bribery will constitute a article 177 or 177a offence, the public prosecutor would usually base his suspicion on both articles 177 and 177a, and thus be able to make use of all special investigative methods.

137. In addition, all investigative methods may be used for investigations on both natural and legal persons, except where such tools would not technically be applicable to legal persons (*e.g.* pre-trial detention of a legal person is an impossibility). Similarly, all investigative methods are available for mutual legal assistance requests (see also part (iii) below).

Bank secrecy

47 Article 126h of the Code of Criminal Procedure.

48 Article 126i, ibid.

49 Article 126j, ibid.

50 Article 126g, ibid.

51 Article 126k, ibid.

52 Article 126m, ibid.

53 See the Factsheet from the Dutch Ministry of Justice on the Special Powers of Investigation Act at http://www.justitie.nl/english/Publications/factsheets/bob.asp.

138. The Dutch authorities stated unequivocally, both in their Phase 2 Responses and at the on-site visit, that the Netherlands "is not a banking secrecy jurisdiction". Dutch law enforcement authorities have wide powers to request information from financial institutions equivalent to information that can be requested from any other person or legal entity. For obtaining other than identifying information, the general investigative techniques, such as search (including in databases), are available.

139. In the context of the fight against money laundering, the Dutch financial intelligence unit, the FIU Netherlands/MOT-BLOM, also has the power to request any additional information from financial institutions, as well as of any of the reporting institutions that have filed a report (see also part B.8. on Money Laundering).

Witness protection

140. A witness protection programme was drawn up by the Dutch authorities in 1995, following a report from a special working group. Under articles 226a to 226f of the Code of Criminal Procedure, persons implicated in criminal investigations can qualify for protective measures prior to, during and after a criminal procedure. The responsible body for the implementation of the programme is the Witness Protection Department, established under the KLPD. A public prosecutor is specifically charged with nationwide authority over the Department and its activities. The measures that can be taken within the framework of this programme are numerous and range from the hearing of a witness anonymously before an investigating magistrate or in court, a witness "going into hiding" in a safe place for a short time, to moving the witness and his family abroad, and proceed to a change of identity.

141. Criteria for admission to a witness protection programme include the presence of objectively measured risks for the life, health or safety of the witness and/or his next-of-kin, insufficiency of police protection, full cooperation with protective authorities, as well as a connection with a testimony or other important service for the benefit of the judiciary and/or the police. While such programmes could theoretically be available in the context of foreign bribery investigations, the Dutch authorities explained that, in practice, such programmes are rarely used.

Crown witnesses

142. A new law on the use of crown witness in criminal proceedings has been adopted by Parliament and entered into force on 1 April 2006. This law introduces a procedure in the Code of Criminal Procedure to reduce the sentence of collaborating suspects (new articles 226g to 226k of the Code of Criminal Procedure). Under this procedure, the public prosecutor may pass an agreement with the suspect, which establishes the conditions under which the suspect is prepared to testify against another suspect. The agreement has to be approved by the investigating magistrate. Following this procedure, the public prosecutor may ask the trial judge to reduce the sentence he/she had in mind to apply against the suspect, by a maximum of a third (new article 44a of the Penal Code).

Commentary

The lead examiners welcome the broad range of investigative measures available to investigative authorities in the context of foreign bribery investigations. They urge the law enforcement authorities to make full use of these techniques to effectively investigate suspicions of foreign bribery.

c. Mutual legal assistance and extradition

(i) Mutual legal assistance

143. In the Netherlands, the system for providing and requesting mutual legal assistance (MLA) is governed by several multilateral MLA treaties, including the European Treaty regarding Mutual Aid in Criminal Cases (Strasbourg, 1959); and bilateral treaties with other countries including Australia, Canada, the United Kingdom and Northern Ireland, and the United States. Where a treaty is applicable, it generally governs the process for obtaining MLA. In relation to incoming requests made by the authorities of a foreign state, the requirements of articles 552h to 552s of the Code of Criminal Procedure are also applicable. If the use of coercive measures is sought, then the request must be treaty based.[54]

Incoming Requests

144. It is the role of the public prosecutor to decide how an incoming MLA request is to be dealt with. In general, a request will be executed either by the police, the Public Prosecution Service or an investigating judge. Section 552.l of the Code of Criminal Procedure prescribes the grounds for refusal of assistance. MLA requests must be refused, for instance, if the purpose of the underlying investigation is to punish the suspect, based on religious, ideological, or political beliefs, nationality, race or ethnicity or if compliance would involve assisting in proceedings that would violate the protection against double jeopardy. In relation to MLA requests for the benefit of an investigation of offences that are of a political nature, authorisation by the Minister for Justice is required. An exception to this rule applies to a request made by a state that is a party to the European Convention on the Suppression of Terrorism or the Protocol, established by the Council in accordance with article 34 of the Treaty on the European Union or to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union. Dutch authorities emphasise that Dutch case law is very restrictive with regard to attributing 'political nature' to offences. In relation to a request where the Minister for Justice is required to act, authorisation can only be given to a request if it is based on a treaty, and following consultation with the Minister for Foreign Affairs.[55] On the information available to the lead examiners it would appear that the concept of "offences of a political nature" does not extend to the offence of bribing a foreign public official. Accordingly, an MLA request relating to a foreign bribery investigation is not, of itself, a ground for automatic referral to the Minister for Justice or indeed, refusal of the request. A similar requirement exists for requests made for the benefit of an investigation of offences with respect to dues, taxes, customs, foreign currency or related offences or for information kept by the State Tax Authorities. To afford assistance on this type of information, the request is required to be based on a treaty, and may not be authorised by the Minister of Justice without first consulting with the Minister of Finance.

145. The Code of Criminal Procedure provides a legislative basis for the Netherlands to respond to financial and transaction requests by foreign authorities, as well as information about the ownership and incorporation of legal persons.[56] A range of measures can also be utilised to assist a requesting State in relation to the seizure and confiscation of the proceeds of crime, the enforcement of foreign confiscation orders or provision of assistance through the establishment of a special financial criminal investigation.

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54 Articles 552n and 552o, Code of Criminal Procedure.

55 Article 552m(1) of the Code of Criminal Procedure.

56 Articles 96a, 126nc-126nf and 126uc-126uf, ibid.

146. The Dutch authorities state that for financial investigations, in general, the normal MLA framework is applicable, albeit that a treaty is still required where coercive measures are required. In that regard, Dutch law does not include any express provisions that enable MLA to be denied on the ground of bank secrecy. The lead examiners were informed however, that if a request for financial data is framed too broadly (*i.e.* a 'fishing expedition') this could constitute grounds for refusing the request. Although, in such circumstances, authorities indicated that they have previously given assistance to foreign requesting authorities to ensure that requests are more rigorous in identifying specific timeframes and, where possible, more specific details about the particular transactions in question, including the bank, person, legal entity, or account.

147. In 2005 Dutch authorities reported that there were about 36,000 incoming MLA requests. In general, the requests take about 2 months to be dealt with, although if coercive measures are required, then it takes about 6 months to respond to the request. Data collected by the Dutch authorities indicated that between 2002 and 2005 there were 28 MLA requests registered from foreign authorities in the Netherlands concerning "offences by public officials." The National Public Prosecutor for Corruption has stated that three of the requests were based on suspicion of corruption (two in 2002, and one in 2003). All three were granted and executed.

148. The Netherlands has, in general, a highly developed and responsive system to deal with MLA requests. The lead examiners did not identify any fundamental problems with the law, procedure or the quality or timeliness of responses to MLA requests from abroad. An area that may require further attention however, is the opportunity for authorities to utilise incoming MLA requests as a source for making a determination as to whether independent Dutch investigations should be initiated. It was suggested by at least one senior prosecutor that incoming MLA could, in some cases, disclose criminality of direct interest to Dutch authorities. It would appear that incoming requests have not been used in this way.

Outgoing Requests

149. The power to issue outgoing MLA requests resides with both public prosecutors and investigating judges. In 2005, Dutch authorities reported that there were more than 7,000 outgoing MLA requests. There were 11 requests registered between 2002 and 2005 concerning offences by public officials. On the available records, the Dutch authorities could not definitively state whether these matters had any relevance to corruption offences. The lead examiners were concerned that the use of MLA requests by Dutch law enforcement and prosecution authorities before deciding whether to continue or close a case, was deficient. It was not apparent that Dutch authorities have, as a matter of common practice, issued MLA requests in response to cases being dealt with by foreign authorities or other serious allegations made in the foreign press involving Dutch citizens and companies where the material conduct and evidence is primarily based abroad. As previously outlined above (see part C.1.b.i) the Dutch authorities did not indicate that steps were taken by them, including a request for MLA, to verify the facts involved in a conviction in a foreign country of a public official of that country of passive bribery by a Dutch company (*e.g.* to determine the circumstances of the case, the nature of the charges, the subsequent convictions and whether there was any associated criminality that required further investigation). The lead examiners welcomed efforts by the *Rijksrecherche* to address the issue of the effective use of MLA regarding foreign convictions and related investigation and enforcement issues within the context of its pilot study with Romanian authorities.

(ii) Extradition

150. Pursuant to section 5(1)(a) of the Extradition Act the Netherlands may provide extradition for criminal investigations instituted by the authorities in the requesting state because of a suspicion

regarding an offence for which a term of imprisonment of one year or more may be imposed under the law of the requesting state and the Netherlands.[57] It can also be provided to enforce a term of imprisonment of 4 months or more[58] regarding an offence referred to under section 5(1)(a).[59] Dual criminality is a requirement under section 5(1)(a) and (b) of the Extradition Act. The requirement is deemed to be met if the offence for which extradition is sought is within the scope of Article 1 of the Convention in so far as it is criminalised pursuant to article 177 or 177a of the Penal Code. In that regard, the Dutch authorities have stated that according to case law the question of whether the offence is punishable both in the Netherlands and in the requesting country must be judged at the time the request is received in the Netherlands.[60]

151. Requests for extradition involved two stages of decision-making: the court and the Minister of Justice. The court of primary process or the Supreme Court decides at first instance on whether to provide extradition. It is only empowered to refuse extradition when there are compelling reasons to do so. Where the court refuses extradition, the Minister of Justice is obligated to also refuse the request. However, where the court decides to grant the request, the Minister has the discretion to refuse the application. A decision of the Minister of Justice to refuse extradition cannot be appealed. The grounds under which extradition must not be granted pursuant to the Extradition Act include where the punishment has been barred by a lapse of time under Dutch law; where the Minister of Justice believes there are good grounds for believing that the person in question would be prosecuted on account of his/her religious or political convictions, and where the offence has a "political nature" or is "connected therewith". Dutch nationals may be extradited where he/she is requested for a criminal investigation and the Minister of Justice is satisfied that there is an adequate guarantee that if a non-suspended custodial sentence is ordered, he/she will be allowed to serve the sentence in the Netherlands.[61] Dutch authorities have confirmed that where extradition is refused on the ground of nationality, the case shall be submitted to the competent authorities for the purpose of prosecution in accordance with Article 10.3 of the Convention.

152. In the period between 2002 and 2005 there were no extraditions (requested by or from the Netherlands) based on corruption. It is noted that one extradition request based on corruption from before 2002 is still pending more than one year after the Dutch courts found the person in question extraditable under the law. On average, an extradition request made by an EU country to the Netherlands, based on the European Arrest Warrant, is dealt with within 6 months. In relation to requests from countries outside the EU, the period for settling the extradition is within 12 months. In practice, there is one clear exception that falls outside this timeframe, which is the long running extradition matter that remains under consideration.

(iii) Cooperation with Aruba and the Netherlands Antilles

153. Aruba and the Netherlands Antilles have their own separate criminal law and procedure and are a party to international MLA Conventions, both multilateral and bilateral.[62] Within the Kingdom of

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57 Pursuant to article 6 of the Extradition Act, the minimum period of 1 year does not apply in respect of extradition to Belgium or Luxembourg.

58 Pursuant to article 6 of the Extradition Act, the minimum period of 4 months does not apply in respect of extradition to Belgium or Luxembourg.

