

Implementing the OECD Anti-Bribery Convention



Phase 4 Report: Netherlands



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This Phase 4 Report on the Netherlands by the OECD 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 the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the 44 members of the OECD Working Group on Bribery on 16 October 2020.

The report is part of the OECD Working Group on Bribery's fourth phase of monitoring, launched in 2016. Phase 4 looks at the evaluated country's particular challenges and positive achievements. It also explores issues such as detection, enforcement, corporate liability, and international co-operation, as well as covering unresolved issues from prior reports.

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Executive summary

This Phase 4 report by the OECD Working Group on Bribery in International Business Transactions (Working Group or WGB) evaluates and makes recommendations on the Netherlands' implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. This report details the Netherlands' particular achievements and challenges in this regard, including with respect to enforcement of its foreign bribery laws, as well as the progress the Netherlands has made since its Phase 3 evaluation in 2012.

Since Phase 3, the Netherlands has taken significant steps to increase its enforcement of the foreign bribery offence. Twenty-six new foreign bribery investigations have been opened since Phase 3, when there were four ongoing investigations. The increase in the number of investigations is particularly noticeable since 2016, which coincides with the creation of a dedicated law enforcement framework to investigate and prosecute foreign bribery. However, the number of foreign bribery cases concluded with sanctions remains low. The Netherlands has sanctioned seven legal persons and two natural persons for foreign bribery since the Convention entered into force, all through non-trial resolutions and in relation to only five foreign bribery schemes. Enforcement of the foreign bribery offence against natural persons has proven particularly challenging and none of the Netherlands' four high profile corporate foreign bribery cases involved liability for the natural persons involved. Processes for assessing legal privilege claims are proving a significant obstacle for investigating and prosecuting foreign bribery cases. The Working Group welcomes the recent revision of the Directive on Foreign Corruption, which should remove confusion over the prosecution policy with respect to small facilitation payments.

The Netherlands' framework for detecting foreign bribery has improved significantly since Phase 3. Both the Fiscal Intelligence and Investigation Service (FIOD) and the Dutch Public Prosecution Office (*Openbaar Ministerie* (OM)) have created dedicated anti-corruption teams which include specialised intelligence units and which work together to detect new cases. The financial intelligence unit's (FIU) targeted awareness raising efforts and new anti-money laundering legislation led to three foreign bribery investigations being opened following a suspicious transaction report (STR) and significant numbers of reports from the auditing profession. A small number of cases have originated from self-reporting but the Netherlands lacks a comprehensive legal framework for self-reporting and non-trial resolutions, generating uncertainty and reluctance in the private sector. Ongoing parliamentary debate about regulating the use of internal investigations in criminal cases should be followed-up. The much-awaited whistleblower protection regime has faced severe criticism and has yet to bear fruits as a source of detection. It is also undergoing reforms to align it with the EU Whistleblower Protection Directive.

Although the Netherlands has a strong framework for international cooperation, including spontaneous sharing of information and informal cooperation, the new Protocol on International Cooperation raises concerns about the role of the Minister of Justice and Security in approving outgoing MLA requests to non-EU member countries. Similar concerns arise in relation to interference by a Dutch ambassador in a foreign bribery investigation, risking considerations prohibited by Article 5 of the Convention and jeopardising the independence of case prosecutors. Retaliation against the whistleblower who reported the Ambassador's misconduct is even greater cause for concern. The revision of the Directive on Large Transactions at the

time of finalising this report removes the requirement for approval of the Minister of Justice and Security for proposed non-trial resolutions. While this addresses the Working Group's primary concerns of ministerial involvement in foreign bribery settlements, the operation of the new 'Review Committee' will require further follow-up, along with the proposed additional legislative amendments to the non-trial resolution framework to introduce judicial oversight.

The Working Group welcomes recent case law that confirms a broader approach to exercising jurisdiction over mailbox companies, and will continue to follow-up on corporate criminal liability as case law develops. Regarding sanctions, and even in the very limited number of concluded cases involving individuals, the available penalties and fines imposed in practice against natural persons may not be sufficiently effective, proportionate and dissuasive. Sanctions imposed on legal persons for foreign bribery in the context of non-trial resolutions have yielded very large fines but more clarity and transparency is required on the method for their calculation. The Netherlands has also been very successful at confiscating illegal proceeds of foreign bribery from legal persons. However, the Netherlands should resolve possible inconsistencies between law and practice in relation to the tax treatment of the confiscated proceeds.

The report and its recommendations reflect the findings of experts from Estonia and Sweden and were adopted by the Working Group on 16 October 2020. The report is based on legislation, data and other materials provided by the Netherlands and research conducted by the evaluation team. The report is also based on information obtained by the evaluation team during its on-site visit to The Hague in February 2020, during which the team met representatives of the Netherlands' public and private sectors, media, and civil society. The Netherlands will submit a written report within one year (October 2021) on progress with legislative reforms to its non-trial resolution framework and the amendment of the Whistleblowers Authority Act to implement the EU Whistleblower Protection Directive (Recommendation 2(a) and Recommendations 6(a)-(d)). Within two years (October 2022), the Netherlands will submit a written report to the Working Group on the implementation of all recommendations and its enforcement efforts.

Introduction

1. In October 2020, the Working Group discussed its fourth evaluation of the Netherlands' implementation of the [Convention on Combating Bribery of Foreign Public Officials in International Business Transactions](#) (the Convention), the [2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions](#) (2009 Recommendation) and related instruments.

Box 1. Prior WGB Evaluations of the Netherlands

2015	Phase 3 Follow-up
2012	Phase 3 Report
2008	Phase 2 Follow-up
2006	Phase 2 Report
2001	Phase 1 Report

1. Previous Evaluations of Netherlands by the Working Group on Bribery

2. Monitoring of Working Group member countries' implementation and enforcement of the Convention and related instruments takes place in successive phases through a rigorous peer-review system. The monitoring process is subject to specific, agreed-upon principles. The process is compulsory for all Parties and provides for on-site visits (as of Phase 2) including meetings with non-government actors. The evaluated country has no right to veto the final report or recommendations. All of the OECD Working Group on Bribery evaluation reports and recommendations are systematically published on the OECD website.

3. During its Phase 3 evaluation by the Working Group in December 2012, the Netherlands received 22 recommendations. In 2015, the Working Group concluded that the Netherlands had taken substantial steps to implement a number of recommendations, with 11 out of 22 recommendations fully implemented, 6 partially implemented and 5 not implemented.¹

¹ See **Annex 1** for a list of the Netherlands' Phase 3 recommendations and the Working Group's assessment of their implementation, based on the Netherlands' Phase 3 Follow-up Report.

Figure 1. The Netherlands' Implementation of its Phase 3 Recommendations

WGB Assessment of the Netherlands' Phase 3 Two-Year Written Follow-up Report - 2015



2. Phase 4 Process and On-Site visit

4. Phase 4 evaluations focus on three key cross-cutting issues: enforcement, detection, and corporate liability.² They also address progress made in implementing outstanding recommendations from previous phases, as well as any issues raised by changes to domestic legislation or the institutional framework. Phase 4 takes a tailor-made approach, considering each country's unique situation and challenges, and reflecting positive achievements and good practices. For this reason, issues which were not deemed problematic in previous phases or which have not arisen as such in the course of this evaluation may not have been fully re-assessed at the on-site visit and may thus not be reflected in this report. However, some issues did require reopening due to the ongoing lack of jurisprudence on the foreign bribery offence and application of sanctions to natural and legal persons (all foreign bribery cases having been resolved out-of-court, to date) and the WGB's commitment to equal treatment.

5. The team for this Phase 4 evaluation of the Netherlands was composed of lead examiners from Estonia and Sweden, as well as members of the OECD Anti-Corruption Division.³ After receiving the Netherlands' responses to the Phase 4 questionnaire and supplementary questions, the evaluation team conducted an on-site visit to The Hague from 10-14 February 2020. The team met with representatives of the Netherlands' government, law enforcement authorities, the judiciary, the private sector (business associations, companies, financial institutions, lawyers and external auditors), as well as civil society (non-government organisations, academia and the media).⁴ The evaluation team expresses its appreciation to all the participants for their contributions to the open and constructive discussions. The evaluation team is also grateful to the Netherlands, in particular the Ministry of Justice and Security (MJS), Ministry of Foreign Affairs, Dutch Public Prosecution Office and the Fiscal Intelligence and Investigation Service, for the exemplary cooperation throughout the evaluation, the organisation of a well-attended on-site visit, and the provision of additional information following the visit.

² See Working Group [Phase 4 evaluation procedures](#).

³ Estonia was represented by **Mr. Tanel Kalmet** Former Head of Division of the Penal Law and Procedure Division at the Ministry of Justice and **Ms. Elina Elkind**, Judge at the Harju County Court. Sweden was represented by **Mr. Walo von Greyerz**, Director at the Division for Criminal Law in the Ministry of Justice, **Mr. Leif Görts**, Chief Public Prosecutor at the National Public Prosecution Department and **Ms. Ulrika Lyckman**, Deputy Director, Department for Trade Promotion, Nation Branding and CSR. The OECD was represented by **Ms. Leah Ambler**, Coordinator of the Phase 4 Evaluation of the Netherlands; **Ms. Alice Berggrun**, Legal Analyst and **Ms. Alejandra Tadeu**, Legal Analyst, all from the Anti-Corruption Division, Directorate for Financial and Enterprise Affairs.

⁴ See **Annex 2** for the agenda and list of participants in the on-site visit discussions.

3. Netherlands Economy and Foreign Bribery Risks

6. In 2018, the Netherlands was the 14th largest economy in terms of GDP among the 44 Working Group members, the 17th largest economy in the world and in 2019, it was the fifth largest economy in the European Union (EU).⁵ In 2019, Dutch exports in goods and services comprised 83.3 per cent of its GDP.⁶ The Netherlands is also a key European transportation hub—the port of Rotterdam is the largest in Europe—and has a large volume of re-export activities. Its main exports include chemicals, refined petroleum, and electrical machinery, and it has a highly mechanised and profitable agricultural sector. The major services exports include business, professional and technical services, franchises (and similar rights), and air and sea transport. The Netherlands' major export partners are EU member states (in particular Germany, Belgium and France), the United Kingdom, China and the United States.⁷

7. In 2018, the Netherlands was in second place globally behind the United States with USD 2 380 billion in outward foreign direct investment (FDI; stock at current prices). FDI flows to the Netherlands rose to USD 114 billion in 2018 (equal to 12.5% of GDP), up from USD 60 billion the previous year, against a backdrop of a general decline in FDI around the world.⁸ More than half of such investment has been in member countries of the EU (in particular Germany, Switzerland and Luxembourg), the United Kingdom and the United States. Mining, oil, chemicals and quarrying activities, as well as investment in banking and insurance, are the most prominent sectors for FDI from the Netherlands.

8. The economy of the Dutch special municipalities in the Caribbean (Bonaire, St Eustatius and Saba; BES Islands) is largely based on tourism, with Bonaire attracting significant investment in the real estate sector. In 2017 the GDP of the BES Islands was USD 583 million. Bonaire has also seen a rise in company registrations, with over 700 new companies incorporated between 2014-2015; 74% of which were companies involved in 'business services and other services'.⁹

9. Following the on-site visit, the Coronavirus (COVID-19) pandemic brought about unprecedented challenges, uncertainty and major economic disruption on a global scale, including increased risks of bribery and corruption. The impact of the pandemic on the Dutch economy and the magnitude of the foreign bribery risks the Netherlands will face as a result of the actions taken to mitigate the health and economic crisis could not be fully assessed at the time of finalising this report.

a) Special Purpose Entities: increased financial flows and significant risks

10. A specific feature of the Dutch economy is the significant presence of Special Purpose Entities (SPEs, or mailbox companies). In November 2018, the Ministry of Finance reported that there were 15 000 SPEs registered in the Netherlands. These are legal persons that have been set up mainly for tax purposes, which comply with the minimum requirements for organisation and registration. They usually have no office, business assets or employees in the Netherlands and carry out their commercial activities in another country. Mailbox companies are most often managed by Trust or Company Service Providers (TCSPs), which can be representatives of the legal or accounting and audit profession (sometimes referred to as 'gatekeepers'). The economic relevance of SPEs in terms of their contribution to GDP is generally small,

⁵ Eurostat, "[Which EU countries had the highest GDP in 2019?](#)", 8 May 2020.

⁶ Statistics Netherlands – CBS, [Approaches of domestic product \(GDP\); National Accounts](#) (2019, preliminary).

⁷ [OECD Economic Surveys: Netherlands](#) (OECD, 2018).

⁸ OECD (2020), FDI flows (Netherlands). doi: 10.1787/99f6e393-en (Accessed on 16 March 2020).