59 Article 5(1)(b) of the Dutch Extradition Act.

60 The Response to the Phase 1 Questionnaire, question 14.2, p. 22.

61 Article 4(2) of the Extradition Act

62 Response by the Netherlands to Questions Concerning Phase 2, 22 November 2005, p. 6.

the Netherlands, the three Countries (Aruba, the Netherlands Antilles and the Netherlands) can request each other's cooperation in criminal proceedings, including handing over of suspects.[63] The extradition of persons from the Netherlands Antilles and Aruba to foreign states is based on international treaties, and on a regulation entitled "*Nederlands-Antilliaans uitleveringsbesluit*". This regulation provides, among other things, that extradition is possible to a foreign state, including for persons with Dutch nationality. It must be based on a request by the authorities of a foreign state, for a crime that carries a possible sentence of at least one year imprisonment, both under the law of the requesting state and the Netherlands Antilles or Aruba. The principle concern of the lead examiners is that, because the Netherlands Antilles and Aruba have not criminalised the offence of the bribery of foreign public officials, the effectiveness of MLA and extradition procedures for this type of offence could be frustrated due to the requirement of dual criminality. Under current arrangements there exists the unwelcome prospect that alleged perpetrators located in Aruba or the Netherlands Antilles are unable to be extradited for the offence of foreign bribery.

Commentary

The lead examiners are concerned that the Dutch authorities are not effectively and pro-actively using MLA as an evidence gathering tool to obtain and assess evidence of potential corruption activities involving Dutch citizens and legal persons abroad. This is an issue that must be addressed. It is the view of the lead examiners that law enforcement and prosecution authorities should be encouraged to be more proactive in their use of MLA requests and in responding to serious allegations from important and credible sources. In that regard, a stronger emphasis on the use of MLA could be addressed in the Directive on investigation and prosecution of corruption offences, underpinned by renewed efforts to raise awareness and, where necessary, training of police and prosecutors in relation to the use of MLA, particularly where allegations are made of corruption, including bribery of foreign public officials by Dutch citizens and legal persons.

The absence of dual criminality between Aruba/The Netherlands Antilles and a foreign state requesting extradition related to an offence of bribery of foreign public officials, highlights a further important reason for urging prompt ratification and implementation of the Convention across the entire Kingdom of the Netherlands.

2. Prosecution

a. Prosecutorial bodies and principles of prosecution

(i) The Public Prosecution Service

Organisation of the Public Prosecution Service

154. The Public Prosecution Service (PPS) in the Netherlands is under the responsibility of the Ministry of Justice. As provided under article 134 of the Judicial Organisation Act, the PPS consists of:

- the Board of Procurators General;
- the 19 District Public Prosecutors Offices;
- the National Office of the PPS (Landelijk Parket);

[63] This practice is based on Article 36 of the Charter, which states that the Countries 'shall accord one another aid and assistance'.

- the National Office of the PPS on Economic Crime (Functioneel Parket); and
- the five Public Prosecutors Offices at the Courts of Appeal.

155. The PPS has a staff of approximately 2000, 500 of which are public prosecutors, assisted by administrative personnel, junior clerks, and accounting professionals. It is headed by a Board of Procurators General which consists of three to five members, all of whom are lawyers. The Board of Procurators General determines, collegially, policies with regard to investigations and prosecutions. The Board of Procurators General may give instructions to the chief public prosecutor of the District Public Prosecutors Offices concerning their tasks and powers in relation to the administration of criminal justice and other statutory powers, *i.e.* supervision of police. Such an instruction may be of a general criminal policy nature or concerning an individual criminal case. The Board also supervises the National Public Prosecutor for Corruption (see below) and the *Rijksrecherche*.

156. At the regional public prosecutors' offices there are currently seven centres with experts for certain types of fraud related crime, for example in Haarlem for economic crime and public health crime and in Rotterdam for fraud causing damage to the European Union and for combating crime in connection with animal feed. Furthermore, there is a National Office of the PPS in Rotterdam (Landelijk Parket), for the prosecution of serious international organised crime. A second National Office of the PPS (Functioneel Parket) focuses on economic offences and environmental crime.

The National Public Prosecutor for Corruption

157. The Dutch authorities indicated in their Phase 2 Responses that, in addition to these specialised centres, a National Public Prosecutor for Corruption (NPPC) had been appointed in 2000 within the National Public Prosecutor's Office in Rotterdam. The NPPC is responsible for both executing and coordinating criminal prosecutions on corruption offences. Furthermore, this Public Prosecutor serves as the coordinating Public Prosecutor of the *Rijksrecherche*, and as secretary to the CCR (Coordination Committee) of the *Rijksrecherche* (see also part 1.a.(iv) above on coordination of law enforcement agencies). The NPPC is also responsible for providing guidance to the criminal intelligence unit of the Rijksrecherche, as well as conducting, coordinating and assisting other prosecutors in investigations into the bribery of foreign public officials.

158. Discussions with the NPPC during the on-site visit revealed that the role of this public prosecutor is essentially limited to coordination within the CCR. As the secretary of the CCR, the NPPC receives reports from all parts of the Netherlands, and advises on the appropriate body for investigation (regional police, national police, or *Rijksrecherche*). The other main function of the NPPC is to act as an intermediary between several stakeholders to ascertain whether policies are appropriate, and act as an intelligence officer (receiving anonymous reports, whistleblower reports, etc.). In fact, case related work is also carried out by the NPPC: at the time of the on-site visit, the NPPC was handling only one corruption case (involving organised crime).

159. The existence of a coordination body to gather information regarding potential corruption cases is undeniably an important element to ensure that such cases are adequately dealt with by the appropriate agencies, and provide practical support and advice on these cases. As indicated by the Dutch authorities, because of its important role as coordinator and secretary of the CCR, the NPPC has little time to get involved in the actual prosecution of cases. This initially raised some concern among lead examiners that the valuable knowledge acquired by the NPPC would not be used to its full potential with respect to prosecution of foreign bribery offences. This concern was however largely alleviated by assurances from the NPPC that prosecutors specialised in complex economic and financial crime are available within other prosecution bodies, notably within the Functioneel Parket, and that the role of the NPPC is, indeed, when informed of possible foreign bribery instances, to

ensure that they are attributed to competent authorities. What did seem to pose problem was awareness among law enforcement authorities as to the coordinating role of the NPPC in respect of foreign bribery instances. For instance, during the on-site visit, while the existence of the NPPC was known to most stakeholders, some panellists were not fully aware of the role of the NPPC with specific regard to foreign bribery issues. Furthermore, the NPPC informed the examining team that certain cases raised by other prosecutors during the on-site visit had not been brought to her attention. Thus, if the NPPC is to fulfil its role as coordinating body for foreign bribery offences, it is essential that its role be explicitly explained and underlined to all law enforcement agencies so that cases are reported accordingly. One suggestion put forward by the NPPC to this end would notably be to involve representatives of the Functioneel Parket in the preparations of the meetings of the CCR, the authority responsible for attribution of foreign bribery cases.

Commentary

The lead examiners welcome the creation of the post of the National Public Prosecutor for Corruption (NPPC), and its important coordinating role it has in centralising information on potential transnational corruption cases and ensuring cooperation among the law enforcement agencies. They urge the Dutch authorities to ensure that law enforcement authorities are aware of the coordinating role of the NPPC, and, that, accordingly, all suspected foreign bribery cases are duly reported to the NPPC. Nevertheless, the lead examiners also recommend that the Dutch authorities ensure that the necessary resources and expertise remain available at prosecutorial level, for the effective investigation and prosecution of the foreign bribery offence.

(ii) Decision to prosecute

Discretionary prosecution

160. Article 167 of the Code of Criminal Procedure delegates the decision to prosecute to the Public Prosecutor's Office. The Netherlands emphasised that the decision to prosecute is not a matter of arbitrariness, because the public prosecutor is subject to general directives for prosecution (see also part (iii) below on the Directive on Investigation and Prosecution of Corruption of Officials), which in turn reduces the risk of a lack of uniformity in the application of prosecutorial discretion.

161. The Dutch authorities indicated at the time of the Phase 1 that the rationale for the delegation of power under article 167 of the Code of Criminal Procedure "is to prevent criminal proceedings from becoming dependent on political considerations". The Dutch authorities further explained in their Phase 2 Responses that decisions to prosecute always rest with the public prosecutor in charge of the investigation. The NPPC may provide assistance with respect to corruption cases, given that, as previously noted, all potential corruption cases in the Netherlands have to be reported at a central level to the CCR, which is assisted by the NPPC.

162. Article 167 of the Code of Criminal Procedure allows the Public Prosecution to not prosecute on "public interest" grounds. In the Phase 1 evaluation, Dutch authorities had stated that they could not find any jurisprudence indicating that such decisions are influenced by any of the prohibited grounds under Article 5 of the Convention. At the on-site visit, prosecutors confirmed they were confident that considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved would not be taken into account in decisions to prosecute. Rather, decisions not to prosecute would be based on serious possibilities that the procedure would not lead to a conviction due to lack of evidence (see also part 4b on discussions of prosecutorial decisions to prosecute legal persons).

Discretion on choice of persons prosecuted

163. The public prosecution also retains discretion to choose which party(ies) to prosecute:
- the natural or legal person who committed the offence;
- "those who have ordered the commission of the criminal offence, and […] those in control of such unlawful behaviour".[64]

164. The prosecution may also decide to prosecute two, three or more parties, separately or simultaneously.

Instructions

165. As noted in the Phase 1 Report, the Minister of Justice has the authority, pursuant to articles 127-129 of the Judicial Organisation Act, to issue general and specific instructions concerning the tasks and competence of public prosecutors. The Dutch authorities state that in practice, the Minister of Justice makes limited use of this power and in practice the Minister of Justice informs the Dutch parliament each year of the number of cases in which the power to issue instructions was used. To date, there have not been any ministerial instructions issues in relation to a decision not to prosecute a foreign bribery or corruption case. At the on-site visit, Dutch authorities further indicated that this power is used a maximum of once or twice a year (and sometimes not even once), in cases which stir significant public debate, such as euthanasia. They re-iterated that the prosecution of a foreign bribery case does not depend on the consent or authorisation of the Minister for Justice.

Commentary

As previously noted, the lead examiners note that, although the legal provisions do not appear to pose a problem, there have been no prosecution of foreign bribery offences pursuant to the Convention initiated in the Netherlands. The lead examiners have some concern about the apparent lack of proactivity on the part of the prosecution, which has the main responsibility in directing and supervising investigations. Thus, as mentioned earlier in respect of the Rijksrecherche, the lead examiners encourage the Dutch authorities to monitor and evaluate the performance on an on-going basis of the Public Prosecution Service and the National Public Prosecutor for Corruption with regard to the initiation and conduct of investigations, as well as concerning decisions on the issuing of indictments in alleged foreign bribery cases.

(iii) The Directive on Investigation and Prosecution of Corruption of Officials

166. In 2002, a Directive on the Investigation and Prosecution of Corruption of Officials was sent by the Dutch Board of Procurators General to the Chief Public Prosecutors and the Director of the *Rijksrecherche*. It entered into force on 15 November 2002, and is valid until 15 November 2006. The Directive relates to active and passive bribery, as well as domestic and foreign bribery offences. A new Directive is to be issued later in 2006.

167. Representatives of the Dutch Ministry of Justice explained that, under the Dutch legal system, Directives are considered as a source of law, as stated by a Supreme Court (*Hoge Raad*) decision. Consequently, Directives are binding on the prosecution, both internally, within the PPS, and externally, as a defence or complaint against prosecutorial action can be formulated on the basis of a Directive. Thus, the Directive on Investigation and Prosecution of Corruption of Officials has much

[64] Article 51(2)(2), ibid.

higher value than mere prosecution guidelines, and its impact on any prosecution of foreign bribery offences needs to be carefully evaluated.

168. The Directive appears unclear in some areas regarding the coverage of foreign bribery. For instance, discussions under Investigation are divided into the subarticles "Investigating domestic corruption" and "Investigating corruption outside the Netherlands". These subtitles are misleading and confusing with respect to the bribery of foreign public officials, in that they both appear to cover domestic and foreign bribery. This may consequently create confusion with respect to other factors as well. For example, under the article on Investigation, it is stated that "the investigation of official corruption is directed both at the bribery and the official bribed". Not only is this incorrect from the point of view of foreign bribery, but it may lead the investigative authorities to interpret it to mean that investigation of the briber should only be undertaken where there is also jurisdiction to investigate the foreign public official.

169. In addition, the Directive states that "the OECD Convention tackles the problem from the perspective of international trade". This may be misleading, because the Convention addresses bribery in "international business transactions", a broader concept than that of "international trade". For instance, bidding to provide services, such as the building of a bridge through a foreign public procurement project, would not be considered "international trade". This may justify inactivity on the part of the prosecution in certain instances, but, given the value of directives under the Dutch legal system, could also possibly be raised as a defence before the courts by defendants.

170. The Directive establishes a list of factors (which are not exhaustive) that are to be taken into account in determining whether it is appropriate to prosecute a case of corruption, including a case of foreign bribery, under the Penal Code. The Directive lists 17 factors to be "borne in mind" in relation to the decision to prosecute domestic corruption, including the person taking the initiative, the value of the gift, the degree of social acceptance, incompatibility with a prevailing code of conduct, the intention behind the gift, the nature of the relationship (personal or business), the action taken by the official, and the impact on legitimate markets. These factors are also applicable to the decision to prosecute for foreign bribery (but with the addition of other factors specific to foreign bribery, as further explained below). Several of these factors raised concern where prosecution of foreign bribery offences is concerned:

- The first factor concerning initiation of the bribery offence, states that "although the law makes no distinction between an official who solicits a gift and an official who is offered one, prosecution would seem more appropriate in the first case than the second". While this statement holds some logic where the prosecution of domestic bribery offences are concerned, this factor should not be taken into account in a decision to prosecute foreign bribery cases.
- Other factors raise questions about compliance with Commentary 7 to the Convention in certain areas (*e.g.* the value of the gift, degree of social acceptance).[65] The factor concerning intent, for instance, where the purpose of the gift is to "oil" a relationship, raises questions about compliance with Article 1 of the Convention, as it is too vague and could easily slip into areas clearly covered by Article 1.

171. In addition to the above mentioned list, additional factors should be "borne in mind" specifically in relation to foreign bribery cases. Notably, "account may be taken of action (or inaction)

[65] According to Commentary 7 of the Convention:
"It is also an offence irrespective of, inter alia, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage."

on the part of the foreign police and justice authorities against the foreign official". This will in many cases not be an appropriate reason. In relation to the bribery of a foreign public official in particular, the foreign authorities may very well choose not to investigate for various reasons, including potential international embarrassment. In any case, action on the part of foreign law enforcement authorities against the foreign official should only to a very limited degree impact on decisions by the Dutch law enforcement authorities to investigate or initiate proceedings against the Dutch natural or legal person paying the bribe.

172. Another important issue in the Directive is the contradiction which it raises with the law on the issue of small facilitation payments. The Directive expressly aims to exclude, where appropriate, facilitation payments and trivial gifts to ensure that they fall outside the scope of Dutch criminal law "in order to prevent Dutch practice diverging from that in other countries party to the OECD Convention." In this regard, the Directive states that it "aims to keep such payments outside the investigative and prosecution framework". Admittedly, under the Convention, the exclusion of small facilitation payments is envisaged. However, in the specific Dutch case, the Directive contradicts the law, thus creating tensions between two sources of law, and, consequently, unclarity for stakeholders, as was underlined by lawyers and corporations during the on-site visit. There is also concern that the Directive may incite passivity on the part of law enforcement authorities to not even open investigations to verify that a particular payment is indeed a small facilitation payment. This could usefully be clarified in the Directive, by, for instance, including examples contained in Commentary 9 of the Convention (see also discussion on the defence of small facilitation payments in part 3 below).[66]

173. This tension created by the Directive was felt not only by the examining team, but also by corporations and representatives of the legal profession. Several of the representatives interviewed during the on-site visit explained that the drafting of this Directive was a typical example of the Dutch trade spirit and pragmatism and that, although there are clear laws "we have to be able to do business abroad". Where small facilitation payments are concerned, lawyers further stressed that the Directive puts them in a difficult position vis-à-vis their clients: under the law, small facilitation payments could clearly constitute a criminal offence, and the Directive does not provide sufficiently clear information to determine whether a payment or a series of payments could be considered facilitation payments. In conclusion, they expressed the view that Directives are essentially useful when a large caseload already exists, which is not the case for offences described in the Directive on Investigation and Prosecution of Corruption of Officials.

Commentary

The lead examiners are seriously concerned that a number of statements in the Directive on Investigation and Prosecution of Corruption of Officials contribute to preventing the effective prosecution of foreign bribery cases in the Netherlands. They urge the Dutch authorities to review and amend this Directive as soon as possible to ensure that the information and the possible interpretation of language contained therein may not be interpreted contrary to the Convention and the bribery offences in the Dutch Penal Code.

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66 Under Commentary 9 of the Convention:
"Small "facilitation" payments do not constitute payments made "to obtain or retain business or other improper advantage" within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action."

Notably, considerations such as (i) who initiated the bribe payment, (ii) the value and intent of the gift or action, and (iii) action or inaction on the part of foreign law enforcement authorities against the foreign public official, should not be unduly taken into account.

b. Jurisdiction

(i) Territorial jurisdiction

174. In accordance with Article 4.1 of the Convention, the Netherlands is required to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or part of its territory. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.[67]

175. Territorial jurisdiction is established in the Netherlands pursuant to article 2 of the Penal Code which states that the "criminal law of the Netherlands is applicable to any person who commits a criminal offence within the Netherlands." Article 3 of the Penal Code confirms that a criminal offence committed on board a Dutch vessel or aircraft outside of the Netherlands would be covered by Dutch criminal law. In Phase 1, the Dutch authorities explained that territorial jurisdiction applies pursuant to article 2 where an offence takes place in its entirety or in part in the Netherlands. The factors cited by the Dutch authorities (from case law and literature) as being relevant to determining the location of an offence are the location of the physical actions; the place where the instrument has its effect; the place where the offence was completed by "occurrence or constitutive consequence"; and the tenet of ubiquity, on the basis of all of these criteria.

176. Dutch authorities indicated that there had not been any obstructions in establishing territorial jurisdiction for natural or legal persons for criminal investigations and prosecutions, as soon as reasonable criminal suspicion has arisen. According to the Dutch authorities, it would be possible, based on jurisprudence of the *Hoge Raad* (Supreme Court), for territorial jurisdiction to be established where an offence is committed in the Netherlands as well as abroad, in circumstances where a telephone call, fax or email emanating from the Netherlands would provide a sufficient nexus. Participants (prosecutors, judges) concurred.

177. Following discussions at the on-site visit, it appeared uncertain whether a foreign bribery instance where the entirety of the action took place abroad, but where the benefits returned to the Netherlands, would be covered under territorial jurisdiction as a foreign bribery offence. However, Dutch authorities assured the examining team that, the offence could be prosecuted under Dutch law, although probably as a money laundering offence (with foreign bribery as the predicate offence), or an offence for transfer of illegally obtained profit, rather than a foreign bribery offence per se.

(ii) Nationality jurisdiction

178. In accordance with Article 4.2 of the Convention, a Party which has jurisdiction to prosecute its nationals for offences committed abroad is required to "take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles."

179. As provided under article 5.1 of the Penal Code, the Netherlands has jurisdiction over criminal offences committed outside the Netherlands by "Dutch citizens" (for discussion of that

[67] Commentary 25 to the Convention

concept, see below). Under article 5.1(1), the requirement of dual criminality is not required in relation to a certain number of serious offences for the purposes of establishing nationality jurisdiction.[68] The foreign bribery offences do not fall within the class of offences described in article 5.1(1).

180. It was therefore clearly established already in Phase 1 that it would always be the case that dual criminality would have to be met in order for nationality jurisdiction to be established over an offence under articles 177, 177a or 178. The Dutch authorities confirmed that the requirement of dual criminality is not strictly interpreted, and would be considered to be met where the offence is punishable in both countries, regardless of the formulation of the offence in the other country.

181. One situation that would not be covered under Dutch nationality jurisdiction is where a foreigner (non-national) working for a domestic company bribes a foreign public official, the entirety of the offence taking place abroad. The Dutch authorities explained that, while this situation is not covered by Dutch law, if the Dutch legal person could be considered criminally liable, this would, under article 51(2) and (3), expose the natural persons who have ordered the commission of the criminal offence and the natural persons in control of such unlawful behaviour to criminal prosecution, regardless of their nationality (for discussion of the possibilities to prosecute legal persons and persons "in control" see part a(ii) above, and part 4 below).

182. In Phase 1 the Dutch authorities had also conceded that nationality jurisdiction could possibly not be established where the bribing of the foreign public official occurs in a third country where there is no foreign bribery offence. Thus, if a Dutch natural or legal person paid a bribe to a foreign public official from country X, but the offence took place entirely in country Y, country Y not being party to the Convention and not criminalising bribery of foreign public officials, the Netherlands could potentially not exercise its jurisdiction.

Nationality jurisdiction over natural and legal persons from the Netherlands Antilles and Aruba

183. The Netherlands has jurisdiction over criminal offences committed outside the Netherlands by "Dutch citizens", pursuant to article 5.1 of the Penal Code. It was confirmed during the on-site visit that, because the notion of "Dutch citizen" includes all holders of Dutch nationality (including people from Aruba and the Netherlands Antilles) it is at least technically possible that the Netherlands could establish jurisdiction over persons from both these countries, based on the nationality principle. As to whether legal persons incorporated in Aruba and the Netherlands Antilles could be considered "Dutch citizens" the answer appears to be no, as one of the central requirements for the establishment of a Dutch legal person, pursuant to the Civil Code, is that the legal person must be located (i.e. incorporated) in the Netherlands.

Commentary

Given the absence of case law on foreign bribery, the lead examiners recommend that the application by the Netherlands of territorial and nationality jurisdiction be monitored to evaluate its effectiveness in enforcing foreign bribery legislation, notably (1) where a Dutch legal person uses a non-Dutch national to bribe a foreign public official while outside the Netherlands; (2) where the bribing of the foreign public official occurs in a

[68] These serious offences include offences against the security of the State, offences against royal dignity, offences relating to migrant smuggling, offences relating to persons who intentionally render themselves, or others, unfit for military service, offences relating to entering into a bigamous marriage, unlawful disclosure of secrets, and certain serious offences relating to shipping and aviation.

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.

c. Statute of limitations

184. As indicated in the Phase 1 Report, article 70 of the Dutch Penal Code contains the rules prescribing the statute of limitations. The provisions that are relevant to the offences under articles 177, 177a and 178 provide that the "right to prosecute lapses" as follows:

- After six years for serious offences punishable by a fine, detention or imprisonment of not more than three years;[69]
- After twelve years for serious offences punishable by a term of imprisonment of more than three years.[70]

185. Accordingly, the statute of limitations is 12 years for offences committed under articles 177 (where the purpose of the bribe is to obtain a breach of the foreign public official's duties), 178(1) (where the purpose of the bribe is to influence a judges' decision), and 178(2) (where the purpose of the bribe is to obtain a criminal conviction). For offences committed under article 177a (where the purpose of the bribe is not to obtain a breach of the foreign public official's duties), the right to prosecution lapses after six years.

186. During the Phase 2 review, Dutch authorities informed the examining team of the recent introduction of new provisions that make it less likely that a trial cannot take place because of expiration of the statute of limitations. Under the former law, the statute of limitations was suspended with every prosecutor's act of prosecution, known by the defendant. Under the new law, which entered into force on 1 January 2006,[71] the condition of knowledge is no longer required: the statute is suspended with every act of prosecution, whether the defendant has knowledge of that act against him or not.

Commentary

The lead examiners welcome the modifications brought by the new legislation which allow for greater flexibility in the suspension of the statute of limitations. Given the very recent entry into force of these amendments, the Working Group on Bribery could follow-up on this issue to confirm that the statute of limitations is not an obstacle for the prosecution of foreign bribery cases.