⁹ [National Risk Assessment on Money Laundering and Terrorist Financing for the Caribbean Netherlands](#) (Bonaire, Sint Eustatius and Saba), 2018 (Research and Documentation Centre, WODC (Cahier 2018-17a); GDP Caribbean Netherlands 2017: \$ 583 million, a growth of 0,1% (Source: [Statistics Netherlands CBS](#)).

but they may have large income flows and large financial stocks and flows. SPE dividends, interest and royalties flowing through the Netherlands amounted to EUR 200 billion in 2016 (an increase from EUR 70 billion in 2014) and tax havens are a major destination for royalties, receiving almost 60% in outward flows.¹⁰ With limited exceptions, the ultimate parent company of an SPE is located abroad.

11. The large numbers of SPEs registered in the Netherlands render it a conduit country for potential illicit financial flows, including bribes to foreign public officials. The Dutch government nevertheless emphasised in its 2019 Anti-Money Laundering Action Plan, that it will not allow an attractive tax climate for international companies with real activities in the Netherlands to be abused for the creation of improper structures, for example, to facilitate transnational corruption or undermine the integrity of the Dutch financial system.¹¹ In addition, the Fiscal Administrative Law Decree prohibits the granting of certainty in advance in tax matters if the applicant is suspected of involvement in money laundering, bribery, serious property crimes or terrorist financing.¹² The Netherlands has also undertaken to introduce a number of measures to counter its use as a conduit jurisdiction, including reforms to its tax regime to implement the OECD Base Erosion and Profit Shifting (BEPS) Project.¹³

b) Brexit: influx of UK companies to the Netherlands

12. A recent and specific economic development which may call for extra resources connected to supervision of multinationals is the influx of British companies relocating to the Netherlands following the Brexit referendum in 2016. The Netherlands Foreign Investment Agency (NFIA) announced that a total of 140 companies have opened offices or moved operations from the UK to the Netherlands and are expected to generate EUR 325 million in investment, predominantly in the finance, information technology, media, advertising, life sciences and health sectors. The NFIA is reportedly in discussion with another 425 companies about making a similar move.¹⁴

4. Foreign Bribery Cases in the Netherlands

13. The case information contained in this report is based on the evaluation team's analysis of the Netherlands' responses to the Phase 4 questionnaire, translated excerpts of court decisions and independent research. The Netherlands also provided anonymised data related to ongoing, terminated and concluded cases. There are 23 ongoing foreign bribery cases, 22 are at the investigation stage and 1 at prosecution stage, involving 40 individuals and 45 companies in the Netherlands.

14. At the time of Phase 3 (December 2012), the Netherlands had not sanctioned any individuals or legal persons for the foreign bribery offence. The Netherlands reported four ongoing and four terminated investigations. Given the fact that there were no concluded cases, the Working Group expressed concern about the low level of enforcement, particularly considering the size of the Dutch economy.¹⁵ Since Phase

¹⁰ [CPB Policy Brief: Conduit country the Netherlands in the spotlight](#) (CPB Netherlands Bureau for Economic Policy Analysis, January 2019).

¹¹ See [Report by the Ministers of Finance and Justice and Security to Parliament on progress with the national AML Plan announced in June 2019](#), 14 January 2020 (in Dutch).

¹² [Fiscal Administrative Law Decree \(Besluit Fiscaal Bestuursrecht\)](#), para. 4.

¹³ [OECD Economic Surveys: Netherlands \(2018\)](#), pp. 34-35).

¹⁴ Reuters, "[Brexit brings record number of businesses to Netherlands in 2019](#)" (19 February 2020).

¹⁵ Sanctions were imposed against seven Dutch companies by means of non-trial resolutions in the context of the Oil-for-Food cases. Although the case involved the payment of kickbacks in Iraq, the companies were sanctioned not for foreign bribery, but for violation of sanctions regulations.

3, there has been a marked increase in the number of investigations into foreign bribery and the Netherlands imposed significant sanctions in four high-profile cases, which were all concluded via non-trial resolution. As of October 2020, the foreign bribery enforcement situation in the Netherlands is as follows:

- Foreign bribery investigations were concluded with sanctions against two individuals (NP) and seven legal persons (LP) by means of a non-trial resolution (Ballast Nedam (1LP); Vimpelcom (2LP); Teliasonera (3LP); SBM Offshore (1LP) Case A (2NP));
- No foreign bribery cases have been concluded following a criminal conviction at trial;
- The Dutch authorities confiscated and forfeited assets valued at a total of USD 892.5 million (EUR 790.8 million, based on the exchange rate at the time of writing) from legal persons as proceeds of the foreign bribery offence;
- Natural persons have not been subject to confiscation orders with respect to the instrument or proceeds of bribes to foreign public officials;
- 40 individuals and 44 legal persons are currently under investigation, and one company is the subject of an ongoing prosecution, for suspected bribery of foreign public officials in connection with 23 cases;
- Foreign bribery proceedings have been discontinued against 13 natural persons and 5 legal persons.

a) Concluded foreign bribery cases

15. **Ballast Nedam:** Between 1996 and 2003 the company paid bribes to Saudi and Suriname officials to secure construction contracts. Ballast Nedam also built two airfields in Saudi Arabia for USD 580 million under a broader contract secured by its parent company valued at EUR 45 billion. It is estimated that around EUR 1 billion were paid in kickbacks of which half was paid by Ballast Nedam itself. The company self-reported following an investigation by the Tax and Customs Administration (TCA). The company was sanctioned by means of a non-trial resolution in December 2012, paying a fine of EUR 5 million and EUR 12.5 million in confiscation. Investigations against six natural persons for foreign bribery and money laundering were discontinued following the conclusion of the case with the company. One natural person reached a non-trial resolution in the context of a criminal investigation for money laundering predicated on foreign bribery on 6 October 2014, paying a fine of EUR 40 000. One natural person, not working for the company, reached a tax settlement with the TCA on 31 May 2013 and the criminal investigation related to money laundering in connection with commercial bribery was discontinued. Ballast Nedam's former CFO was convicted on 10 July 2018 for laundering EUR 3.1 million in connection with commercial bribery. In the same trial, another former senior executive was acquitted on the grounds that the facts predated criminalisation of money laundering in the Netherlands.

16. **SBM Offshore:** In 2012 the company self-reported and conducted an internal investigation into suspicious payments including to government officials. It was revealed that the company had paid around EUR 200 million in commissions to its commercial agents around the world, with approximately USD 180 million being paid to agents in Brazil, Angola, Equatorial Guinea, Kazakhstan and Iraq to secure a total of USD 2.8 billion in contracts with state-owned oil companies in all five countries. Some of those amounts were paid to third parties through those commercial agents, including government officials. The OM sanctioned the company by means of a non-trial resolution in November 2014, paying a fine of EUR 40 million and EUR 200 million in confiscation. The Board of Directors that took office in the first half of 2012 approved a comprehensive package of measures to improve the company's compliance policy. As part of the resolution, SBM Offshore agreed to update the OM on the implementation of its compliance policy. The Netherlands had no jurisdiction over the natural persons identified as suspects but referred information to law enforcement authorities in countries able to exercise jurisdiction. The Netherlands Authority for the Financial Markets (AFM) also sanctioned SBM Offshore EUR 2 million on 28 March 2019 for failing to make timely market announcements of the internal investigation into foreign bribery it was conducting for the

OM.¹⁶ SBM N.V. also reached a settlement with the United States Department of Justice (DOJ) in 2017, entering into a 3 year deferred prosecution agreement, agreeing to pay combined monetary penalties of USD 238 million on behalf of its American subsidiary SBM Offshore USA Inc., and pleaded guilty for conspiracy to violate the anti-bribery provisions of the FCPA in relation to the same facts. As part of the US settlement, the DOJ took into account the penalties and forfeiture of the company's resolution with the Dutch authorities in 2014.¹⁷ The DOJ also imposed a corporate compliance monitor. In July 2018, SBM agreed to pay USD 189 million to the Brazilian authorities and Petrobras in fines and compensation for damages in July 2018.

17. **Vimpelcom:** The company and its subsidiary, Silkway Holdings BV, made payments to the daughter of the President of Uzbekistan, who controlled the Uzbek telecommunications market, between 2006 and 2012 to gain access to the market and obtain relevant licences. The bribes were paid through another of Vimpelcom's subsidiaries, Unitel, and totalled USD 114.5 million. The bribes were paid to an offshore company established in Gibraltar (Takilant Limited) that was ultimately owned by the daughter of the President of Uzbekistan. The OM concluded that the bribes helped Unitel establish a dominant position in the Uzbek telecommunications market with significant profits. The case was detected through a combination of reports by international media, and information obtained by the tax administration and disclosed in incoming mutual legal assistance (MLA) requests, as the facts of the case were being simultaneously investigated in other WGB jurisdictions. Vimpelcom and its subsidiary were sanctioned by non-trial resolution in February 2016, as part of a joint agreement with the authorities in the Netherlands and the United States. The companies paid the Netherlands a fine of EUR 230 million and EUR 167.5 million in confiscation. Lawyers at the on-site visit reported—and prosecutors subsequently confirmed—that the case against the company's CFO was dismissed on 17 January 2020 due to insufficient evidence to attribute knowledge of the criminal nature of the payments or intentional inaction to prevent the bribery.

18. **Teliasonera:** The investigation in the Netherlands focused on three of Teliasonera's subsidiaries, Sonera Holding BV, Teliasonera UTA Holding BV and Teliasonera Uzbek Telecom Holding BV. These subsidiaries were involved in bribe payments between 2007 and 2010 to gain access to the Uzbek telecommunications market, as for the Vimpelcom case. A total of USD 314.2 million was paid in bribes to Takilant Limited, including six per cent of the shares in the Rotterdam subsidiary Teliasonera Uzbek Holding. The companies also paid more than USD 27.3 million in 'sponsorship' and 'charitable contributions' in Uzbekistan between 2007 and 2013. Some of these payments were linked to Uzbek government officials. The three subsidiaries were sanctioned by means of a non-trial resolution in September 2017, as part of a joint agreement between the authorities in the Netherlands and the United States. The companies paid the Netherlands a fine of EUR 100 million and EUR 382.5 million in confiscation.

b) Concluded cases of money laundering predicated on foreign bribery and passive bribery of foreign public officials

19. **KPMG:** The criminal investigation focused on the role KPMG and three of its former partners played in concealing the payments by Ballast Nedam to foreign agents in the context of the Ballast Nedam case between the financial years of 2000-2003. The authorities in the Netherlands found that KPMG failed to comply with due care and integrity requirements and that it was actively involved in concealing the payment of the bribes. The company was sanctioned by means of a non-trial resolution in December 2013 for forgery and money laundering offences, paying a fine of EUR 3.5 million and EUR 3.5 million in confiscation. The three natural persons were prosecuted on charges of money laundering but the Midden-Nederland District

¹⁶ AFM website, "[AFM fines SBM Offshore for non-timely disclosure of inside information](#)", 5 April 2019.

¹⁷ SBM Offshore [press release](#).

Court, in a judgement on 19 April 2018, dismissed the proceedings. The Functioneel Parket (FP, National Public Prosecutor's Office for Serious Fraud, Environmental Crime and Asset Confiscation) has appealed the decision.

20. **ING Bank:** An investigation led by the OM and conducted by the FIOD and the police developed from other investigations into ING account holders (including Vimpelcom). It was revealed that hundreds of millions of euros were being laundered through the bank's accounts. ING was not sufficiently investigating clients and monitoring bank accounts. It was also either failing to report unusual transactions or reporting them too late. The investigation uncovered structural failures in ING's compliance policy; in particular, its client due diligence, and the bank was accused of violating the Dutch Anti-Money Laundering and Counter Terrorism Financing Act (*Wet ter voorkoming van witwassen en financieren van terrorisme* or *Wwft*). ING was also charged with negligent money laundering for failing to prevent bank accounts held by its clients from being used to launder money between 2010 and 2016. The bank was sanctioned by means of a non-trial resolution in September 2018, paying a fine of EUR 675 million (the largest ever imposed in the Netherlands) and an additional EUR 100 million in confiscation. Following an article 12 complaint regarding the settlement decision and the decision not to prosecute ING's CEO (see below, Non-Trial Resolutions), a Dutch court decided to question ING and its former CEO to determine whether to annul the resolution and send the case to trial.¹⁸ The court is expected to make a decision on the validity of the non-trial resolution and non-prosecution decision at the end of 2020.