3. The Foreign Bribery Offence

a. Elements of the offence

187. In the Netherlands, the provisions on the offence of bribing a foreign public official are contained in articles 177.1(1), 177a.1(1), 178.1 and 178.2 of the Dutch Penal Code. The amendments to the Penal Code in 2001 extended and harmonised the application of domestic corruption offences to cover foreign corruption offences. Although the foreign bribery offence in the Penal Code does not utilise the precise terms used in Article 1 of the Convention, it gives the ability for the Dutch to rely on existing case law concerning domestic bribery for important interpretative guidance in applying the

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69 Article 70(2) of the Penal Code.

70 Article 70(3), ibid.

71 Staatsblad 2005, 596.

foreign corruption offences. It is noted by Dutch authorities that the domestic corruption provisions have been influenced by other international Conventions, such as the Council of Europe Criminal law Convention on Corruption and the EU Council Framework Decision on combating corruption in the private sector. This approach however, did require the lead examiners to undertake a close examination of the amendments, the relevant Dutch jurisprudence, and explanations given by Dutch officials, prosecutors and lawyers to ensure that Article 1 of the Convention had been comprehensively implemented by the Netherlands. It was concluded that the provisions conformed to the standards under the Convention. Nevertheless, there are certain elements of the offence that the lead examiners identified as areas requiring particular attention and scrutiny.

(i) "Any undue pecuniary or other advantage" – small facilitation payments

188. Pursuant to articles 177.1(1) and 177a.1 (1) of the Dutch Penal Code, an element of the offence of bribing a foreign public official is that the perpetrator "makes a gift or a promise to a public servant or renders or offers him a service." Although not employing the same terminology, this formulation is designed to cover the requirement in Article 1 of the Convention for each Party to prohibit the offering, promising or giving of 'any undue pecuniary or other advantage' to a foreign public official. The issue that emerged at the on-site visit was not whether the Dutch legal formulation complied with the Convention, but whether this element of the offence also covered 'small facilitation payments'. The prevailing legal view expressed at the on-site visit, particularly by Dutch officials, lawyers and prosecutors, is that the Penal Code provisions are comprehensive, and that the offering, promising or giving of 'small facilitation payments' is clearly prohibited. Furthermore, the Penal Code does not provide a defence for facilitation payments. The strict application and interpretation of the law in relation to facilitation payments has sought to be diluted by the entry into force in 2002 of the Directive on the Investigation and Prosecution of Corruption of Officials. As previously discussed, the Directive provides guidance to investigators and prosecutors in exercising their discretion to investigate or prosecute a case. In particular, the Directive expressly aims to keep 'facilitation payments' outside the scope of the investigation and prosecution framework in the Netherlands. This approach has given rise to a tension between the letter of the law, and its application in practice and has created uncertainty for many Dutch companies operating abroad. A common thread of criticism evident during the on-site visit was the gulf between the Penal Code provisions and the objectives of the Directive, including the unintended consequences of this approach, principally the legal uncertainty and general confusion about the application of the law. These concerns were expressed by representatives of Dutch business associations, major companies and defence lawyers. The content and application of the Directive is considered in more detail in (see part 2.a.(iii) above).

(ii) Foreign public official

189. The Dutch Penal Code does not provide a comprehensive definition of the terms used in the foreign bribery offences to refer to a 'foreign public official'. It was noted in the Phase 1 Report that the definitions of 'public servants' in the Penal Code are not directly applicable to foreign public servants, and so the definition of a foreign public official could not be considered autonomous.

190. Accordingly, there was a clear concern by the lead examiners to ensure that all categories of officials required to be covered by the Convention are covered by the offence of bribing a foreign public official in the Penal Code.

191. In addressing the broad definition of 'foreign public official' in the Convention, the approach taken by the Dutch legislature was to extend the offence provisions in articles 177 and 177a to include "persons in the public service of a foreign state or an international institution" and article 178 to include "a judge of a foreign state or an international institution." Although not defined, the Dutch

authorities have stated that these terms would be applied by courts by reference to three main sources of law, namely the definitions of 'public servant' and 'judge' in article 84 of the Penal Code; Dutch jurisprudence; and most significantly, by reference to the definition of 'foreign public official' in the Convention. In that regard, case law was provided to demonstrate that there is a precedent for the Supreme Court to interpret provisions of the Penal Code by reference to the underlying international convention.[72] Accordingly, on that basis, the Dutch authorities have stated that the foreign bribery offences would be broadly interpreted to cover all categories of officials intended by the Convention including, for example, agents of a public international organisation. This broad interpretation is also supported by the notes prepared for the purpose of the Parliamentary reading of the implementing Bill that highlight that the amendments to the Penal Code are designed to meet and implement the commitments and requirements of the Convention. In the light of this explanation, it would appear that this approach of applying the offence to a "person in the public service of a foreign state or an international institution" would conform to the requirements of the Convention.

(iii) Payments through intermediaries

192. The offence of bribing a foreign public official under the Dutch Penal Code does not expressly refer to bribes made through intermediaries. The Dutch authorities explained that the existing term used within the Penal Code "to make a gift or promise to a public servant or renders or offers him a service" is intended to be interpreted in a broad functional sense and accordingly, the case where an intermediary receives or transmits the payment, offer or other advantage, is covered under Dutch law. This position is supported by Supreme Court authority.[73] A point of clarification was, sought from Dutch authorities about a remark (in its response to the Phase 2 Questionnaire) that payments through intermediaries would fall under the complicity provisions of the Penal Code. Ministry of Justice officials have subsequently confirmed that payments through intermediaries are covered by the offence provisions for bribing a foreign public official in the Penal Code.

(iv) Third party beneficiaries

193. The relevant offences under the Penal Code of bribing a foreign public official do not expressly refer to bribes for a third party, which are captured under the Convention. The Dutch authorities stated that an offence is committed where an 'agreement' is reached between the briber and the foreign public official to transmit the advantage directly to a third party, because in such a case the official is considered to have received something of value for the purpose of influencing him/her. The Dutch authorities referred to a case where it was not the suspect (the public official) who benefited from his act but his two children who were able to use an apartment for a couple of years without paying rent. The owner of the apartment was the manager of a company who had an interest in the suspect's power to give orders to the company of the manager. The court interpreted the use of the apartment as a gift to the public official. Justice Ministry officials also confirmed during the on-site visit that it is not necessary for there to be 'an agreement' *per se* between the briber and the foreign public official to transmit the advantage directly to a third party. The lead examiners were satisfied that, based on the available information and case law, that the Penal Code provisions adequately cover bribes for a third party.

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72 *Hoge Raad* Case 14-03-1989, NJ 1990, 29; In this case the Supreme Court used the 1966 'International Convention of the Elimination of all Forms of Racial Discrimination' to explain the term 'race' in article 137c of the Penal Code.

73 21 October 1918 (NJ 1918, p. 1128).

b. Defences

(i) Exclusion of criminal liability under the Penal Code

194. The Penal Code provides several defences, many of which are not particularly relevant to the offences under articles 177, 177a and 178 of the Penal Code. In article 43.1, for example, there is a defence where an offence is committed pursuant to an "official order issued by a competent authority". The Dutch authorities confirmed that in theory this defence could be applied to the offence of bribing a foreign public official where there is a "connection in public law between the perpetrator and the person giving the order", but have not found any cases where this defence has been applied to bribery, and considered it highly unlikely or impossible to apply it in practice.

(ii) Non-codified General excuses and justifications

195. The Netherlands Supreme Court accepts the absence of blameworthiness (fault) as an excuse in cases where the perpetrator makes a mistake of fact or a mistake of law.[74] The application of 'mistake of law' has engendered some discussion and consideration in the Phase 1 and Phase 2 evaluations. In the Phase 1 Report it was noted that in order to plead a 'mistake of law' successfully, the perpetrator must believe that a punishable offence has not been committed. The Dutch authorities added that with respect to the foreign bribery offence, the only case in which a mistake of law would apply would be where the perpetrator has been informed by a source with a sufficient degree of authority that the payment in question is required or permitted by the statutory regulations in force in the foreign public official's country.

196. During the on-site visit, Ministry of Justice officials played down the application and practice of mistake of law. The officials stated that not only does it have a narrow application it is rarely pleaded within the Netherlands. That said, the 2002 Directive on the Investigation and Prosecution of Corruption of Officials emphasises that "companies operating abroad should be under no misapprehension that simply using the services of a local agent, representative or consultant confers immunity from prosecution. Dutch nationals operating outside the Netherlands are obliged to seek accurate information about the rules applying abroad. Their sources of information must also be impeccable: they should only act on the recommendations of a person or body whose authority is such that their advice may reasonably be deemed to be sound." It is further stated in a footnote in the Directive that the abovementioned position is "entirely in line with Dutch case law on excusable mistakes of law.[75]

197. At the on-site visit it Ministry of Justice officials further clarified that a defence of mistake of law should only be permitted, when the perpetrator has acted on the grounds of an 'excusable unconsciousness' with regard to the illegal character of his act. The situation of 'unconsciousness' demands a firm belief by the perpetrator that his or her act is in fact legal. Referring to the authority of a *Hoge Raad* case, the Dutch authorities have stated that "every indication that the perpetrator had some doubt about the legality of his act excludes the admission of the defence."[76]

Commentary

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74 *The Dutch Penal Code*, translated by Louse Rayar and Stafford Wadsworth, 1997, in *the American Series of Foreign Penal Codes: the Netherlands* (Rothman & Co., 1997). See p. 25 of introductory notes by Grat Van Den Heuvel and Hans Lensing.

75 Directive on the Investigation and Prosecution of Corruption of Officials, footnote 14, p. 9.

76 *Hoge Raad* 09-03-2004, LJN: AOL1490.

The lead examiners consider that on the basis of the documentation, available case law and the explanations given by officials, that the provisions on the offence of bribing a foreign public official contained in articles 177.1(1), 177a.1(1), 178.1 and 178.2 of the Dutch Penal Code conform to the standards required under the Convention.

The lead examiners recommend that the Dutch authorities take appropriate measures to further clarify the application of the law in relation to small facilitation payments and, in line with previous comments made by the lead examiners, review the Directive as soon as possible to ensure that the information and the possible interpretation of language contained therein may not be interpreted contrary to the Convention and the bribery offences in the Dutch Penal Code.

4. Liability of Legal Persons

a. Establishing liability of legal persons

(i) Definition of legal persons

198. Under Dutch law, legal persons appear to be broadly defined. Articles 1, 2 and 3 of the Civil Code include notably the State, provinces, municipalities, as well as bodies empowered under the Constitution to issue regulations, and bodies "charged with part of the duties of government" pursuant to the law (article 1); religious associations (article 2); and associations, cooperatives, mutual insurance societies, companies limited by shares, and private companies with limited liability and foundations (article 3). Article 51(3) of the Penal Code further specifies that ship owning firms, unincorporated associations, partnerships and special funds are also deemed equivalent to legal persons. The Dutch authorities, supported in this by jurisprudence and legal doctrine, confirm that all kinds of corporations have legal personality. One legal review stated that the only "corporation" not covered would be the one-man business.

(ii) Criminal liability

199. The criminal liability of legal persons in the Netherlands is set out under article 51 of the Penal Code.

200. Dutch jurisprudence, as explained in Phase 1, originally required (1) that the legal person perpetrated the illegal act through a natural person with the power to direct its activities; or (2) that the legal person perpetrated the illegal act through a natural person with no directive powers, but within the sphere of normal activity of the legal person, and for its benefit. This raised concerns, notably regarding the possibility to proceed against a legal person (1) where the natural person is not identified (which may increasingly be the case in complex foreign bribery cases involving large corporate structures) and, thus, its "control" over the legal person's activities cannot be determined, which may often be the case in increasingly decentralised, complex corporate structures where corporate operations and decision-making are diffuse; and (2) where the natural person "in control" is identified, but may not be criminally liable under Dutch law, for instance, for issues of jurisdiction (foreign manager residing abroad and committing foreign bribery), or even incapacity (death of the "person in control", for example).

201. However, a recent decision of 21 October 2003 by the *Hoge Raad* (Supreme Court) broadened the possibility to trigger liability of legal persons by providing for an autonomous liability of legal persons. According to the *Hoge Raad*, "one important point of orientation for the attribution is whether the conduct took place or was carried out in the spirit of the legal entity" [underlining added].