21. **Takilant:** Takilant is a Gibraltar-based mailbox company beneficially owned by the daughter of the former president of Uzbekistan. The company was used to receive bribes paid both by Teliasonera and Vimpelcom in order to gain access to the Uzbek telecommunications market and obtain the necessary licences to operate in the country. The company was prosecuted for passive bribery and tried in absentia. In July 2016, the Amsterdam District Court convicted Takilant for complicitly being an accessory to an official accepting a gift, knowing that this gift was made in order to induce an act in breach of professional obligations, and complicitly falsifying documents. The court imposed a fine of EUR 1 580 000, confiscated 1 080 registered shares held by Takilant in TeliaSonera Uzbek Telecom and issued a confiscation order of EUR 123 093 600 as deprivation of illegally obtained advantages. A substantial part of this amount is still outstanding, pending an MLA request to another WGB party to execute the confiscation order.

c) Overall enforcement situation in the Netherlands

22. Despite the significant amounts imposed in fines and confiscation in the four concluded foreign bribery cases, the enforcement level of the foreign bribery offence for both legal and natural persons remains low. Of the 23 ongoing investigations into foreign bribery offences, 18 have been opened since 2016 (when the FP and FIOD assumed responsibility for foreign bribery cases), showing a significant increase in enforcement efforts in recent years.¹⁹ Only two natural persons have been sanctioned for foreign bribery since the Convention entered into force, with the combined fine amounting to EUR 25 000 in a case where more than EUR 430 000 were paid as bribes to obtain 11 different contracts ranging in value from USD 580 600 to USD 1.5 million. Neither of the individuals sanctioned played a major role in the bribery scheme.

23. Regarding the grounds for termination of foreign bribery investigations, in **Case A** the investigation into two natural persons was discontinued because they had a very small role in the bribery scheme. Prosecutors in the **Ballast Nedam** case discontinued the investigation against six natural persons suspected of foreign bribery and money laundering offences because the case was resolved with the

¹⁸ Reuters, "[Dutch court to question ING and ex-CEO Hamers in money laundering case](#)" (8 July 2020).

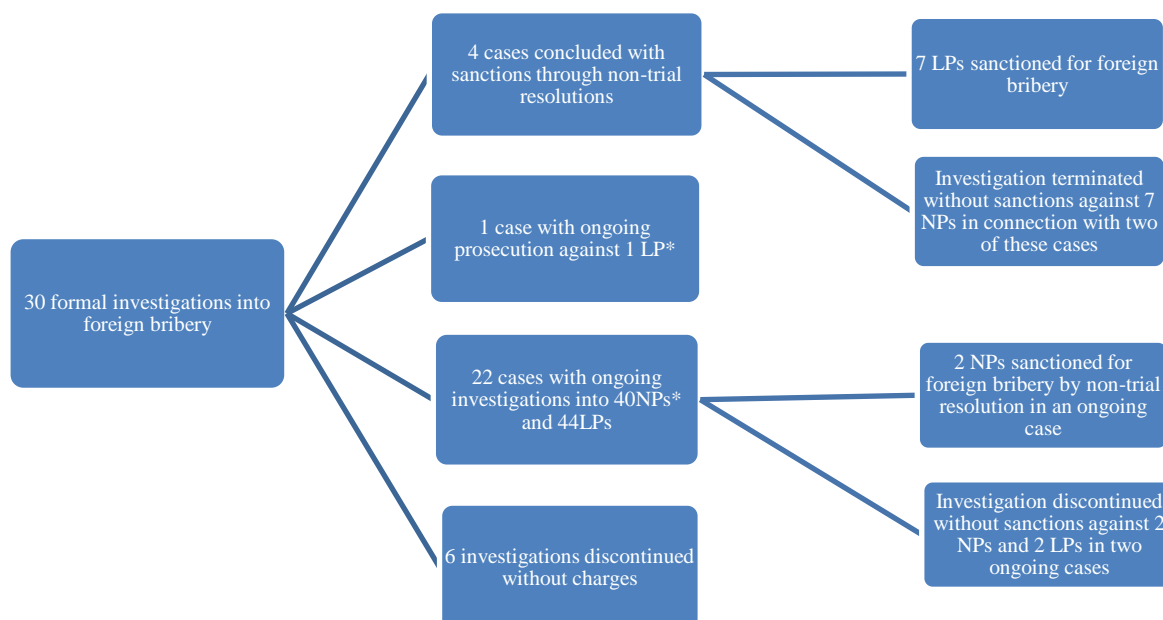
¹⁹ One investigation has been opened and discontinued regarding the foreign bribery offence since 2016. The investigation is still ongoing regarding other criminal offences.

company by means of a non-trial resolution, among other things.²⁰ In the **Vimpelcom** case, the investigation against one natural person was dismissed due to insufficient evidence.

24. Foreign bribery investigations were also terminated against two legal persons that were forced to declare insolvency. One legal person was being investigated in connection with **Case A** but there was insufficient information that could lead to a prosecution. The Netherlands reports that information on this case has been shared with the country where the offence took place, which is a WGB member. Two foreign bribery investigations were not formally pursued due to the facts being time-barred. Additionally, one foreign bribery investigation was not pursued due to lack of evidence, although the case is currently still ongoing regarding forgery offences.

25. The flow chart in figure 2 shows the results of all the known investigations into foreign bribery in the Netherlands' since the Convention came into force in 1999.

Figure 2. The Netherlands foreign bribery enforcement since 1999



Note: Data to October 2020, numbers relate both to individual criminal proceedings and foreign bribery 'case scenarios'; 'NP' and 'LP' stand for 'natural' and 'legal' persons, respectively.

Source: Phase 4 evaluation case data.

Commentary

The lead examiners commend the increase in enforcement efforts in the Netherlands since Phase 3. In particular, the number of foreign bribery investigations opened since 2016 (18) is evidence of the effectiveness of the recent reorganisation of the investigative and prosecutorial framework. However, only three cases have been concluded with sanctions in the Netherlands since Phase 3, two of them in connection with the same facts. Enforcement against natural persons also remains low, with only two individuals sanctioned for the foreign bribery offence since the Convention entered into force and a number of proceedings discontinued or dismissed. Enforcement of the

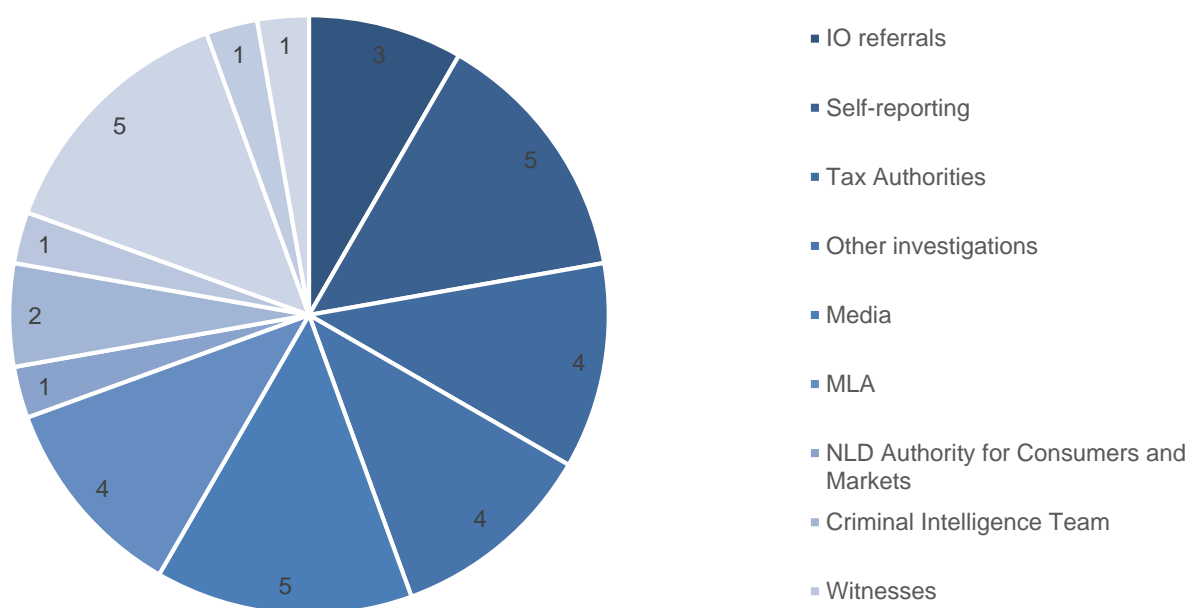
²⁰ According to information provided by the Netherlands on foreign bribery enforcement in the context of the Phase 4 Questionnaire responses.

foreign bribery offence in the Netherlands remains low, especially in view of the size and specific risk profile of the Dutch economy. This report endeavours to identify the reasons behind the low rate enforcement and makes recommendations to address this concern.

A. Detection of the foreign bribery offence

26. The Netherlands actively uses a range of sources to detect bribery of foreign public officials by Dutch nationals and companies. The following table indicates how foreign bribery cases have been detected, to date, by the Dutch authorities.

Figure 3. Sources of the Netherlands foreign bribery investigations



Note: The majority of foreign bribery investigations had multiple sources. These have all been taken into account individually in the figure above.

1. Detection through the Dutch Anti-Money Laundering Framework

27. In Phase 3, the Working Group recommended that the Netherlands raise awareness and provide training to the FIU, law enforcement authorities and reporting entities on foreign bribery as a predicate offence for money laundering. This recommendation was deemed fully implemented at the time of the Phase 3 Written Follow-up report. However, developments since Phase 3 merit a review of the Netherlands' capacity to detect foreign bribery through its anti-money laundering (AML) system.

28. As was previously addressed, the Netherlands is a major financial centre with very significant FDI flows. The first national risk assessment (NRA) carried out in 2017 identified the main money laundering vulnerabilities as an internationally focused financial sector and the scale of incoming financial flows derived from criminal activity, including fraud.²¹ The Netherlands published its second NRA in July 2020 and updated the list of priority money laundering risks.²² The Netherlands' economy is also characterised by large numbers of mailbox companies which can be misused in the context of bribery schemes. Reporting obligations under money laundering regulations are an essential part of detection since they cover TCSPs and other professional service providers who play an essential role in setting up and maintaining these companies.

29. Additionally, there have been several legal and institutional developments in the AML framework since Phase 3. The Netherlands' AML legal framework is set out in the Wwft. The Wwft has been amended a number of times since Phase 3, most recently by the 2018 Implementation Decree, which entered into force on 25 July 2018 and transposed the EU Directive 2015/849 of the European Parliament and the Council of 20 May 2015 (the fourth AML directive). The Wwft was further amended by an Implementation Decree that entered into force on 21 May 2020, transposing EU Directive 2018/843 of the European Parliament and the Council of 30 May 2018 (fifth AML directive). The Act Implementing a Register of Ultimate Beneficial Owners of Companies and Other Legal Entities, set to enter into force on 27 September 2020, will also introduce further amendments to the Wwft (see below, Access to beneficial ownership information in the near future).

a) The challenges of processing a dramatic increase in transaction reporting

30. Reporting entities are broadly defined under the Wwft and include banks, other financial institutions and designated non-financial businesses and professional natural persons, such as accountants and lawyers, legal persons or partnerships in the context of their professional activities (article 1(1)(a)). These reporting entities must file unusual transaction reports (UTRs) immediately with the FIU as soon as (i) the unusual nature of the transaction becomes apparent and (ii) customer due diligence fails or a business relationship is terminated, and there are simultaneously indications that the customer in question may be involved in money laundering or terrorist financing. The report must be filed regardless of whether the transaction in question has already been completed or has merely been attempted (article 16(1) and (4)).

31. The BES islands have their own AML legislation, the BES Prevention of Money Laundering and Terrorism Financing Act (Wwft BES). Under this legislation, service providers established in the BES islands are required to report unusual transactions to the FIU Netherlands (article 3(2)). To facilitate reporting, the FIU Netherlands has established a permanent liaison officer on the islands. In 2019, the FIU Netherlands received 1 031 UTRs from the BES islands, of which 276 were declared suspicious.²³ This represents a slight increase following a trend of progressive decline in the number of UTRs reported since 2015.²⁴ According to the FIU Netherlands, the agency has been focusing on improving the quality of the reports from service providers in the BES islands and will, "*in due course*", focus on the quantity of the reports.²⁵

²¹ [National Risk Assessment 2017](#), p.9. The results of this NRA clearly signal money laundering via financial institutions as the biggest potential risk, followed by money laundering via payment-service providers, trust offices and offshore firms.

²² [National Risk Assessment 2020](#).

²³ [FIU Netherlands 2019 Annual Report](#), p.48.

²⁴ According to the information available in the FIU Netherlands annual reports: [2015](#) (1,285 UTRs), [2016](#) (1,281 UTRs), [2017](#) (1,038 UTRs) and [2018](#) (993 UTRs).

²⁵ [FIU Netherlands 2018 Annual Report](#), p. 40.

32. Given the volume of UTRs submitted, the FIU conducts an initial filter through a Reporting and Analytical Tool, which became operational in 2014. This IT tool conducts automatic queries based on risk profiles developed by the agency. In 2017, the FIU prioritised the detection of corruption as a strategic theme. Four different queries were introduced in the FIU database, including definitions of corruption and countries and sectors of particular concern. These queries allow the FIU to prioritise corruption-related UTRs.