Thus, there is a jurisprudential shift of focus from a legal fiction involving a natural person, to a concept which focuses on the act committed. The decision also states that "standards for attributing conduct by a natural person to a legal entity" can also be used to trigger the liability of the legal person, but this is no longer a prerequisite. Thus, concerns raised by former case law are somewhat alleviated.

202. This new jurisprudence raises further questions, however. The Court goes on to explain that a legal person could be held liable for a criminal offence committed by its employees, if it could "determine" the act and "accepted" it; acceptance would be deemed to exist if the legal person did not prevent the act although it was in its power to do so. While this does imply that the legal person has an important role to play in preventing the commission of offences by its employees, this jurisprudence raises further questions. For instance, where a company has not put in place mechanisms to enable it to prevent certain offences, could it be automatically considered to have accepted the criminal conduct, and held criminally liable for such conduct by its employees? Conversely, if internal company controls or ethical rules have been set out by a company, would this be sufficient for the legal person to escape liability, or would the legal person still have to establish that these controls were effective and that it did all in its power to prevent the commission of the offence? Where bribery is concerned, another issue is whether a legal person could potentially argue, in order to evade its criminal liability, that the employee paying bribes was acting outside the sphere of normal activities, since the commission of criminal offences could hardly be considered the normal activities of an enterprise. Such questions may require further interpretation by the courts in future cases.

b. Prosecution of legal persons in practice

203. Article 51(2) specifies that criminal proceedings may be instituted simultaneously or separately against legal and natural persons, and that penalties may be imposed on either or both the legal and natural person. Thus, the prosecuting authorities retain discretion on whether or not to institute criminal proceedings against a legal person, and the courts retain discretion on whether or not to impose sanctions on the legal person.

204. The theoretical questions put forward in the above article (a) take on a greater importance when read in conjunction with statistics on the prosecution of legal persons, and comments made by prosecutors and judges interviewed during the on-site visit.

205. Statistics regarding active domestic bribery cases show that out of 110 cases, only 15 involved legal persons.[77] Although, clearly, not all domestic bribery cases would involve legal persons, this appeared to the examining team as a relatively low number. Information provided did not indicate whether this low number of court decisions involving legal persons was due to the fact that most of these cases involved bribery only by individuals, or whether this was the consequence of decisions not to prosecute legal persons in a number of cases. Statistics on the total number of prosecutions of legal persons were not provided.

206. In addition, one prosecutor and a judge expressed the view that, in a certain number of circumstances, prosecutions would be carried out only against the natural person, even where a legal person may be involved in the offence. Several reasons were put forward:

- The legal fiction necessary to establish attribution to a legal person of an act committed by a natural person remains difficult to prove before a court;

[77] Group of States against Corruption – Second Evaluation Round – Evaluation Report on the Netherlands – October 2005, p.18.

- The low level of sanctions for legal persons may not make it worth the while of the prosecutor to go through a trial against a legal person, not only because of the low level under the law, but also because judges tend to impose even lower fines and confiscation measures than those requested by the prosecution (see also part (c) below on the issue of adequacy of sanctions for legal persons).

Commentary

The lead examiners recommend that the Working Group on Bribery follow up on the prosecution in practice of legal persons in the context of foreign bribery cases, notably to review how the jurisprudence developed by the* Hoge Raad *and 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.

c. Adequacy of sanctions for legal persons

207. Under the Dutch Penal Code provisions governing foreign bribery, the same fines apply to natural and legal persons. Maximum fines amount to EUR 11 250 for breaches of articles 177[78] and 178(1)[79] of the Penal Code, and to EUR 67 000 for breaches of articles 177a[80] and 178(2).[81] With specific regard to legal persons, article 23(7) of the Penal Code provides for the possible increase of the fine in cases "where the category defined for the offence does not allow appropriate punishment"; in such cases, the fine may be up to EUR 45 000 for the lower offences, and EUR 670 000 for the aggravated offences. [82]

208. The Working Group on Bribery questioned in Phase 1 whether the level of sanctions applicable to legal persons was sufficiently effective, proportionate and dissuasive. The Working Group on Bribery recommended that this issue be further monitored in Phase 2.

209. Representatives of the Ministry of Justice indicated that pecuniary fines should not be considered alone, and that the possibility to confiscate proceeds of bribery should also be seen as a deterrent. Indeed, with regard to seizure and confiscation, the same rules and regulations in relation to natural persons are applicable in relation to legal persons (see also part 5.b.(ii) below on Confiscation). However, figures of the past few years tend to show a relatively low number of confiscation measures pronounced against legal persons: for instance, out of 1596 cases involving confiscation adjudicated in 2003, only 76 concerned legal persons.[83] As previously acknowledged, clearly, not all confiscation cases would involve legal persons, but, nonetheless, figures appear to be relatively low. Furthermore, the proceeds gained from a foreign bribery offence may be difficult to calculate. Finally, prosecutors repeatedly indicated that judges almost systematically and significantly reduce prosecutorial requests

78 Where the purpose of the bribe was not to obtain a breach of duty.

79 Where the purpose of the bribe was to influence a judge's decision.

80 Where the bribe was paid to obtain a breach of duty.

81 Where the bribe was paid to a conviction in a criminal case.

82 After the on-site visit the maximum fines for legal persons have been increased from EUR 450 000 to EUR 670 000. This amendment came into force on 1 February 2006 with the Law on the revision of a number of legal maximum penalties.

83 Statistics provided by Compas, the Dutch case registration system. Other figures show that for 2002, 1270 cases involving confiscation were adjudicated, of which 57 concerned legal persons; for 2001, 30 cases concerned legal persons, out of a total of 1069 confiscation sentences.

for sanctions, including confiscation, notably to take into account "mitigating circumstances" such as the delay in court proceedings, or the bad publicity suffered in the press to reduce sentences.

210. The Dutch authorities also indicated that dissolution of the legal person could be pronounced. Article 2(20) of the Civil Code provides that the court may order the winding up of a legal person whose activities have infringed rules on public order, or where the legal person has an illegal purpose. However, discussions with prosecutors and a judge indicated that this provision is very rarely, and would in fact be essentially applicable to legal persons whose activities per se constitute a criminal activity (for instance, a non-profit organisation set up to fund radicalisation groups and terrorism would be dissolved), or where there is a structural character in the commission of offences by the legal person. Thus, in the specific case of transnational bribery, it is probable that only a company specifically set up to pay bribes would actually be wound up. In addition, to request the dissolution of a legal person, a prosecutor would have to initiate a separate civil procedure, distinct from the criminal one.

211. No other administrative sanctions, such as debarment from public tenders or exclusion from public funding may be pronounced by the courts. However, companies may be sanctioned under export credit and/or public procurement rules and regulations, but decisions are taken independently by the responsible agencies (see discussion on Other Sanctions under part 5c).

212. This low level of sanctions applicable to legal persons may even be taken into account by prosecutors in their decision whether or not to prosecute a legal person. A judge gave his view that public prosecutors typically try to prosecute directors as the dissuasive effect of a high level fine and an imprisonment sanction is much greater for the natural person. A prosecutor further explained that the prosecution tries to be "creative" when going after a legal person, seeking, for instance, requesting sanctions for multiple and/or repetitive offences, as well as negotiating confiscation where that is possible. Overall, representatives of the prosecution and the judiciary seemed to agree that the "stick" approach was an essential component of an effective fight against foreign bribery, and felt that current fines, while they may be important for small and medium size enterprises, would have no deterrent for large corporations, a view supported by certain defence lawyers as well.

Commentary

The lead examiners remain concerned as to whether a EUR 670 000 fine (which, in any case, would be applicable to only to certain acts of bribery) would be very effective, proportionate and dissuasive for a legal person, especially where that legal person is a large multinational corporation. Based on the information available, the lead examiners are not convinced that other sanctions available for legal persons, such as confiscation or dissolution, will adequately replace or supplement effective, proportionate and dissuasive criminal sanctions. Additionally, the fact that judges will often reduce these already low sanctions, based on such circumstances as reputational damage, further raises concern.

Consequently, the lead examiners recommend that the Netherlands increase the maximum levels of monetary sanctions for legal persons to ensure that they are effective, proportionate and dissuasive. Furthermore, they recommend that the Dutch authorities compile, for future assessment, information on fines and confiscation measures imposed on legal persons.

Finally, the lead examiners consider that the Working Group on Bribery should follow-up on whether the low level of sanctions may, in practice, deter Public Prosecutors from initiating proceedings against legal persons.

5. Adjudication and Sanction of the Foreign Bribery Offence

a. The courts

213. In the Netherlands, the organisation of the civil and criminal courts is based on a three tier system. The lowest court are the 19 District Courts, with specialised chambers dealing notably with civil law, criminal law, and administrative law, where judges sit alone or in panels of three, depending on the seriousness of the offence. Appeals are heard in the Court of Appeal where justices usually sit in panels of three to hear cases. There are five Courts of Appeal in Amsterdam, The Hague, Den Bosch, Leeuwarden and Arnhem. The highest judicial body in the Netherlands is the *Hoge Raad* (Supreme Court). Cases in the *Hoge Raad* are heard by a panel of five justices.[84]

214. A judge interviewed during the on-site visit further explained that specialised economic chambers exist to adjudicate offences falling under the Law on Economic Offences, which covers economic crime such as trading without a licence, or certain types of fraud. The foreign bribery offence does not fall under this Act, and, consequently there would be no specialised chambers to deal with (foreign) bribery cases. The judge interviewed shared his view that, given the potential complexity of foreign bribery offences in the context of large business transactions, specialised courts could be useful in dealing effectively with such cases. This, in his view, could also usefully contribute to reducing court delays. The judge also mentioned that where delays are felt to have been unduly lengthy, the court may take this factor into account to reduce sanctions. Following the on-site visit, the Dutch authorities indicated that the Council for the Administration of Justice, which is a liaison between the Minister of Justice and the courts, recognised that expertise in the area of complex financial and economic crime could only be achieved through extensive case experience. To provide judges with the relevant information necessary for dealing with large corruption cases, it is planned that a comprehensive, digital database of court decisions delivered in this area be made available to judges.

215. Indeed, court delays appeared to be an issue in the Netherlands. Judges indicated that an average case, involving economic offences, and tried by a single judge lasts approximately 269 days in the District Court; a three judge panel takes approximately 401 days to try economic offences. In the view of one judge interviewed, this could be due to the absence of specialised judges (see also paragraph above), issues of coordination between the prosecution and the judges, as well as the offenders themselves who, notably in major economic and financial cases, are well counselled, request multiple witnesses, thus lengthening the process.

216. With respect to training of judges, the *Stichting Studiecentrum Rechtspleging* (SSR), the Training Institute for Judges, organises courses on a number of issues. Courses include training on fiscal and customs fraud, cyber crime, banking and finance law, organised crime. Discussions with representatives of the SSR confirmed that no training courses have been held nor planned on the foreign bribery offence.

Commentary

The lead examiners recommend that the Dutch authorities consider, possibly in cooperation with the Stichting Studiecentrum Rechtspleging, providing training specialised judges to deal with foreign bribery offences in certain District Courts and Courts of Appeal. This would notably improve the delays in dealing with such potentially

[84] See the brochure on The Court System in the Netherlands, published by the Dutch Ministry of Justice at http://www.justitie.nl/english/Images/court_system_tcm75-28565.pdf.

complex cases, thus possibly allowing for imposition of more effective, proportionate and dissuasive penalties for foreign bribery offences.

b. Sanctions imposed by the courts

217. No foreign bribery case has been brought before the Dutch courts to date. Thus, it is difficult to evaluate at this stage the effective, proportionate and dissuasive effect of sanctions with specific regard to the foreign bribery offence.