33. Following a positive result, the FIU will conduct a preliminary investigation to determine whether to declare the UTR as suspicious and file an STR with criminal law enforcement agencies. FIU representatives at the on-site visit indicated that the number of UTRs received by the FIU is too high to allow for an individual investigation, and all UTRs are run through a semi-automatic system that compares them with data available to the FIU, including data from law enforcement agencies. No other agency aside from the FIU has access to the UTRs. Once a UTR is declared suspicious by the Head of the FIU and becomes an STR, it is registered in a central system accessible to all law enforcement and intelligence agencies. There are four ongoing foreign bribery investigations that were detected through STRs since Phase 3. The FIOD has conducted training together with the FIU on bribery typologies and corruption schemes.

34. In 2019, the FIU received the highest number of UTRs, to date. Of the 2 462 973 UTRs received, the FIU submitted 5 302 files containing 39 544 transactions declared suspicious to investigation, intelligence and security services for further criminal investigation and possible prosecution. Only 62 of these files involved possible corruption offences, although it is unclear how many of these involved bribery of foreign public officials.²⁶ The STRs represented a total of over EUR 19 billion: the largest amount ever recorded by the FIU in a single year. By contrast, an average of 424 118 UTRs were filed annually over the past five years in relation to which the FIU identified an average of EUR 4.92 billion in suspicious transactions.²⁷

35. The extraordinary increase in volume of UTRs can be mostly attributed to the entry into force of the 2018 Wwft Implementation Decree. This Decree imposed a new objective reporting threshold, by which all transactions undertaken with high-risk countries, as designated by the European Commission, would be deemed unusual transactions. This objective reporting threshold was cancelled in October 2019. The extraordinary increase in volume of UTRs offered extremely limited information with which to analyse them as suspicious. Representatives of the financial sector at the on-site visit indicated recent enforcement actions resulting in significant fines imposed against financial institutions for failures in their AML controls as an additional incentive for increased reporting. Consequently, 2019 registered an increase by more than 1 700 000 UTRs in relation to the second year with the highest number of UTRs (2018), but the number of transactions that were declared suspicious by the FIU actually decreased to the degree of 18 406 fewer STRs.

36. At the on-site visit, representatives from the banking sector, as well as auditors and lawyers, considered that the difference between an unusual and a suspicious transaction was unclear and, therefore, the threshold for reporting might be too low. This could lead to overzealous reporting, resulting in a decrease in the overall quality and relevance of the reports. Although private sector entities reported

²⁶ [FIU Netherlands 2019 Annual Report](#), p. 6.

²⁷ FIU annual reports:

- [2014](#) (277 000 UTRs, 29 000 declared suspicious (5 661 separate files) amounting to EUR 2.4 billion);
- [2015](#) (312 160 UTRs, 40 959 declared suspicious (6 382 separate files) amounting to almost EUR 2 billion);
- [2016](#) (417 067 UTRs, 53 533 declared suspicious (6 516 separate files) amounting to more than EUR 4 billion);
- [2017](#) (361 015 UTRs, 40 546 declared suspicious (5 898 separate files) amounting to almost EUR 6.7 billion);
- and
- [2018](#) (753 352 UTRs, 57 950 declared suspicious (8 514 separate files) amounting to over EUR 9.5 billion).

receiving feedback from the FIU when a UTR became an STR, this varied between sectors. Representatives from the banking sector indicated that the FIU's backlog of UTRs made it difficult to provide feedback on the quality of the reports. Auditors mentioned receiving feedback on specific cases where additional information was required from them. The representative from the trust sector reported having a specific contact point within the FIU and very clear channels for feedback and providing information.

b) An increase in FIU resources

37. In addition to a large volume of UTRs, non-government representatives at the on-site visit unanimously expressed their concerns that the FIU does not have enough resources to process the number of reports it receives. The concerns over resources are not new, with the FIU indicating in Phase 3 that it was 'tight' with a staff of 57 people for an approximate number of 200 000 UTRs per year. Fastforward eight years, and the FIU currently has 63 full time employees and additional part-time employees to manage an increase of over two million UTRs (even though out of the 2 462 973 UTRs received in 2019, 1 921 737 transactions were reported due to the objective reporting threshold regarding high risk countries). The Netherlands reports that the FIU will recruit 25 additional full-time employees (including data scientists and technology experts) following an increase in funding from EUR 6 million to EUR 9 million in 2020. The additional funding will also be used to invest in new technology and artificial intelligence to aid in data analysis.

38. This increase in the FIU's budget is linked to additional structural funds to implement the fifth AML directive, as well as to the Money Laundering Action Plan (MLAP), submitted to Parliament on 30 June 2019 by the Minister of Finance and the Minister of Justice and Security. The MLAP provides for additional funding to the FIOD, TCA, FIU and OM of EUR 29 million from 2021 onwards *inter alia* to help in the fight against money laundering. The MLAP also mentions a national programme for 2019-2022 to combat money-laundering set up by the OM in consultation with the police, FIU and FIOD.

c) Encouraging effective reporting by the private sector

39. In 2017, the FIOD, FP, FIU and the four main banks in the Netherlands established a public-private partnership focusing specifically on corruption.²⁸ The goal was to increase awareness of corruption within banks and to improve transaction monitoring to detect more corruption cases. The 2018 Annual Report of the FIU indicates that the pilot has produced very useable UTRs for further investigation.²⁹ Based on the OESO and Egmont Group indicators, a 'corruption query' is made for banks to detect possible corruption cases and test its effectiveness, efficiency (not too many 'false positives') and added value (whether new cases are detected compared to current transaction and client monitoring). The FIU and the FIOD-ACC analysed the STRs in 2018 and 2019 possibly related to corruption in order to optimise the query. Furthermore, the FIOD-ACC has produced a 'knowledge document' in cooperation with the banks intended to increase awareness on corruption and detection of possible corruption cases for transaction monitoring analysts, customer due diligence and compliance officers within the banks. This 'knowledge document' was published in August 2020 and accompanied by a promotional video.

40. Also within the financial sector, the Dutch Bankers' Association announced on 8 July 2020 the creation of a joint body—Transaction Monitoring Netherlands (TMNL)—between five Dutch banks (ABN AMRO, ING, Rabobank, Triodos Bank and de Volksbank) to conduct collective transaction monitoring and share information with a view to easier and more effective tracking of criminal funds.³⁰ The banks have

²⁸ The participating banks are ABN AMRO, ING, Rabobank and the Volksbank.

²⁹ [FIU-The Netherlands Annual Report 2018](#), p. 11.

³⁰ Dutch Bankers' Association website, "[Transaction Monitoring Netherlands: a unique step in the fight against money laundering and the financing of terrorism](#)" (8 July 2020).

involved the FIU, OM, Ministry of Finance and MJS in the project and an amendment of the Wwft will be necessary to enable full-scale collective transaction monitoring. The TMNL Initiative will be rolled out in phases, with the objective of opening it to other banks. Financial institutions at the on-site reported that this initiative is still in the early stages, as they are struggling to overcome legal challenges relating to data privacy. The Netherlands reports that concerns over data privacy are being addressed in a bill (the Data Processing Act for Partnerships) that was sent to Parliament in April 2020.

41. The FIU also conducted a pilot project involving reporting entities, law enforcement agencies and supervisory authorities, which contributed to the adoption by the Egmont Group of a new set of corruption indicators in July 2019.³¹ The FIU circulated the list of Egmont Group corruption indicators to reporting entities. In relation to specific types of reporting entity, in 2018 the FIU worked together with the Dutch Authority for Financial Markets (AFM), FP and FIOD's Anti-Corruption Centre (FIOD-ACC) on a project to enhance UTR reporting by auditors. In this context, the FIU contributed to workshops for auditors organised by the AFM.

42. Auditors report 1 100 unusual transactions annually to the FIU. Of these, in 2018, 306 UTRs were declared suspicious. Over the last five years, the FIOD-ACC has examined STRs filed by auditors on possible corruption offences. This resulted in 70 STRs that were not related to an ongoing criminal investigation. Of these, the FIOD-ACC was able to initiate seven criminal investigations into corruption offences, two of which involved bribery of foreign public officials. The Netherlands reports that the FIU, the FP and the FIOD-ACC are considering similar initiatives in the future regarding other financial sector gatekeepers.

43. Lawyers at the on-site visit recognised that legal professionals are not inclined to report information from clients and there are many grey areas where it is not clear whether their activity falls under the obligation to report or an exception. Nevertheless, the Netherlands Bar Association has been actively assessing how law firms are dealing with their reporting obligations and regularly consults with FIU-the Netherlands. Given the key role played by lawyers in setting up corporate structures, and the particular money laundering risk posed by such structures in the Netherlands, future FIU awareness-raising efforts should continue to focus specifically on this profession.

44. The FIU has also been conducting targeted activities in the BES islands to raise awareness of reporting obligations. One of these activities was a seminar and workshop organised in Bonaire in 2018 for all major banks, in cooperation with the DNB. Each of the banks present was also addressed individually in an effort to improve the quality of reports. In the course of 2018, there were also several meetings between the supervisory bodies, the DNB, the Central Banks of the Kingdom and the FIUs of the Netherlands, Aruba, Curaçao and Sint Maarten to discuss red flags and money laundering scenarios in the context of the Caribbean region.³² As described above, 2019 showed a recovery from previous years' decline in the number of UTRs from the island. The FIU should therefore ensure that its efforts to raise awareness of reporting obligations remain effective.

Commentary

The lead examiners welcome the increase in detection of foreign bribery through STRs since Phase 3 and are encouraged by the potential of the AML system to play an even greater role in detection. The FIU has undertaken innovative awareness-raising initiatives, such as the establishment of a public-private partnership in collaboration with the FIOD, FP and the Netherlands' four main banks focusing on the detection of corruption by improving transaction monitoring, and by targeting specific reporting entities, such as the auditing profession. The TMNL Initiative and its world-first trial of collective transaction monitoring is also an impressive development. Of particular

³¹ [Egmont Group set of indicators for corruption related cases.](#)

³² [FIU-The Netherlands Annual Report 2018](#), p. 39.

importance is the increase in financial and human resources in the FIU, considering the practically unanimous view that these were, until this moment, insufficient. This welcomed increase in resources will hopefully improve the FIU's capacity to process UTRs.

Consequently, the lead examiners recommend that the Working Group follow up on whether the increase in resources enhances FIU-the Netherlands' ability to process UTRs and provide feedback on their overall quality to the private sector, as it relates to the detection of foreign bribery. Given the essential role of the legal profession in setting up corporate structures and the particular risk these structures pose in the Dutch economic context, the lead examiners further recommend that the FIU increase its awareness-raising efforts with the legal profession on AML reporting obligations and specific exceptions for lawyers, as well as red flags for foreign bribery-based money laundering.

2. Detection by the Tax Authority

45. The FIOD is the criminal investigation service of the TCA. A dedicated Anti-Corruption Centre (ACC) was established within the FIOD and became operational in September 2016. Its mandate is to investigate foreign and commercial bribery cases (see also, Investigating Foreign Bribery). According to representatives at the on-site, the FIOD-ACC is starting to institutionalise its foreign bribery detection capacity, as well as train other agencies on detection. The TCA has specific tax auditors who work with large companies and who FIOD-ACC trains to detect and report red flags for corruption, however the specific legislation governing the TCA and the nature of tax audits present certain hurdles. According to the questionnaire responses, the Netherlands indicates that the TCA may find evidence of bribery when investigating the accuracy and completeness of tax returns; verifying expenses; or monitoring transfer pricing among large international corporate groups. Although TCA staff are bound by a duty of confidentiality (article 67, General State Taxes Act (AWR)), this duty can be lifted in cases where a serious criminal offence (including foreign bribery) may have been committed (article 161 Dutch Criminal Procedure Code (DCPC); article 43c implementing regulation AWR).

46. The Minister of Finance has issued guidance on how tax officials should report suspected crimes to criminal law enforcement agencies. This procedure involves contacting the FIOD or OM liaison officer within the TCA before reporting to the OM and it applies to specified crimes including: bribery, private-sector corruption (public corruption is already covered by a legal reporting obligation), laundering of the proceeds of non-tax offences, and terrorist financing. At the time of Phase 3, the **Ballast Nedam case** was the first foreign bribery case to be detected by the TCA. Since then, the TCA has referred three foreign bribery cases to the OM. One of these cases has been concluded (**Vimpelcom case**) and the other two are the subject of ongoing criminal investigations. The cases were detected respectively through information uncovered examining bank accounts of individuals and companies not registered in the Netherlands; an assessment of a company's tax return (namely, strange movement of shares within the company and its subsidiaries) and an investigation into transfer pricing. As noted below (Self-Reporting), the TCA also detected the foreign bribery in the **Ballast Nedam case** following an inquiry into the administration of foreign entities, after which Ballast Nedam self-reported to the OM.

Commentary

The lead examiners commend the Netherlands' tax authority for a proactive approach to detection, resulting in the referral of foreign bribery cases to law enforcement authorities, or indeed companies taking the initiative to self-report.

3. Whistleblower Protection and Reporting

47. To date, no foreign bribery cases have been detected by whistleblowers although a report from a witness has triggered a foreign bribery investigation in the Netherlands. Despite relatively well-established reporting mechanisms and whistleblower protection frameworks in Dutch companies and government agencies, these have not contributed to the detection of foreign bribery in the Netherlands, despite the enactment in 2016 of the Whistleblowers Authority Act (WAA; *Wet Huis voor klokkenluiders*).³³ Media representatives at the on-site visit were of the view that the Whistleblowers Authority (the Authority, *Huis voor Klokkenluiders*) was not what was initially expected and that it was painful for journalists, who deal with whistleblowers on a daily basis, to inform them that they are not safe to report in the Netherlands.

a) The Whistleblowers Authority Act: Groundbreaking legislation that nevertheless fails to provide comprehensive protection

48. Reporting mechanisms and whistleblower protection in the Netherlands are largely governed by the WAA. It regulates both the scope and procedure for reporting a suspicion of wrongdoing (*vermoeden van een misstand*) within an organisation and prohibits retaliation against those who report.³⁴ Furthermore, the WAA requires public and private sector organisations employing 50 or more people to put in place protected reporting channels (S. 2). The WAA mandates the Whistleblowers Authority to receive both reports of wrongdoing and reports of retaliation against whistleblowers and conduct investigations into both. Both the Whistleblowers Authority and the WAA are the subject of ongoing review and reform in the context of the Netherlands' transposition of the European Union Directive on the protection of persons who report breaches of Union Law (EU Whistleblower Protection Directive), which must be completed by 17 December 2021, in accordance with article 26(1) of the Directive.³⁵

49. The WAA defines the scope of protected individuals; sets out a tiered system for reporting and available protections and remedies; provides for investigations into the manner in which employers act in relation to employees who report 'suspected abuse'; requires organisations to put in place protected reporting channels; and prescribes the advice, investigation and prevention functions of the Authority.

Scope of protected individuals

50. The WAA defines protected individuals as 'employees' (article 1(h)) who perform or have performed work pursuant to a civil-law employment contract or an appointment under Dutch public law or who perform or have performed work other than in the context of an employment relationship. Protection also extends to interns, volunteers, ex-employees and self-employed persons. The scope of protected individuals defined in the WAA excludes officials holding a position in sensitive areas of the government (article 4(2)) such as members of the judiciary, national and military intelligence and security services. Staff at the Ministry of Defence and the National Police would be covered by articles 12quater and 12o of the Defence Civil Servants Act and article 47 paragraph 3 of the Police Act 2012, that provides that those who report suspected abuse in good faith as referred to in article 1(d) WAA must not, as a result, suffer any detriment to their legal status either during or after the period in which this report is dealt with by the

³³ [Whistleblowers Authority Act](#) (in Dutch).

³⁴ The WAA introduces a prohibition on retaliation against reporting persons by modifying Article 658c of Book 7 of the Civil Code; Section 47 (3) of the Police Act 2012 and section 12quater, second paragraph and 12o, fifth paragraph of the Defense Civil Servants Act.

³⁵ [Directive \(EU\) 2019/1937](#) of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

competent authority or agency. The OM has published internal instructions to provide guidance for protected reporting under the WAA to its employees.

Disclosures made on “reasonable grounds” and “in good faith”

51. Under the WAA, “whistleblowing” occurs when an “employee” reports a “suspected abuse” to the organisation (article 1(d)).³⁶ Under the WAA, a disclosure will only be investigated—and a reporting person only be entitled to protection—if the report is made on “reasonable grounds” and a “public interest is at stake”. It is not clear whether this provision could be interpreted to impose additional conditions on the manner in which whistleblowers must make reports in order to be protected under the WAA. There are other provisions in Dutch law that provide parallel—and contradictory—frameworks for protected reporting. This is even more important given that other applicable legislation requires that the report be made in ‘good faith’, a higher standard than that of ‘reasonable grounds’, set out in the WAA.³⁷ There are therefore differing thresholds for protection creating legal uncertainty for whistleblowers.

52. In practice, however, it is not clear that the “reasonable grounds” standard sufficiently protects whistleblowers while they still carry the burden of proving the validity of their report. The Whistleblowers Authority has not referred any cases of retaliation against whistleblowers to the civil courts; it is therefore untested whether a whistleblower must prove retaliatory intention on behalf of the employer in order to claim remedies for retaliation. Caselaw developments should be followed to ensure Dutch civil courts are evaluating whether whistleblowers had adequate reasons to make their reports, rather than the accuracy or pertinence of the disclosures. The Netherlands indicates that this issue will be resolved when the EU Directive is transposed, along with its requirement to shift the onus of proving the retaliation was not linked to the report to the employer.

53. Additionally, the WAA (article 7) requires the investigation department of the Authority to give notice to the employer of the report, which could potentially expose the whistleblower to retaliation. This risk seems more concrete given that in 2014, SBM Offshore filed a defamation suit in Monaco and the Netherlands against an employee who recorded the meeting that led to the uncovering of bribery of foreign public officials by the company and subsequently disclosed it to journalists. The recording would form part of a body of evidence used by a Dutch magazine, *Vrij Nederland*, in 2017 to claim SBM Offshore tried to conceal certain bribery allegations. The employee left SBM Offshore in 2012 following a dispute over the handling of the investigation.³⁸ In August 2020, he was arrested in Croatia while on holidays following an Interpol Red Notice issued by Monaco for the defamation suit lodged by SBM Offshore in 2014. Civil society organizations have called on Monaco authorities to immediately withdraw all charges against the whistleblower and allow him to return home. Civil society organisations have also voiced concerns on the situation of whistleblowers in the Netherlands, in particular, the mechanisms used by companies to intimidate and silence whistleblowers who speak out in high-profile foreign bribery cases.³⁹ Whistleblowers have also been the subject of political pressure and interference. In July 2019, the Dutch Foreign Ministry fired a former senior policy advisor at the Dutch embassy in Nigeria who reported to the Embassy’s police liaison officer that the Dutch ambassador had breached confidentiality with respect to the foreign bribery investigation into Royal Dutch Shell (see below, Independence). A September 2020 court ruling in The

³⁶ WAA, Section 1 (d).

³⁷ WAA, Chapter 3, Section 18 modifying Article 658c of Book 7 of the Civil Code; Section 47 (3) of the Police Act 2012 and section 12quater, second paragraph and 12o, fifth paragraph of the Defence Civil Servants Act.

³⁸ Global Investigations Review, “[Inside a company’s decision to self-report bribery](#)” (1 August 2018).

³⁹ ECPMF, “[MFRR partners an call on Monaco to withdraw arrest warrant on oil industry whistleblower Jonathan Taylor](#)” (14 August 2020)

Hague found that the former employee had made a ‘realistic whistleblower report’, was wrongly dismissed and ordered the Dutch State to pay compensation and legal costs to the whistleblower.⁴⁰

Tiered approach to reporting: internal vs external reporting

54. The WAA (article 2) introduces a tiered approach to protected reporting. Whistleblowers must first use internal reporting channels in their workplace. However, there are situations in which an employee can immediately report a suspected abuse externally, for example, when it would be unreasonable to expect the employee to report it internally (article 6(1)(e)). What is considered reasonable is not defined in the law, but is defined by the Whistleblowers Authority on a case-by-case basis. Protection is extended to reports about an organisation with which the whistleblower has come into contact through his or her work.

Scope of protections and remedies

55. Harassment of employees is prohibited by law, although the WAA does not specifically define whistleblower retaliation, as such. Definitions of retaliation differ depending on the applicable legislation (see WAA Act, Chapter 3), varying from a prohibition on ‘unfair treatment’ in the Civil Code, to ‘detriment to his legal status’ in specific public sector laws. Moreover, there are no legal requirements for employers to reinstate and compensate whistleblowers who have been dismissed or otherwise retaliated against for reporting wrongdoing. The Authority can investigate allegations of unfair treatment of whistleblowers and produce a written report. For legal remedies, whistleblowers would have to make a claim before an employment court (i.e. sub-district court) and would bear the burden of proof to establish that the retaliation was linked to the report. The Authority will issue written recognition (klokkenluiders brief) to the whistleblower prior to the beginning of its investigation into the reported wrongdoing and/or retaliation, certifying that the report was submitted in accordance with legal requirements and emphasising that s/he should enjoy the protection provided by law. The Dutch authorities emphasised that this is a policy tool developed by the Authority and does not have a formal legal status. If a whistleblower decides to take legal action, it is not known whether and to what extent a judge would take into account the written recognition or investigation report issued by the Authority. To date, written recognition and investigations reports have not been used in court cases.

56. Moreover, the WAA does not provide for sanctions for retaliation by individual employers or organisations. Panellists at the on-site visit were unanimous that for the WAA to be truly effective there needs to be a reversal of the burden of proof on the employer and further remedies available for whistleblowers.

57. The Civil Code (article 7:658c) provides that in the event that an employee reports a suspected malpractice with due care and in good faith, the employer may not adversely affect the employee, both during and after the processing of the report by the employer or authorised institution. This means that even after the investigation department of the Authority has concluded the investigation, the whistleblower is entitled to protection under the Civil Code. Dutch authorities indicate that the protection is not limited in time, and would be available as long as the disadvantage can be traced back to the report of the suspected wrongdoing.

58. Financial compensation for whistleblowers undergoing workplace harassment proceedings is also a possibility for certain public officials in the Netherlands, particularly for staff at the Ministry of Defence, the central government and the National Police. The General Military Civil Service Regulations (chapter 11c, paragraph 3), the Central Employment Agreement ‘CAO Rijk’ (chapter 13) and the General Police Decree (chapter VII. a, paragraph 2.3) allow for compensation of costs related to workplace harassment

⁴⁰ [Court of The Hague, Judgment of 09/09/2020, 8429332 RL EXPL 20-5528](#) (in Dutch).

proceedings and/or legal aid. This compensation is not available for other employees in the private and public sector.

b) The Whistleblowers Authority

59. The WAA mandates the Authority to provide advice and support to whistleblowers and conduct investigations into reported wrongdoing and alleged retaliation, if no other Dutch authority is mandated to investigate or take measures (WAA, article 6). Dutch authorities assert that the Authority can commence its investigation into the reported retaliation regardless of whether the organisation has commenced its own internal investigation into the report, or other authorities have planned or commenced criminal investigations. The Authority has three departments: the advice unit (advising potential whistleblowers on legal requirements for reporting), the investigative unit (investigates allegations of retaliation and reports of wrongdoing) and the prevention unit (advises employers on matters concerning integrity management, including the implementation of reporting mechanisms). The Authority also advises employers on implementing internal reporting mechanisms. The Authority has around 25 full time employees.

60. The services provided by the Authority are confidential, independent and free of charge for whistleblowers and employers. The Authority is statutorily independent; its board members and chairperson are appointed by Royal Decree, although it is administratively dependent on the Ministry of Interior and Kingdom Relations. Even though Parliament can only hold the Minister accountable, the agency delivers an annual report to Parliament. It has an annual budget of approximately EUR 3.5 million. Since the Authority became operational in 2016, until (and including) 2019, the Authority has received 70 requests to conduct investigations. Nineteen of these requests concerned an alleged retaliation and 28 concerned a potential wrongdoing as well as an alleged retaliation. Fourteen requests have been further investigated and five reports have been made public. In one case, the investigators found proof of unfair treatment (retaliation). The Authority has received 23 requests to investigate a potential wrongdoing (without retaliation issues), three of which have led to an investigation being conducted. The lead-time for an investigation varies and is often a year or more. The report on the 'Evaluation of the Whistleblowers Authority Act' published in June 2020 noted that the average turnaround time in practice for the investigative report is considerably higher than the statutory limits.⁴¹ The statutory period of six weeks had not been met three out of four times and the target period of one year had not been achieved four out of four times. Because the lead times of the admissibility assessment and the investigation are long, there is a danger that once the report is ready, the problem will no longer be relevant or that the consequences for the whistleblower are severe. Since 2016, the Authority has received 1 703 requests for advice on cases of potential wrongdoings/retaliation.