(i) Criminal sanctions

218. Under the Dutch Penal Code, penalties are identical for foreign and domestic bribery. For natural persons, the following maximum sanctions apply:

- For breach of article 177, where the purpose of the bribe is to obtain a breach of the foreign public official's duties, the maximum sanctions are 4 years imprisonment, and a EUR 67 000 fine (5th category fine);
- For breach of article 177a, where the purpose of the bribe is not to obtain a breach of the foreign public official's duties, the maximum sanctions are 2 years imprisonment, and a EUR 11 250 fine (4th category fine);
- For breach of article 178(1), where the purpose of the bribe is to influence a judge's decision, the maximum sanctions are 6 years imprisonment, and a EUR 11 250 fine (4th category fine); and
- For breach of article 178(2), where the purpose of the bribe is to obtain a conviction in a criminal case, the maximum sanctions are 9 years imprisonment, and a EUR 67 000 fine (5th category fine).

219. For legal persons, fines may be increased to the amount of the next category, which would bring maximum applicable fines to EUR 67 000 for the lower bribery offences, and EUR 670 000 for the aggravated offences. These sanctions have been considered by the Working Group on Bribery to be relatively low (see also part 4c on sanctions for legal persons), and raised concern as to whether they are sufficiently effective, proportionate and dissuasive.

220. During the on-site visit, the examining team was informed that there are no sentencing guidelines to help judges in imposing sanctions. A judge indicated that issues such as profitability of the offence for the offender, damage to public interests, repetitive offences, and crime committed in organised manner are among the main factors usually taken into account by the courts in handing down sentences. The judge assured participants that, in his view, "environmental" pressures (*i.e.* the fact that corruption is a general occurrence in the country and/or industry concerned) would not be taken into account by the courts as a mitigating circumstance in foreign bribery cases.

221. A more worrying aspect repeatedly mentioned by representatives of the *Rijksrecherche*, the prosecution, the judiciary, as well as civil society is that these already rather low maximum sanctions are generally not imposed by the courts, particularly in large bribery cases with high publicity. It was clearly explained to the examining team that, in large fraud and/or bribery cases, maximum sentences are hardly ever imposed as the courts take into account the bad publicity that the natural and/or legal person(s) may have suffered, as it is felt that the reputational damage in itself constitutes a severe sanction. Delays in proceedings also weigh in the decision to impose criminal sanctions. Where a person has been dismissed by his/her company, this may also weigh in the court's decision to sentence a natural person. As well, the position of the natural person in society, and the effect a sentence could have on his/her reputation were also mentioned as possible factors taken into account by judges to impose reduced penalties. These views have been corroborated in a study into "Public Corruption in

the Netherlands", carried out by the *Vrije Universiteit Amsterdam*, and sponsored by the Ministry of Justice.[85]

Commentary

The lead examiners retain some concern regarding whether the level of sanctions in bribery cases in the Netherlands, both with regard to legal and natural persons is effective, proportionate and dissuasive (see also the Commentary in this respect under part 4c), especially in view of certain mitigating factors regularly taken into account by the courts to reduce or suspend sentences. The lead examiners however acknowledge that no sanctions have been handed down to date in foreign bribery cases, and consequently recommend that the issue of adequacy of sanctions be followed-up when data on their application for the foreign bribery offence becomes available.

(ii) Confiscation

222. Confiscation of the bribe, but, more importantly, of the proceeds of bribery, is an essential facet in the sanctioning of the foreign bribery offence in the context of business transactions. Indeed, while the fines imposed by the courts may often be bearable for a corporation, and particularly for large multinationals, strong and effectively applied confiscation measures may be much more dissuasive since they can deprive the legal person of the gains accrued from the foreign bribery offence. This is particular true in the Dutch context, where, as previously mentioned, criminal sanctions may not be sufficiently effective, proportionate and dissuasive.

223. Since the Phase 1 Report on implementation of the Convention by the Netherlands, Penal Code provisions governing confiscation have been amended by Act of Parliament of 8 May 2003, which entered into force on 1 September 2003.

Ordinary confiscation

224. With regard to confiscation of the instrument of the offence (*i.e.* the bribe), the legislation has not been amended. Under article 33a(1)(c) of the Penal Code, confiscation measures could be imposed on conviction by the courts in respect of certain objects. This includes objects used to commit or prepare the offence, whether the object was in possession of the convicted person, or of a third party who knew, or should have known the purpose or use of the object. The confiscation may be ordered by the court, even where there has been no request to that effect by the prosecution.

225. At the time of the Phase 1 Review, confiscation of the monetary equivalent of the bribe, where the bribe can not be subject to confiscation (*e.g.* because it is already abroad with the foreign public official, or in the possession of a *bona fide* third party), was not possible. The new Penal Code provisions which entered into force in 2003 still do not allow for confiscation of a monetary equivalent where the bribe may not be confiscated.

226. Under article 33a(1)(a), objects belonging to the convicted person "and obtained entirely or largely by means of the criminal offence" may be subject to confiscation. As is the case for

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85 "The study reveals that a gap between the sentence that the public prosecutor has in mind and the final decision by the judge. The latter takes several circumstances into account – *i.e.* publicity, organisational chaos at the workplace of the public servant – and tends to interpret these elements to the advantage of the condemned persons." (Summary of the study, available in English at http://www.minjust.nl:8080/b_organ/wodc/publications/1065_summary.pdf).

confiscation of the instrument of the offence, confiscation of the may be ordered by the court, even where there has been no request to that effect by the prosecution.

Special confiscation

227. Prosecutors explained that, with regard to foreign bribery, the ordinary confiscation measures (article 33a of the Penal Code) would in fact rarely be used, as (1) the bribe would often already be gone from the Netherlands, and (2) there would probably not be an "object" gained from the offence, but rather benefits in the forms of a permit, a right to tender, a public procurement contract, etc. Thus, the special confiscation provisions introduced by the Act of Parliament of 8 May 2003, and in particular those under article 36e, are the ones that would mostly be relied upon in foreign bribery cases.

228. It should be noted that, prior to the 2003 amendments, the courts could only order, on application by the prosecution, and by "separate judicial decision", the payment of a sum of money in order to deprive a person convicted of a criminal offence of "unlawfully obtained gains". The Dutch authorities explained in Phase 1 that the purpose of this provision was to restore the "lawful financial state of affairs" rather than result in an additional punishment. Such an order was only available upon conviction in relation to any criminal offence; where there had been no conviction, this measure was applicable only for an offence for which a category 5 fine would apply.[86]

229. Under the new legislation, the main provision governing confiscation of the monetary equivalent of "illegally obtained profits or advantages" is article 36e(1) of the Penal Code. This article provides that the monetary equivalent of the proceeds of foreign bribery may be confiscated by order of the court, in a separate decision, assuming the person has been convicted for that offence, and the Public Prosecutions Department has requested the confiscation.

230. Additionally, a person sentenced for an offence may also be ordered to pay a sum of money in confiscation of illegally obtained profits in relation to other "similar offences" or to offences punishable with a category 5 fine, other than the offence for which the offender was convicted, if there is sufficient evidence to assume that these offences were also committed by the offender.[87] Furthermore, a person sentenced for an offence punishable with a category 5 fine, may be ordered to pay a sum of money in confiscation of illegally obtained profits in relation to criminal offences other than the one for which the offender was convicted, if (1) this is requested by the Public Prosecutions Department, (2) a criminal financial investigation is conducted against the offender, and (3) it is "likely" that these illicit profits result from these other criminal offences.[88]

231. Given the recent entry into force of these provisions, there is not much jurisprudence yet available. Thus, some questions remain, notably whether the concept of "illegally obtained profits and advantages" would cover all situations that the Convention aims to address, such as, for instance, where the briber was the best qualified bidder or could otherwise have been properly awarded the business, or where bribes were paid to obtain a legal advantage such as a permit.

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86 With regard to foreign bribery, offences incurring category 5 fines include only bribery where the purpose was to obtain of breach of the foreign public official's duties, or where the purpose of the bribe was to obtain a criminal conviction.

87 Article 36e(2) of the Penal Code.

88 Article 36e(3), ibid.

232. In 2005, the Board of Procurators General issued a Directive on Special Confiscation to provide information and explanations to prosecutors on the use of special confiscation provisions. The Directive notably sets out the role of the Prosecution Service Criminal Assets Deprivation Bureau (BOOM), a specific unit within the PPS. The BOOM has a staff of four legal advisers, one international legal adviser, and ten specialised asset tracers. The BOOM's main tasks include:

- To assist the Public Prosecutions Department in the field of confiscation legislation. This includes acting as a helpdesk, sending newsletters, providing training, and the collection of data in the field of confiscation.
- The provision of case support to the public prosecutor in the application of confiscation legislation. The BOOM advisory team is also able to assist public prosecutors in the management of confiscation investigations.
- The provision of support to the Central Fine Collection Agency, when collecting confiscation orders. To this end, a BOOM public prosecutor has been appointed to the position of National Public Prosecutor Responsible for Enforcement.

233. As indicated above, special confiscation can only be ordered in proceedings separate from the main criminal prosecution, and may be initiated within two years following a conviction. The Dutch authorities explained that, in practice, the financial investigation often runs in parallel to the main criminal investigation. The purpose of this financial investigation is to gather complete information on the state of wealth of the suspect and on the proceeds of the corruption offence as well as other possible offences. The BOOM may provide assistance to the prosecutors in this investigation, or handle the investigation directly, for the more complex cases. The Directive also lays out several calculation methods which may be used by prosecutors in estimating and quantifying proceeds. Though they feel the indications contained in the Directive are useful, prosecutors at the on-site acknowledged that it will often be difficult to evaluate, in foreign bribery cases, what part of the profit gained by the offender accrued directly from the bribe.

234. In practice, application of confiscation measures still appears relatively low. Statistics show that, out of 119 cases between 2001 and 2004 concerning active bribery of domestic public officials, only 2 resulted in the application of confiscation measures; figures are slightly higher for cases of passive bribery offences in the public sector, where 9 confiscation sentences were pronounced, out of a total of 73 cases between 2001 and 2004.[89] According to representatives of the BOOM interviewed, this would be partly due to the recent entry into force of the new law governing special confiscation. BOOM representatives presented some figures to the examining team for 2005: courts pronounced confiscation measures in the amount of approximately EUR 104 million, of which EUR 11 million were in effect confiscated. These figures, being in aggregate form, render any evaluation of possible improvement difficult, as a proper assessment would require some information on the number of confiscation measures compared to the number of criminal cases, as well as a breakdown per case, and perhaps also additional information on the circumstances of the cases.

Commentary

The lead examiners welcome the new provisions governing special confiscation introduced by the Act of Parliament of 8 May 2003, which appear to allow for broader possibilities to confiscate property the value of which constitutes the proceeds of foreign bribery. Nevertheless, given the recent entry into force of the legislation, and that no information is yet available with specific regard to confiscation in foreign bribery cases, the lead examiners recommend that this issue be the subject of follow-up by the Working

89 Statistics provided by Compas, the Dutch case registration system.

Group on Bribery 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 foreign bribery in the Netherlands. To this end, the Dutch authorities could usefully gather statistics illustrating the use of confiscation measures by the prosecution and the courts.

(iii) Out of court transactions

235. The Public Prosecutor's Office has broad discretionary powers to dismiss cases notably through the process of out-of-court transactions. This process is governed by article 74 of the Penal Code, and essentially involves the payment of a sum of money by the defendant to avoid criminal proceedings. It can also involve the renunciation of title to or surrender of objects that have been seized and are subject to forfeiture and confiscation, or payment of their assessed value.[90] Moreover, it can involve the payment of the estimated gains acquired from the criminal offence[91], as well as compensation for any damage caused.[92] Pursuant to article 74(1), it is available in relation to "serious offences" excluding those for which the penalty of imprisonment is more than 6 years.[93] The right to prosecute lapses once the conditions set in a particular case have been met.

236. Dutch authorities have stated that following settlement by means of a 'transaction', this is recorded in the Judicial Convictions Register, as are penal sanctions. As a transaction has the character of a settlement between the public prosecutor and a suspect, the transaction is not made public in an active way. However, the public prosecution service is free to comment on the transaction following media reports or questions about the transaction. Further, if there is a victim in the case, he/she will be notified of the settlement and informed that he/she can make an appeal against the settlement before the Court of Appeals.

237. The Dutch authorities indicated in Phase 1 that guidelines on the exercise of the prosecutorial discretion in respect of corruption and bribery offences would be prepared and would focus on the determination of whether certain "minor" forms of corruption qualify for out-of-court settlements, and in particular, whether the legal process will be served by a public trial. The Directive on Investigation and Prosecution of Corruption of Officials, which was issued subsequently, does not deal with the issue of out-of-court settlements. Following the on-site visit, the Dutch authorities informed the examining team that the Board of Procurators General released the Directive on Large and Special Transactions,[94] which contains rules for out-of-court-settlements involving high amounts of money.

238. The Dutch authorities informed the examining team that the legislation on out-of-court transactions was in the process of being modified. As of March 2006, the Draft law on OM Punishment[95] was in the First Chamber of Parliament. It had already been discussed by the

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90 Article 74(2)b, c and d of the Penal Code.

91 Article 74(2)(d), ibid.

92 Article 74(2)(e), ibid.

93 Thus, this procedure could be relied on for breaches of articles 177(1) and 177a for which the penalties are, respectively, 4 and 2 years imprisonment. It would not be applicable for offences under articles 178(1) and 178(2) which incur, respectively, 6 and 9 years imprisonment.

94 "*Aanwijzing hoge transacties en bijzondere transacties 2006A001*".

95 OM stands for "*Openbaar Ministerie*", the Dutch term referring to the Public Prosecutor's Office.

Parliamentary Justice Commission, and the Government had supplied answers to the Commission's questions. At the time of the review, discussions were still ongoing in the First Chamber.

Commentary

The lead examiners recommend that the Working Group on Bribery monitor the use of out-of-court transactions where foreign bribery offences are concerned, to ensure that they result in the imposition of effective, proportionate and dissuasive sanctions.

c. Other Sanctions

(i) Export credits

239. It is a requirement of the OECD Action Statement on Bribery and Officially Supported Export Credits that if there is sufficient evidence of bribery involved in the award of an export contract, the official export credit provider must refuse to approve any support. If support has already been approved then the export credit provider must take appropriate action, such as denial of payment or indemnification, refund of sums provided and/or referral of evidence of bribery to the appropriate authorities.[96] The Netherlands informed the lead examiners that there are measures that are available to its export credit agency, Atradius DSB, before and after officially supported export credit assistance is provided.[97] Under the export credit system in the Netherlands, if Atradius DSB obtains "sufficient evidence" of bribery before the decision to provide support has been made, then official support will be withheld for the transaction in question. In circumstances where support has already been provided, the requirement and practice under the export credit system where there is sufficient evidence of bribery or a conviction is to invalidate cover, deny claim indemnification, and seek recourse. These actions are not triggered where there is only a suspicion of bribery. To date, there have not been any instances where the sanctions have been applied.

(ii) Public procurement

240. A new decree on procurement rules for government tender, a *Besluit aanbestedingsregels voor overheidsopdrachten (BAO),* implementing the EU directive 2004/18/EG on public procurement procedures, took effect on 1 February 2006. When a company submits a bid for tender, it must provide a "Certificate of good conduct for legal persons" (VOG RP) as proof of the absence of relevant criminal convictions (including bribery as defined in articles 177, 177a and 178 of the Penal Code). Refusal to grant this certificate of good conduct by the Ministry of Justice *Centraal Orgaan Verklaring Omtrent Gedrag* (COVOG) constitutes grounds for exclusion from participation in a public contract. Prior to 1 February 2006, a contracting authority had the option to overlook the lack of a good conduct certificate under the condition that extra control measures be taken. This is no longer possible under the new provisions--a contracting authority must excluded any candidate or tenderer convicted of bribery (among other crimes) from participation in a contract. The BAO does allow an exception: "The contracting authority can deviate from [this] obligation…for compelling reasons in the public interest."

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96 Working Party on Export Credits and Credit Guarantees '*Action Statement on Bribery and Officially Supported Export Credits*', 20 February 2003, paragraph 4.

97 2004 Revised Survey on Measures taken to Combat Bribery in Officially Supported Export Credits (situation as of 30 September 2005).

241. While exclusion from a bidding process is thus possible, there is no specific period of exclusion, nor is there a blacklist of excluded companies. To date, no company has been excluded from public procurement procedures on the basis of past convictions of bribery. Currently the authority concerned operates on the basis of internal instructions. It is the intention to publish these instructions after some practical experience has been obtained.

(iii) Official development assistance

242. There are specific measures available to Dutch authorities when a party to a transaction, funded by Dutch official development assistance, engages in or has engaged in foreign bribery. The external arrangements underlying the allocation of Dutch official development assistance always contain specific clauses specifying the type of sanction that would be applicable in the case of irregularities. Sanctions normally consist of fines, immediate dissolution of the underlying contract, and restitution of transferred funding. There is no blacklist *per se*, but there is a computerised information system that facilitates a review of past contracts granted to a given contractor.

6. The False Accounting Offence

a. The offences

243. Bribe payments made to foreign public officials in the context of international business transactions can be detected through analysis of books and records violations by accountants and auditors. According to the Dutch authorities in Phase 1, the establishment of off-the-book accounts, the making of off-the-book or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object and the use of false documents, prohibited under Article 8 of the Convention, would be contrary to the requirements under articles 361, 362, et seq. of Book 2 of the Civil Code and article 225 of the Penal Code.

244. Articles 361, 362 et.seq. of Book 2 of the Civil Code, which are based on relevant EU Directives, requires all companies: to prepare annual accounts, which are to include a balance sheet, profit & loss account and notes on accounts; to draw up the profit and loss account in a manner as to allow a reasonable judgement with regard to the pattern of income and expenditure of the company; and not to adopt annual accounts before an independent accountant has issued a statement regarding the credibility of the annual account.

245. Article 225.1 of the Penal Code prohibits the false preparation or falsification of a document. Pursuant to Article 225.2, it is an offence for a person to intentionally use a false or falsified document, or intentionally deliver or have it at his/her disposal where he/she knows or should reasonably suspect that it will be used in such a manner. The Dutch authorities state that these provisions cover the fraudulent preparation or fraudulent use of documents with the intent to conceal the fact that a foreign public official has been or will be bribed. It also covers circumstances where the falsification involves a change, addition or omission from a document. It is also noted that the intentional disclosure of a false statement, balance sheet, profit and loss account, statement of income and expenditure or false explanations pertaining to such documents or intentionally allowing such disclosure to take place by a trader, director, managing partner or member of the Supervisory Board of a juristic person or a commercial partnership is prohibited under article 336 of the Penal Code.

b. Sanctions

246. If the annual accounts fail to 'provide the required insight', contrary to article 362 of Book 2 of the Civil Code, this may constitute an economic offence under article 1.4 of the Economic Offences

Act – the penalty includes imprisonment of 2 years, a category 5 fine of EUR 67 000 (and for the legal person EUR 670 000), complete or partial closure of the company or placement of the company under an administrative order. If the worth of the goods involved in the offence is a quarter or more of the fine, the next category fine can be used. The penalty for the offence of false preparation or falsification of a document under article 225 of the Penal Code is a maximum term of imprisonment of 6 years or a category 5 fine (EUR 67 000, for a legal person EUR 670 000). The intentional disclosure of a false statement, balance sheet etc under article 336 of the Penal Code is punishable by imprisonment of up to six years or a category 5 fine (EUR 67 000, for a legal person EUR 670 000). Article 339 of the Penal Code provides for other punishments, *i.e.* publication of the conviction and the convicted person can be forbidden to work in the profession in which he committed the offence.

247. The Dutch authorities have not produced any statistics to indicate the number of prosecutions conducted in relation to the false accounting offences (outlined above). Accordingly, it has not been possible to assess the effectiveness of these provisions, nor whether the penalties are persuasive, proportionate and dissuasive in relation to such omissions and falsifications. In their Phase 2 responses, the Dutch authorities indicated that there had been no cases concerning false accounting offences related to bribery. Information provided subsequently by the Netherlands, suggested that there may have been up to 5 possible cases, although this has not been verified, nor any details confirmed. Given that financial and economic crime, including the payment of bribes is often likely to result in related accounting offences, the lead examiners are concerned about the level of enforcement in this regard.

Commentary

The lead examiners are concerned about the apparent low number of prosecutions for false accounting offences 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 and thus recommend follow-up by the Working Group with regard to the application in practice of Article 8 of the Convention.

7. The Money Laundering Offence

248. At the time of the Phase 1 Evaluation, the Netherlands did not have a separate money laundering offence, and had relied on articles 416 and 417 of the Penal Code to deal with allegations of money laundering activity. New legislation on money laundering entered into force in December 2001. Amendments to the Penal Code introduced new offences in articles 420*bis*, 420*ter* and 420*quater*.

249. Article 420*bis* of the Penal Code establishes, *inter alia*, that:

- concealing or camouflaging the source, place, the source of the transaction or transfer of a good, or concealing or camouflaging the owner or the holder, knowing that the good – immediately or more distantly – originates from crime;
- acquiring a good, holding, transferring, converting or using it, knowing that the good originates – immediately or more distantly – from crime;

is punishable by 4 years imprisonment and a fine of EUR 67 000. These sanctions may be increased to a maximum of 6 years in case of offences committed regularly (article 420*ter*) and reduced to one year when committed unintentionally (article 420*quater*). Goods include all property and property rights.

250. Persons can be convicted in the Netherlands for the predicate offence and for money laundering. Dutch authorities state that, under Dutch law, all (serious) crimes can serve as a predicate offence to money laundering and accordingly, all corruption offences are a predicate to money laundering. This issue was addressed in a Supreme Court decision that decided that a proven link with the predicate offence was not necessary.[98] Accordingly, because the prosecution does not have need to prove any specific predicate offence (it is sufficient that it derives from a crime) it is only necessary that the accused has or should have known that the goods/monies derive from a criminal act.

251. In circumstances where the predicate offence takes place abroad, issues could arise where the courts require that certain additional conditions be met (for example, dual criminality or a conviction of the predicate offence). In response, the Netherlands responded that there is no specific case law on this matter, but that "it is certain that the requirement of an 'offence' in paragraph 420*bis* can also be satisfied by an offence committed abroad." It is suggested that, even where the underlying conduct is punishable in the Netherlands, but not in the jurisdiction where the conduct occurred, a money laundering prosecution could probably occur in the Netherlands for such conduct. This proposition however, is not without some doubt and it is acknowledged that case law is required to provide certainty on this point.[99]

252. The Netherlands informed the lead examiners that there are not any cases of money laundering with bribery of a foreign public official as a predicate offence, that are known of. That said, precise information is unavailable, since the predicate offence to money laundering cases is not registered. In the Netherlands all offences can be predicate offences. Statistical information shows that in 2004 the public prosecutors office issued summons for money laundering offences in 244 cases. At the beginning of 2005 in 138 cases there had been a conviction, while 87 cases were still pending. In the first ten months of 2005 in 34 cases there had been a conviction for a money laundering offence, while 151 cases were still pending. Dutch officials explained that because prosecution for money laundering is often combined with prosecution for other offences, like drugs trafficking or fraud, it is not possible to present reliable statistics on duration of imprisonment terms imposed for the specific part of the combined prosecution consisting of money laundering offences. Similarly, there were no specific statistics available in relation to the confiscation orders made in relation to money laundering offences.

Commentary

The lead examiners encourage the Netherlands to compile statistical information on the application of the offence of money laundering, including the level of sanctions and confiscation of the proceeds of crime.

8. The Netherlands Antilles and Aruba

a. General observations

253. The Kingdom of the Netherlands consists of three countries: the Netherlands, the Netherlands Antilles and Aruba. Each country has its own separate and distinct constitution, government, and parliament and, to a large extent, conducts its own affairs. The Netherlands Antilles and Aruba are not member States of the United Nations. It is the Kingdom of the Netherlands that signs and ratifies international agreements, although it often remains the decision of each of the three

98 LJN: AP2124, *Hoge Raad*, 02679/03, 28 September 2004.

99 Responses to Phase 2 Questionnaire, question 11.1(c), p. 17.

national governments to determine whether an international agreement should be ratified by the Kingdom on its behalf. The Kingdom of the Netherlands is a signatory to the OECD Convention, but so far it has only been ratified by the Kingdom on behalf of the Netherlands (in Europe). The lead examiners therefore decided to review steps taken by the Netherlands (in Europe) as well as Aruba and the Netherlands Antilles, to ratify the Convention throughout the Kingdom. In that regard, because the Convention cannot be extended to the Netherlands Antilles or Aruba without the enactment of implementing legislation in each of their respective parliaments, the on-site visit provided an opportunity to assess this progress. The lead examiners were mindful that, because of the inherent links between the economies and governments of the three countries, by not having ratified in two of those countries, practical gaps in the implementation of the Convention might result within the Kingdom.