61. The Authority is failing to meet expectations due to its limited mandate. Civil society and private sector representatives at the on-site visit cited the lack of legal remedies and protections afforded to whistleblowers under the WAA and expressed concerns about the organisation of the Authority. Particularly, they mentioned the potentially conflictual role it has in investigating retaliation by companies against employees who report wrongdoing, whilst giving recommendations on protected reporting mechanisms to those same companies. Civil society organisations considered that most of the problems related to the Act stemmed from the lack of public consultation on the draft before enactment. Of particular concern is the Authority's mandate to investigate the reports of wrongdoing it receives, including potential foreign bribery (WAA articles 1(d) and 3a(3)). The Authority does not have the technical experience or criminal investigative mandate or tools to investigate allegations of foreign bribery. These should instead be referred directly to the FIOD-ACC or the FP. The Netherlands indicated that, in practice, the WAA does not investigate reports of misconduct received from whistleblowers and refers these directly to law enforcement authorities. However, even though the authority has concluded a coordination protocol with

⁴¹ [Report 'Evaluation of the Whistleblowers Authority Act'](#), Kwink Groep, 2020.

the OM under Article 17b of the WAA, neither FIOD-ACC nor FP have, to date, received a referral from the Authority.⁴²

c) WAA obligations to implement procedures for protected internal reporting

62. One of the most innovative aspects of the WAA is that it requires employers with 50 or more people working for them (including employees, temporary workers, interns, contractors, etc.) to have a protected internal reporting framework. The Whistleblowers Authority is not mandated to monitor implementation of this requirement although it did conduct surveys in 2017 and 2018 on internal reporting procedures and ‘confidential integrity advisors’, respectively. This analysis found that most respondent employers had introduced (79%) or were introducing (8%) a reporting procedure and about half of these were introduced or adapted in response to the WAA.⁴³ Company representatives at the on-site considered there was room for improvement, specifically, a legal mandate for the Authority to provide guidance on effective protected reporting mechanisms. In 2017, the Netherlands chapter of Transparency International conducted a study of organisational whistleblowing mechanisms in 27 publicly-listed companies which found that only 50% of companies surveyed had satisfactory levels of protection, effective procedures and a corporate culture supportive of reporting wrongdoing.⁴⁴ In May 2020, TI Netherlands assessed whistleblower frameworks within 68 companies in the Netherlands against the EU Whistleblower Protection Directive requirements. The study showed that half of those companies did not have the necessary procedures in place for internal reporting. Moreover, almost one-third of the companies failed to provide whistleblowers follow-up on their disclosure within three months.⁴⁵ It seems that major businesses in the Netherlands have well-established channels that have not been changed following the enactment of the WAA, but these channels are rarely used for reporting criminal violations such as foreign bribery

d) Cooperation between the Whistleblowers Authority and the Functioneel Parket

63. The Authority and the Board of Prosecutors General concluded a Memorandum of Understanding (MoU) on 2 February 2017, in accordance with the requirements of the WAA (article 17a(1)).⁴⁶ The MoU covers cases in which a particular issue leads to the opening of an investigation by both the Investigation Department (into a wrongdoing that has been reported) and by the OM (into a criminal offence). If there were a wrongdoing and a criminal offence respectively in a specific case, the parties would then have to hold consultations about the structure of both investigations in accordance with the cooperation protocol and exchange information based on its provisions. Interestingly, the protocol signed between the OM and the Whistleblowers Authority (article 3.3) only allows the OM to request information from the Authority’s Investigations Department and not from the Advice Department, which works with confidential information. To date, only one case reported to the Authority related to economic crime has led to the opening of a criminal investigation (fraud case referred to the *Rijksrecherche*). Investigators from the FIOD voiced concerns about the impact the law has on potential whistleblowers, given that except in cases where an employee can prove that s/he could not reasonably be asked to report internally first, that employee is expected to go through her/his own company with a report instead of directly contacting external law

⁴² [Coordination Protocol between OM and the WA](#), 2017 (in Dutch).

⁴³ Dutch Whistleblowers Authority, [Survey: Reporting procedures and integrity provisions in The Netherlands in 2017; Survey: The confidential integrity adviser - Current status and future prospects in The Netherlands](#) (2018).

⁴⁴ Transparency International Nederland, [Whistleblowing Frameworks: Assessing Dutch Publicly Listed Companies](#) (2017).

⁴⁵ Transparency International Nederland, [“Dutch companies falling short of compliance with new EU whistleblower directive”](#) (28 May 2020).

⁴⁶ [Cooperation Protocol](#) between the DPP and Huis voor Klokkenluiders (7 February 2017) (in Dutch).

enforcement agencies. Dutch authorities assert that this situation will change with the transposition of the EU Whistleblower Protection Directive and a whistleblower will be able to report internally or externally according to her own choice.⁴⁷

e) Promising reforms planned for the WAA and the Authority

64. The functioning of the Authority has been evaluated twice by the National Ombudsman, which advised providing relevant information to the whistleblower including referrals to relevant organisations and if necessary assuming a mediating role. The Ombudsman also recommended greater cooperation between the advice and investigation departments and the board. Additionally, legal and social psychological assistance for whistleblowers should be available through external providers. A draft bill amending the WAA and other relevant laws to implement the Directive was opened for public consultation from 31 July to 10 September 2020 but did not address the findings of the ‘Evaluation of the Whistleblowers Authority’ conducted in June 2020.⁴⁸ The Netherlands indicates that the draft will be reconsidered in light of comments received and then follow the normal legislative process. A further evaluation of the WAA was published in June 2020 and an additional report was expected to follow in September 2020. The Netherlands indicated that additional draft legislation would be prepared to take into account the results of these evaluations.

65. The bill on ‘Amendment of the Whistleblowers Authority Act’, as published for consultation, seems limited in scope.⁴⁹ In particular, the absence of sanctions for retaliation against whistleblowers. Furthermore, the bill mandates eight different authorities to investigate reports. How these institutions are to coordinate investigations and assure equal treatment and protection of whistleblowers remains unknown. The bill does introduce some positive measures to transpose the EU Directive, such as a presumption in favour of the whistleblower with respect to retaliation and a provision for the Authority to refer whistleblowers to agencies that can provide legal or psychosocial support. The bill also creates a new test for reporting, based on “*reasonable grounds to believe the ... information is correct*”, removing the previous references to the “*in good faith*” standard for reporting.

66. The need for amendments to the WAA Act was confirmed by Authority representatives, who during discussions recognised that strengthened legislation would be highly beneficial, along with the necessary resources to implement such changes. Government representatives, civil society and the Authority itself stated that a more fundamental revision of the WAA and the Authority was required. In particular, civil society organisations considered that a complete overhaul of the WAA would be necessary to bring it into line with the new EU Whistleblower Protection Directive.

67. Since the Phase 3 evaluation of the Netherlands, whistleblowers have disclosed allegations of foreign bribery to the media rather than internally within their organisations or to external authorities. For this reason, civil society representatives called for sanctions to deter retaliation against reporting persons in violation of the WAA. Other private sector participants also supported enhancing measures to ensure confidentiality or even anonymity for whistleblowers and discourage retaliation.

Commentary

Overall, the lead examiners are encouraged by the enactment of the Whistleblowers Authority Act in the Netherlands. It is an ambitious and world-first project to create a dedicated authority to advise and support whistleblowers, as well as receive and investigate reports of wrongdoing and

⁴⁷ [Directive \(EU\) 2019/1937](#) of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

⁴⁸ [Report 'Evaluation of the Whistleblowers Authority Act'](#), Kwink Groep, 2020.

⁴⁹ [Amendment of the Whistleblowers Authority Act to implement EU directive](#), July-September 2020 (in Dutch).

retaliation. They recognise the challenges faced by the Authority in its infancy, both in terms of legal and institutional arrangements and with respect to human and financial resources. The lead examiners are hopeful that these challenges will be addressed by the planned reforms to the WAA. Nevertheless, recent cases of retaliation against public and private sector whistleblowers in foreign bribery cases raise serious concerns.

The lead examiners therefore recommend that the Netherlands, as a priority, amend the Whistleblowers Authority Act to transpose the EU Whistleblower Protection Directive and implement, as appropriate, the recommendations of the various evaluations of the Authority, to ensure that public and private sector employees who report suspected acts of foreign bribery are protected from discriminatory or disciplinary action. Moreover, the lead examiners recommend that the Netherlands conduct training and awareness raising activities for the private sector and public agencies, specifically the Ministry of Foreign Affairs, on implementing the WAA's requirements for effective internal protected reporting mechanisms and its amendments, once enacted. They also recommend that the Netherlands ensure clear guidance and training to Whistleblowers Authority officials on procedures for detection and reporting of the foreign bribery offence to criminal law enforcement authorities.

4. Self-reporting/Voluntary disclosure by companies

68. To date, five foreign bribery cases have been detected through corporate self-reporting (or voluntary disclosure) to the FP. Ballast Nedam was the first company to self-report in the Netherlands for facts relating to foreign bribery. In January 2011, Ballast Nedam transferred the findings of an internal investigation to the OM following a 2009 request from the TCA for information about the administration of a foreign entity that was discontinued in 2001. SBM Offshore self-reported bribes paid in Equatorial Guinea, Angola and Brazil to the Dutch authorities in 2012. Both the **Ballast Nedam** and **SBM Offshore cases** were resolved through non-trial resolutions. The three other self-reports were made in 2016, 2017 and 2019 and investigations are ongoing in each case. These self-reports were mainly made to the FP. Only in one case, there was contact first with the FIOD-ACC, which then directly informed and involved the FP. In practice, and according to Dutch authorities, companies either report directly to the FP or to the FIOD-ACC because of their awareness-raising efforts with compliance officers and the publication of information on settlements in newspapers and the OM website. As discussed below (Investigative Techniques; Non-Trial Resolutions), self-reporting has led to further cooperation, such as sharing of internal investigation reports, and non-trial resolutions of foreign bribery cases in the Netherlands.

69. One positive aspect of self-reporting in the Netherlands is the fact that it has allowed the FP to detect and resolve cases more efficiently. However, there is no legal framework or prosecutorial guidance on self-reporting. The Directive on Foreign Corruption (see below, Enforcement Policy) previously referred to specific detection sources for foreign bribery although these references—including self-reporting—were removed during the recent revisions. This leaves prosecutors uncertain as to how to assess corporate self-reporting and how this should influence a decision to prosecute or resolve a case out of court, or be taken into consideration to mitigate sanctions. The Dutch authorities indicated that suspects who self-report could expect prosecutors to consider certain factors in deciding the penalties to be requested in court or offered in non-trial resolutions, such as acknowledgment of the offences; measures to ensure future compliance; internal investigation and cooperation; willingness to compensate for damages and recidivism.

70. As emphasised by members of the legal profession at the on-site, companies have no certainty that prosecutors will offer a non-trial resolution when they self-report and indeed some cases have been resolved out-of-court in the absence of a self-report by the company involved (e.g. Vimpelcom and Telia). Private sector and legal representatives considered that the uncertainty of the consequences of a self-report—including in the context of facts that involve several countries and may result in multijurisdictional proceedings—deters a number of companies from coming forward. Prosecutors at the on-site visit

indicated that when a company self-reports, and depending on the facts of the case, they may advise it to also approach other national law enforcement authorities. Companies and business associations considered that there were insufficient incentives for self-reporting, compared with other jurisdictions that offer settlements or declinations for companies that self-report, self-remediate and cooperate. Another concern with self-reporting relates to how it could potentially expose an auditor to liability for audit opinions issued during the period subject to self-report, or indeed incriminate natural persons. Participants in the on-site visit—including prosecutors—were unanimous that guidance on self-reporting was necessary. Specifically, prosecutors mentioned the need for guidelines on procedures for non-trial resolutions in the context of a self-report by a company.

Commentary

The lead examiners welcome the use of self-reporting as a source of detection of foreign bribery cases in the Netherlands. However, self-reporting has only resulted in the detection of a small number of cases, to date. There appears to be a general reluctance to make self-reports given uncertainty about the consequences and the lack of an overarching legal framework. The lead examiners therefore recommend that the Netherlands establish a clear policy and guidelines explaining the extent to which self-reporting will be considered in resolving and sanctioning foreign bribery cases. Furthermore, they encourage the OM to provide guidance on procedures for self-reporting. Finally, they note that the uncertainty of facing multiple proceedings in various countries may create a disincentive for self-reporting to enforcement authorities.

5. Detection and Reporting by Accountants and Auditors

71. The 2009 Recommendation on Further Combating Bribery of Foreign Public Officials encourages Parties to require external auditors to report indications of suspected bribery to corporate management and, if appropriate, corporate monitoring bodies and to consider requiring reporting to external law enforcement authorities. As noted above (Netherlands Economy and Foreign Bribery Risks), gatekeepers play a key role in facilitating possible foreign bribery offences from the Netherlands, particularly in their role as TCSPs for mailbox companies. The accounting and audit profession falls under this category and can be an important source of detection.

72. In Phase 3, the Working Group recommended that the Netherlands ensure that the foreign bribery offence and the accounting and auditing requirements of the Convention were covered in training programmes and related guidelines for the accounting and auditing profession, in order to facilitate a more active role in detecting foreign bribery (Recommendation 6(a)). At the time of the Written Follow-up, the Working Group noted that the Royal Dutch Professional Association of Accountants (NBA) had developed a draft guideline on training auditors to detect foreign bribery but that the training itself would not be provided until the guideline had been finalised and therefore considered the recommendation not implemented.

73. The Netherlands implemented the Clarified International Standards on Auditing (ISA) (*Nadere Voorschriften Controle- en overige Standaarden* – ‘NV-COS’) in 2010. The requirements for accountants and external auditors to report suspicions of fraud in the Netherlands are based on ISA 240, ISA 250, the Auditors Supervision Act (article 36) and Audit Firms Supervision Act (article 26(3)). Accordingly, when auditing a company’s annual accounts, auditors are obliged to conduct 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 the suspicions to management and subsequently verify whether adequate action has been taken. If the fraud is material to the financial statements and adequate action has not been taken by management, the auditor is obliged to report the suspicions to the Dutch police, after which the prosecutor will take appropriate action. The term ‘fraud’ applied in the ISA standards would cover suspicions of foreign bribery. In addition, auditing professionals in the Netherlands

are reporting entities under the Wwft and are required to file UTRs with the FIU (see above, Detection through the Dutch AML Framework).

74. Since Phase 3, the Netherlands has adopted the International Ethics Standards Board for Accountants (IESBA) Non-Compliance with Laws and Regulations (NOCLAR) standard. The NBA adopted rules governing non-compliance with laws and regulations (known as NV NOCLAR) for the accountancy profession pursuant to article 24 of the Code of Conduct and Professional Practice for Accountants Regulation (VGBA). While the NV NOCLAR does not contain a direct reporting obligation for auditors, it outlines situations in which the auditor should consider reporting in the public interest. Under article 16 of the NV NOCLAR, an auditor is required, after urging the client to take measures to rectify non-compliance, to consider whether s/he should take further action in the public interest, including reporting to the competent authorities. Before making such a report, the auditor should inform the client.

75. In addition, article 6 of the NV NOCLAR provides that an auditor should immediately report the non-compliance to a competent authority if direct action by the competent authority appears necessary to prevent or mitigate material damage. In December 2016, the NBA issued Practice Note 1137 on 'Corruption, procedures of the auditor'.⁵⁰ The Practice Note outlines the relevant legal framework, describes corruption risks and sets out a procedure for auditors to follow when corruption indicators arise in the context of an audit, including communicating findings of corruption.

76. The AFM conducted a thematic survey of the 'Big 4' audit firms in the Netherlands to determine the degree of foreign bribery risk management. It revealed that the Big 4 audit firms recognise the risk of audit clients' involvement in foreign bribery. In March 2016, the AFM sent a letter to the licensed audit firms to remind them of the risks of corruption. In 2019, the AFM launched a further thematic review on audit firm procedures to prevent corruption. The objective of the review is to influence audit firms to strengthen their control measures, in order to prevent involvement with corruption. The AFM and the Financial Supervision Office (BFT) have concluded a cooperation agreement allowing them to exchange information for the purposes of supervising the accounting and audit profession.⁵¹ As noted above, auditors and an audit firm have been investigated and prosecuted for their role in concealing bribery of foreign public officials in the context of the **Ballast Nedam case**. While the firm was sanctioned, the criminal proceedings against the individual auditors were dismissed at first instance. There are ongoing criminal proceedings against another audit firm for its role in the **Vimpelcom case**. On 17 June 2020 the Dutch Audit Chamber ruled on a disciplinary action (namely, a reprimand) brought by the AFM against PwC auditors for Dutch company SHV and its Middle Eastern subsidiary, Econosto, for failing to report cash commissions of over EUR 3 million paid to third parties which raised red flags for fraud and corruption between 2007 and 2014. In its decision, the Chamber exonerated the group auditor for the parent company on the basis that the amount of the alleged cash payments was immaterial to the overall group financial statements and that the audit measures taken were adequate, but upheld the action brought against the auditor of the subsidiary. The AFM may appeal the decision.⁵² The outcome of these disciplinary proceedings (reprimand for the subsidiary auditor and exoneration for the group auditor) do not send a strong signal to the audit profession about its responsibility to detect and report suspected foreign bribery. Both companies are the subject of criminal investigations into possible foreign bribery offences arising from these facts; however, it is unclear whether the auditors are also under criminal investigation.

77. Representatives of the audit profession at the on-site visit noted that there was an increasing amount of guidance and training from supervisory and law enforcement authorities (AFM; NBA; FIOD and

⁵⁰ [NBA Practice Note 1137: Corruption, procedures of the auditor](#), 22 December 2016.

⁵¹ BFT Website, "[Better Wwft supervision of accountants through collaboration between AFM and BFT](#)" (25 May 2020, in Dutch).

⁵² AFM website, "[AFM partially successful in disciplinary action against SHV accountants PwC](#)" (17 June 2020, in Dutch).

FIU) focusing on the role of the profession in detecting corruption and money-laundering. They considered that progress had been made, evidenced by more risks identified in company financial statements and more frequent issuing of qualified audit opinions. They also seemed very conscious of the threat of potential liability, noting that, “*in a corruption investigation, the first thing that the prosecutors do is to look at the gatekeepers involved*”. Despite the significant regulatory changes, institutionalised guidance and training and a clear criminal justice policy of prosecuting accountants and auditors for their role in foreign bribery cases, prosecutors and investigators at the on-site visit had not seen an uptake of direct auditor reporting. Auditors made five reports of suspected fraud to police in 2018 and one fraud report in 2019. Law enforcement officials were of the view that if auditors are going to report, they will most likely report to the FIU. Until 2018 auditors reported approximately 1 100 unusual transactions annually to the FIU. In 2018 the number of UTRs submitted by auditors increased to 1 987 and in 2019 to 3 444. This increase is partly due to a new objective reporting threshold in relation to the high-risk countries designated by the European Commission (see Detection through the Dutch AML framework). In comparison, between 2012 and 2016 auditor UTRs resulted in 70 STRs disclosing corruption offences that were not already the subject of a criminal investigation.

Commentary

The evaluation team congratulates the Netherlands for its significant efforts to address the role of accountants and auditors as ‘gatekeepers’ for the financial system and in light of the role they play in auditing various legal entities, including mailbox companies. They welcome the impressive array of regulatory and case law advances coupled with awareness raising initiatives undertaken by supervisory authorities, professional bodies and law enforcement agencies since Phase 3 and consider Recommendation 6(a) fully implemented. The auditing profession submits a substantial number of UTRs to the FIU annually; however there is minimal direct reporting to criminal law enforcement agencies.

6. Increasing detection through other potential sources

78. In Phase 3, the lead examiners noted that while the Dutch authorities could open investigations based on a wide range of possible sources, the number of investigations remained low. The Working Group therefore recommended that the Netherlands proactively gather information from diverse sources at the pre-investigative stage to increase the sources of allegations and to enhance investigations (Recommendation 3(a)). The Working Group deemed this recommendation partially implemented at the time of the Phase 3 Written Follow-up report, noting that the OM had set up a forum in which all relevant agencies could share information and consult. However, the forum had only met once and none of the seven new foreign bribery investigations at the time had resulted from proactive detection efforts. This Phase 4 evaluation highlighted the significant efforts undertaken by the FIOD-ACC and FP to increase detection and intelligence gathering capacity.

a) The role of the Ministry of Foreign Affairs and Embassies

79. Employees of the Ministry of Foreign Affairs (MFA) are subject to the general obligation in art 162 DCPC of civil servants to report suspected offences by Dutch nationals or companies. The MFA’s Integrity Coordinator acts as a contact point for the Ministry and for embassy staff. In 2019, the Integrity Coordinator created a unified hotline and resource centre (a central internal integrity reporting office) for MFA staff to report concerns in the field of social and business integrity (such as fraud, conflicts of interest, malpractices, accepting gifts and foreign bribery). Information on the hotline and resource centre was communicated to all staff during the Week of Integrity in September 2019 in several languages. If a report of foreign bribery is submitted via the hotline, the Integrity Coordinator will forward it to the FP. Staff (whether capital or

embassy-based) should inform their hierarchical superior or those in charge of the mission, where possible. The MFA Code of Conduct has an Annex dedicated to the procedure for reporting foreign bribery.

80. The MFA has also conducted awareness raising activities on the duty to report for MFA officials posted abroad, including the issue in annual ambassador conferences. As noted below (Official Development Assistance), Dutch embassies abroad are responsible for administering certain ODA projects and assist with conducting risk assessments for other ODA agencies, such as the Netherlands Enterprise Agency (RVO). Two foreign bribery cases have been reported from Dutch embassies abroad to the FP since the Phase 3 Written Follow-up Report in 2012. One report was not investigated because of a lack of evidence to indicate foreign bribery and the other was not investigated due to inadequate merits or scale to justify prioritising it for investigation.

81. As noted above and below, a senior policy officer at the Dutch embassy in Nigeria was fired in July 2019 after reporting to the Embassy police liaison officer the Ambassador's breach of confidentiality with respect to the foreign bribery investigation into Shell and other integrity violations. The Court of The Hague on 9 September awarded damages to the whistleblower and found that not only was the report a valid whistleblower report, but that the dismissal was unlawful. The evaluation team's concerns at the Dutch ambassador to Nigeria disclosing the confidential Dutch criminal investigation into foreign bribery to Royal Dutch Shell, and accompanying recommendations to the MFA, are outlined below (see, Independence). This case raises concerns about the MFA's framework for protected reporting and involvement in foreign bribery cases contrary to Article 5 of the Convention.

b) Intelligence

82. The FP's Anti-Corruption Team has an intelligence coordinator and corruption policy officer who work on developing intelligence on potential cases and hold periodic meetings with the FIOD-ACC to discuss incoming cases. This intelligence is assessed and may lead to the institution of preliminary criminal investigations. This Team is also the point of contact for both national and international partners and focuses on the acquisition and intake of cases within the legal and policy framework. FIOD-ACC and the FP intelligence officers at the on-site visit described a joint internal yearly plan that sets out the 'type' of cases to target for detection and investigation in the coming year. This policy is not determined based on a risk assessment, *per se*, but instead targeting specific sectors or focusing on cases that can have the biggest impact, for example in 2019 the focus was on auditors or 'gatekeepers', and in 2020 on healthcare and trusts.

c) Media

83. In the Netherlands, media reports of alleged foreign bribery can be used to open investigations as long as they are sufficiently detailed and can be verified. Law enforcement authorities will attempt to substantiate claims in the media with other independent sources before moving forward to a formal investigation. The Vimpelcom and Teliasonera cases were initiated partly on the basis of investigative journalism in Sweden. There are two ongoing foreign bribery investigations which were detected through media reports and a third case where the investigation started from information obtained both from the media and from an MLA request. According to the questionnaire responses, the reports on two of these investigations originated from domestic media and the remaining three from international media. The FIOD and FP monitor media and civil society reporting on a daily basis. The authorities in the Netherlands also report that the Matrix of alleged foreign bribery cases maintained by the OECD is used to obtain information on corruption indicators and criminal procedures in other countries dealing with the same entities. Investigative journalism has been very active in the Netherlands in uncovering and reporting allegations of foreign bribery. Media representatives at the on-site visit demonstrated impressive awareness of issues covered by the Convention.

84. In 2020, the Netherlands ranked 5 out of 180 countries for the most free press, in the Reporters without Borders World Press Freedom Index.⁵³ Following a rise in online threats, in 2018 the government instituted a new policy whereby all criminal complaints filed by a journalist have to be thoroughly investigated.⁵⁴ The Netherlands appears to have in place a robust legal framework to protect freedom of the press, particularly since the entry into force of the Source Protection in Criminal Matters Act, on 1 October 2018. This Act, which amended the Code of Criminal Procedure, establishes that journalists summoned as witnesses may refuse to answer questions from the judiciary that may compromise the confidentiality of their journalistic sources. In line with the case-law of the European Court for Human Rights, this refusal may be overruled by the court if the magistrate considers that there is an overriding requirement of the public interest that outweighs the right of non-disclosure.