254. In order to fully assess progress in ratifying the Convention for the Netherlands Antilles and Aruba, officials from both countries were invited to attend a panel session dedicated to issues involving the Kingdom and the Convention. However, Dutch authorities advised at the commencement of the panel session that officials from the Netherlands Antilles and Aruba had declined to attend. Further, Dutch officials informed the lead examiners that they had been instructed by the administrations in the Netherlands Antilles and Aruba not to respond to questions on their behalf. The lead examiners were given a copy of a letter from the Minister Plenipotentiary of Aruba, dated 27 January 2006, to the Dutch Ministry of Economic Affairs. The letter formally declined the invitation to participate in the panel session on the basis that Aruba is not an 'active party to the Convention.'[100] The Minister Plenipotentiary, in acknowledging the importance of the Convention, noted the wish and intention of Aruba to become a party to the Convention and signalled that Aruba is now in the process of preparing the necessary implementing legislation. The letter also outlined some useful information about mutual legal assistance, extradition and anti-money laundering arrangements in Aruba. There was no similar response or any other information provided to the lead examiners by the Netherlands Antilles. The lead examiners were disappointed with the non-participation of Aruba and the Netherlands Antilles from the panel session, given that key responses by the Netherlands to the written questionnaires had been predicated on the basis that matters (including money laundering, bank secrecy, accounting and auditing systems, and tax treatment of bribes) could be taken up "during the panel discussions with delegations from Aruba and the Netherlands Antilles."[101]

b. Applicability of the OECD Convention and Revised Recommendation within the Kingdom

255. The Charter of the Kingdom of the Netherlands, proclaimed in 1954, forms the basis for governance within the Kingdom, and it stipulates those matters which are to be administered jointly as "Kingdom affairs."[102] These affairs include the maintenance of the independence and defence of the Kingdom, foreign relations, Netherlands nationality, and extradition.[103] Although the sole authority for

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100 Letter to the Ministry of Economic Affairs from The Minister Plenipotentiary of Aruba, dated 27 January 2006.

101 See response to question 1b, Response to the Supplementary Questionnaire: The Netherlands.

102 Ministry of Foreign Affairs, *Constitutional relations within the Kingdom of the Netherlands*, July 1997. p. 2.

103 Article 3, Charter for the Kingdom of the Netherlands, as last amended by the Kingdom Act of 15 December 1994 (Bulletin of Acts and Decrees 1995, no. 1).

ratification of a treaty is conferred on the Kingdom, there is scope for countries to act on their own behalf with regard to the negotiation of treaties.[104]

256. The current legal status and application of the OECD Convention within the Kingdom is clear. Although the Kingdom, as a whole, is a signatory to the Convention, the Kingdom has only ratified the Convention on behalf of the Netherlands. The ratification occurred in 2000 and the instrument of ratification was deposited on 12 January 2001. In doing so, the Netherlands defined the territorial application of the Convention, by limiting it to the "Kingdom in Europe" and excluding, until further notice, its application to the "Netherlands Antilles and Aruba". The practice, upon signature or ratification, of a declaration on the territorial effect of a treaty has long been known and is considered consistent with article 29 of the Vienna Convention on Law of Treaties (*Territorial Scope of Treaties*). In the present case, the reservation on the territorial application was not contested by other Parties to the Convention. Therefore, the limitation indicated by the Netherlands is in accordance with international law.

257. Given that the Netherlands Antilles and Aruba did not participate in the on-site visit, it is not possible to assess whether they are being sufficiently proactive in taking the necessary steps to enable the Kingdom of the Netherlands to ratify the Convention for them. A review of the relevant laws indicates that in the absence of making certain key amendments, ratification will not be possible. For instance, fundamental issues, such as the criminalisation of bribery of a foreign public official and the prohibition on the tax deductibility of bribes, have not been adequately addressed in either Aruba or the Netherlands Antilles. The lead examiners have not been satisfied that the liability for legal persons has been effectively established in law and in practice within the Netherlands Antilles and Aruba. Against that background, it is also possible that the Netherlands would not have grounds to establish jurisdiction, based on the nationality principle, over legal persons incorporated in the Netherlands Antilles and Aruba. As previously mentioned, another concern is that because the Netherlands Antilles and Aruba have not criminalised the offence of the bribery of foreign public officials, the effectiveness of MLA and extradition procedures for this type of offence could be frustrated due to the requirement of dual criminality. In order to help overcome and address the concerns raised, it is the view of the lead examiners that all three countries should make every effort to ensure the prompt ratification and implementation of the Convention within the Kingdom as a whole.

c. Efforts by the Netherlands to promote the ratification of the Convention in the Kingdom

258. The 2001 Phase 1 Report for the Netherlands noted that Dutch authorities had confirmed that Aruba and the Netherlands Antilles intended to implement the Convention in due course. The subsequent failure to do so has been explained by Dutch authorities as a matter (and responsibility) that rests solely with the governments of those countries. The Netherlands has, on various occasions, brought to the attention of the relevant authorities in the Netherlands Antilles and Aruba that ratification is of the utmost importance.[105] In that regard, in December 2005 the Dutch Minister for Kingdom Relations sent a letter to the Prime Ministers of the Netherlands Antilles and Aruba to urge both countries to agree to the ratification of the OECD Convention and to take steps to ensure that the necessary implementing legislation is in place. Dutch authorities have informed the lead examiners that the letter stated that the Netherlands was currently being evaluated pursuant to the OECD Convention and it emphasised the necessity for all three countries (Netherlands-in-Europe, Antilles, Aruba) to meet the international standards set out in OECD, Council of Europe, and UN Conventions

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104 Ministry of Foreign Affairs, *Constitutional relations within the Kingdom of the Netherlands*, July 1997, p. 7.

105 Response by the Netherlands to Questions Concerning Phase 2, 22 November 2005, p. 2.

in the field of combating bribery, in order for the Kingdom of the Netherlands to contribute to the international fight against corruption. The letter also requested that the Netherlands Antilles and Aruba indicate when they will have established the legislation that is needed for implementation of the OECD Convention, to enable ratification of the Convention. The Dutch Minister for Kingdom Relations also indicated that he wished to discuss the issue of combating bribery at a tripartite meeting on 'Integrity' that is due to take place in 2006.

259. The recent initiative by the Dutch Government to write to the Prime Ministers of Aruba and the Netherlands Antilles, is viewed by the lead examiners as a positive and encouraging step taken by the Netherlands. It is also evident that the Netherlands has a long record of providing assistance to Aruba and the Netherlands Antilles, in the form of direct police, prosecutorial, and judicial assistance and expertise. Indeed, in the framework of the Financial Action Task Force (FATF), it has given assistance in the form of advice to the authorities in Aruba and the Netherlands Antilles with regard to anti-money laundering legislation. However, the Netherlands has not indicated that, other than the letter referred to above and certain other overtures, similar cooperative steps have been taken to promote the ratification and implementation of the OECD Convention by Aruba or the Netherlands Antilles. This is an important finding given that a reason expressed by Dutch authorities for the failure of their counterparts to ratify the Convention, was not due to any disagreement or evident resistance to the terms of the Convention, but was simply a question of capacity. Accordingly, an issue requiring further attention by all three governments is the need to give a higher priority to the ratification and implementation of the Convention, and to ensure that the necessary resources and expertise are available to put words into action. In that regard, the proposed tri-partite meeting in 2006 on integrity issues, referred to in the letter from the Minister for Kingdom Relations, may provide needed impetus for addressing these very issues.

Commentary

It is acknowledged that whilst the Kingdom of the Netherlands is a signatory of the Convention, only the Netherlands (in Europe) has ratified it and accordingly neither Aruba nor the Netherlands Antilles are bound by its terms. Given the economic role of Aruba and the Netherlands Antilles, the lead examiners strongly recommend 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.

D. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP

260. Based on the findings of the Working Group regarding the application of the Convention and the revised Recommendation by the Netherlands, the Working Group (1) makes the following recommendations to the Netherlands, and (2) will follow-up certain issues when there has been sufficient practice.

1. Recommendations

Recommendations for Ensuring Effective Prevention and Detection of the bribery of foreign public officials

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:

a) 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);

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).

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);

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);

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);

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);

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).

Recommendations for Ensuring Effective Investigation, Prosecution and Sanctioning of Foreign Bribery and related Offences

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);

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);

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);

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);

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);

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).

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).

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);

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).

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).

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).

2. Follow-up by the Working Group

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);

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 Netherlands [106]; (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);

[106] The Working Group notes that this is a general issue for many Parties.

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);

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);

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);

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);

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).

APPENDIX – LIST OF ACRONYMS

AFM	Authority for the Financial Markets
BAO	*Besluit aanbestedingsregels voor overheidsopdrachten* , decree on procurement rules for government tender
Bft	*Bureau Financieel Toezicht,* Bureau for Financial Supervision
BOOM	*Bureau Ontnemingswetgeving Openbaar Ministerie* Prosecution Service Criminal Assets Deprivation Bureau
CCR	National Police Internal Investigation Department Coordination Committee
CIR	*Commissie integriteit rijksoverheid*, Central Government Integrity Committee
COVOG	*Centraal Orgaan Verklaring Omtrent Gedrag,* Ministry of Justice office that issues VOG RP
CSR	Corporate Social Responsibility
DAC	OECD Development Assistance Committee
DNB	De Nederlandsche Bank
DSB	Dutch State Business
EKV	Normal export credit insurance
EU	European Union
EUR	Euro
EVD	Agency for International Business and Cooperation
FDI	Foreign Direct Investment
FIOD-ECD	*Fiscale inlichtingen- en opsporingsdienst en Economische controledienst,* Fiscal Information and Investigation Service / Economic Investigation Service
FIU	Financial Intelligence Unit
FMO	*Financierings-Maatschappij voor Ontwikkelingslanden,*Netherlands Development Finance Company
FNV	*Federatie Nederlanse Vakbeweging*, Netherlands' largest trade union
GRI	Global Reporting Initiative
IFRS/IAS	International Financial Reporting Standards/International Accounting Standards
IIC	Independent Inquiry Committee into the United Nations Oil-For-Food Programme
IPO	Inter-Provincial Consultations
ISA	International Standard on Auditing
KPLD	*Korps Landelijke Politiediensten*, Dutch National Police (Services Agency)
MLA	Mutual legal assistance
MOT/BLOM	*Meldpunt Ongebruikelijke Transacties/ Bureau politieke ondersteuning Landelijke Officier van justitie inzake Mot,* The Dutch Financial Intelligence Unit
MoU	Memorandum of Understanding
MVO	*Maatschappelijk Verantwoord Ondernemen Platform,* corporate social responsibility platform
NIVRA	*Koninklijk Nederlands Instituut van Registeraccountants*, Royal Institute of Registered Accountants
NOvAA	*Nederlandse Orde van Accountants-Administratieconsulenten*, Dutch Order of Accountants Consultants
NPPC	National Public Prosecutor for Corruption
NV	*Naamloze Vennootschap*

NVB	*Nederlandse Vereniging van Banken*, Netherlands Bankers' Association
ODA	Official Development Assistance
PPS	Public Prosecution Service
SMEs	Small and medium-sized enterprises
SSR	*Stichting Studiecentrum Rechterlijke*, Training Institute for Judges
UN	United Nations
VNG	*Vereniging van Nederlandse Gemeenten,* Association of Netherlands Municipalities
VNO-NCW	*Verbond van Nederlandse Ondernemingen- Nederlands Christelijk Werkgeversverbond*, Union of Dutch Entreprises- Christian Dutch Employers Organisation, Confederation of Netherlands Industry and Employers
VOG RP	*Verklaring Omtrent Gedrag RP,* Certificate of good conduct for legal persons
Wet BOB	Special Powers of Investigation Act