85. Of particular concern is the fact that witnesses may be held in detention by the court if they refuse to respond to the judge's questions. In 2019, following the entry into force of the new protections, telephone conversations between a journalist and his source were intercepted in the context of a murder investigation. The journalist was called as a witness in the trial and, on 24 October 2019 was detained for 36 hours by the Rotterdam District Court for refusing to provide information on the source despite invoking the provisions establishing source protection.⁵⁵

Commentary

The lead examiners welcome the strong legal framework in place to protect freedom of the press in the Netherlands, along with regular monitoring of the media by law enforcement authorities as a source of detection. They are, however, concerned about reports of a journalist being detained for not identifying his sources, in a case unrelated to foreign bribery. The lead examiners will follow-up to ensure that sources who report foreign bribery are afforded protection in accordance with the Source Protection in Criminal Matters Act.

d) International cooperation and multilateral organisations

86. MLA requests from countries investigating their public officials for accepting bribes from businesses in the Netherlands are a potential source of foreign bribery allegations. The FP has an International Legal Assistance Centre (FP-IRC) that receives incoming requests for legal assistance and, in cooperation with the National Coordinating Prosecutor for Corruption (NCPC) and the FIOD, determines whether there are potential grounds for initiating an investigation into corruption in the Netherlands and its respective coordination with the requesting country (see, Mutual Legal Assistance and Extradition in Foreign Bribery Cases). There are currently four ongoing foreign bribery investigations detected through incoming MLA requests.

87. Referrals from multilateral development banks and international organisations are also dealt by the FP, specifically, the Information and Operational Coordination Team (TIOC). Within the TIOC, the intelligence coordinator and the policy officer responsible for intelligence on money laundering and corruption cases, in cooperation with the FIOD-ACC, assess the incoming intelligence and determine whether to institute a preliminary criminal investigation. There are three ongoing foreign bribery investigations that resulted from referrals from international organisations (specifically, the European Anti-Fraud Office (OLAF)) and multilateral development banks.

⁵³ [Reporters without borders](#), Netherlands 2020

⁵⁴ Ibid.

⁵⁵ Some news articles on the case of Robert Bas, the journalist detained by the court: [Het Parool](#), [European Federation of Journalists](#), [Teller Report](#), [AD News](#), [NL Times](#).

e) Special Municipalities could better detect foreign bribery

88. The BES Islands are special municipalities within the Netherlands and are directly administered by the Dutch government.⁵⁶ The financial services industry is active on the BES islands. As such, they may be used to facilitate foreign bribery or launder its proceeds. This represents a great potential for detection, including money laundering predicated on foreign bribery. Steps have been taken to improve the detection of economic and financial crimes on the BES islands. The Dutch MJS has allocated EUR 303 000 annually for corruption investigations by the National Police Internal Investigation Department (*Rijksrecherche*). The evaluation team also heard that the *Rijksrecherche* conducted a baseline study to analyse criminality in the region. However, how this would be potentially used by the local authorities remains to be seen.

⁵⁶ [Evaluation](#) of the new administrative structure of the BES Islands 2015.

B. Enforcement of the Foreign Bribery Offence

1. The Foreign Bribery Offence

89. Relevant amendments to the Dutch Criminal Code entered into force in the Netherlands on 1 January 2015. In its Phase 3 Written Follow-up report, the Netherlands indicated that the foreign bribery offence would be applied relying on existing domestic bribery case law. The Working Group acknowledged the amendments made to simplify and harmonise the foreign bribery offence in 2015, including the distinction between bribery to induce a violation of official duty and bribery to receive a benefit within the official's duty (Recommendation 1(a)). Given this, at the time of the Netherlands' Phase 3 Written Follow-up report, the Working Group considered Recommendation 1(a) fully implemented. However, the WGB agreed during the Written Follow-up report that in line with standard procedure, a full evaluation of the amended law should be conducted in the next evaluation phase, given the Netherlands' reliance on domestic bribery jurisprudence in the absence of case law on the foreign bribery offence.⁵⁷

90. While Phase 4 presented an opportunity to explore the revised offence at the on-site visit, there continues to be no caselaw on the foreign bribery offence and so the evaluation team has no confirmation that the offence would hold up in court. Furthermore, while the OM's Directive on Foreign Corruption was modified in 2013 and 2020, the modifications did not clarify issues with the foreign bribery offence that had been identified in previous evaluations of the Netherlands. The full text of the offence following the 2015 reform reads as follows:

Pursuant to **Article 177 DCC** (Active bribery of a public official):

1. Punishment in the form of a prison sentence of no more than six years or a fine in the fifth category will be imposed on:

1°. Whoever makes a gift or a promise to a public official, provides, or offers him a service with a view to getting him to carry out or fail to carry out a service;

2°. Whoever makes a gift or a promise to a public official, provides, or offers him a service in response to or in connection with a service, past or present that the official carried out or failed to carry out.

2. The same punishment will apply to anyone who commits an offence as described in the first paragraph, under 1°, against a person who has prospects of an appointment as a public official, if the appointment as a public official is followed.

New Article 178 DCC (Active bribery of a judge)

⁵⁷ Netherlands [Phase 3 Written Follow-up report](#), p. 5.

1. Whoever makes a gift or a promise to a judge or provides or offers him a service with a view to exerting influence on his decision in a case that is subject to his judgment will be punished with a prison sentence of at most nine years or a fine in the fifth category.
2. If the gift or promise is made or the service is provided or offered with a view to obtaining a conviction in a case, the guilty person will be punished with a prison sentence of at the most twelve years or a fine in the fifth category.
3. The offender may be disqualified from the practice of that profession if he commits any of the serious offences defined in this section in the practice of his profession.
4. Disqualification from the rights listed in section 28(1)(1°), (2°) and (4°) may be imposed.

New Article 178a DCC (Extended definition of public official)

1. With regard to Article 177, persons working in the public service of a foreign state or an organization governed by international law are equivalent with public officials.
2. With regard to Article 177, first paragraph, under 2°, former public officials are equivalent to public officials.
3. With regard to Article 178, judges in a foreign state or an organization governed by international law are equivalent to judges.

a) Elements of the offence

Make, promise, offer

91. Article 177 DCC refers to the 'making' of a gift or a promise to a public official, it does not cover the offer of a gift. It also refers to the provision or offer of 'a service'. Dutch authorities assert that a 'service' can be broadly interpreted and that the purpose of including the word 'service' was to transpose judicial precedent. Moreover, in its questionnaire responses, the Netherlands indicated that according to its legislative history and Parliamentary Papers, it is "*immaterial whether the consideration was actually provided or the public official accepted the promise, gift or service (meaning an offering of a promise)*".⁵⁸ According to case law of the Supreme Court the offering of a gift is to be considered as a promise and is criminalised in this way.⁵⁹

Definition and scope of gift, promise or service

92. Articles 177 and 178 DCC refer to 'gift', 'promise' and 'service' to describe the undue advantage in a bribery case. In its questionnaire responses, the Netherlands indicated case law defines a 'gift' as something that has value for the recipient. In 1994, the Supreme Court expanded the definition to include material as well as immaterial advantages.⁶⁰ The Dutch authorities provided other examples of judicial interpretation of gifts in domestic bribery cases, including free travel, use of a holiday chalet at a reduced rate and a commission for services rendered.⁶¹ Some of the ongoing and concluded foreign bribery cases shed light onto what constitutes a gift. For example in the **SBM Offshore case**, advantages included

⁵⁸ Parliamentary Papers, House of Representatives 1998/99, 26469, no. 3. Article 177 of the Criminal Code was modified to implement the OECD Convention (and other provisions). Besides 'gift' and 'promise', the article was broadened by the addition of the words 'provides or offers a service'.

⁵⁹ See HR 29 November 1915, NJ 1916, p. 300. "Considering *ex officio* that the offering of a Guilder (old Dutch money) is to be considered as making a promise within the meaning of article 177 DCC" (in a domestic bribery case).

⁶⁰ The Netherlands' Supreme Court, 31 May 1994, NJ 1994, 673

⁶¹ See Parliamentary Papers, House of Representatives 1998/99, 469, no. 3, p. 4.

payments for travel and study costs to one or more Angolan government officials or their relatives, cars and a house.

93. In November 2018, the Netherlands Supreme Court confirmed the conviction of the former Prime Minister of Curaçao for receiving large sums of money from an Italian businessman. The Prime Minister argued that the payments served to finance a yet-to-be-formed political party and therefore did not constitute 'gifts' pursuant to offence. The Supreme Court confirmed the ruling of the court of appeal that the payments could be considered as 'gift', since they also had value for the Prime Minister when used for financing the political party. The interpretation of 'gift' complies largely with the requirements of Article 1 of the Anti-Bribery Convention. For the interpretation of what would constitute a 'service', Dutch authorities refer to a case concerning domestic bribery where a Dutch public official accepted help from a subordinate to build his house, thereby making him vulnerable to potential inducements to act or refrain from acting in the performance of official duties.⁶² The evaluation team is reassured that the FP is willing to apply a broad interpretation of 'gift', 'service' and 'advantage' in foreign bribery cases. However, given that the foreign bribery offence remains to be tested before the Dutch courts, the Working Group should follow-up on the interpretation of these terms as case law develops.

Definition of a foreign public official

94. Commentary 3 to the Convention requires countries to introduce “an ‘autonomous’ definition [of foreign public official] *not requiring proof of the law of the particular official’s country*”. Article 178a DCC defines foreign public officials as “*persons in the public service of a foreign state or of an international (law) organisation*”. This text was not altered by the 2015 amendments and is not defined further in the DCC or elsewhere under Dutch law. The scope of the definition is therefore left to the courts to interpret on a case-by-case basis. The definition is not autonomous and may involve in practice, a reference to other sources of evidence, such as evidence of the person’s employment status and duties in the foreign state.⁶³ The lack of a definition for foreign public officials (and therefore its non-autonomous nature) was raised in the Phase 2 evaluation of the Netherlands and by other international monitoring bodies, including the Council of Europe’s Group of States against Corruption (GRECO).⁶⁴ Government representatives at the on-site visit also indicated that the courts would refer to the nature of the tasks being performed (for example, by an SOE to determine whether they involved the provision of a ‘public service’).

95. In 2008 GRECO recommended that the Netherlands analyse if there is a need to clarify which functions are covered by the notion of ‘public official’ in the DCC bribery offences (recommendation i). It found that Dutch Supreme Court jurisprudence was contradicted by “*instances in which courts deemed the extent of the defendant’s knowledge as to his/her or another’s status as a public official a relevant factor in deciding on the guilt of the person concerned*”. In its 2010 compliance report to GRECO, the Netherlands reported having commissioned a study by the Research and Documentation Centre (WODC) in the context of a debate on the implementation of public officials’ duty to report criminal offences, which confirmed GRECO’s concerns and found that the term ‘public official’ used in Dutch criminal law can lead to misunderstandings regarding the duty to report for private entities executing public functions. The Netherlands indicated that this would be rectified, by either amending the legislation, or adding a

⁶² Den Haag 20 December 2017, ECLI:NL:GHDHA:2017:3702, under 11.6.2.

⁶³ In 2007, the Court of Appeal deemed the extent of the defendant’s knowledge as to his/her or another’s status as a public official a relevant factor in deciding on the guilt of the person concerned (*cf.* Court of Appeal Den Bosch, 12 October 2007, LJN: BB5551 and LJN: BB5556).

⁶⁴ [Phase 2 Report](#) (para. 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” and NL GRECO report, 2008, para. 87.

supplementary provision to the general administrative order pertaining to the relevant criminal provisions.⁶⁵ Nothing has been done to address the problems with the definition of public official since the study was commissioned.

96. The evaluation team is particularly concerned that the 2015 amendments to the bribery offences were not used to also clarify the definition of public official. Nevertheless, prosecutors at the on-site visit did not consider that the lack of definition of public official was problematic and pointed to the judgment of the Amsterdam District Court in the **Takilant case**. This case brought before court the off-shore company through which bribes were channeled in the **Vimpelcom** and **Teliasonera cases**. The court considered the President of Uzbekistan's daughter beneficial owner of Takilant, a public official noting her actual "control over government bodies in Uzbekistan, including those working in the telecom market".⁶⁶ The evaluation team notes, however, that this case was tried *in absentia* for the passive bribery offence.

Payments through intermediaries and to third parties

97. Articles 177 and 178 DCC do not refer to bribes paid through intermediaries or bribes for third party beneficiaries. The 2020 update to the Directive on Foreign Corruption incorporated the following text as guidance for prosecutors: "Companies operating abroad should be under no misapprehension that using the services of a third party, such as a local agent, representative or consultant, confers immunity from criminal liability. It is widely known that such parties are often used in the payment of bribes abroad." As was the case in previous evaluations the Dutch authorities consider that accessorial offences in the DCC such as aiding and abetting (articles 47-48 DCC) would apply. In the **SBM Offshore case** bribes were paid through commercial agents (intermediaries). According to the OM, the payments had been made with the knowledge of people then employed by SBM, including a then member of the Management Board. In the **Teliasonera/Vimpelcom cases** bribes were paid through Takilant, a mailbox company incorporated in Gibraltar whose beneficial owner was the daughter of the Uzbek president. The issue of liability for bribes paid to third parties has not, to date, been tested in a foreign bribery case in the Netherlands.

Commentary

The lead examiners had the opportunity to evaluate the 2015 amendments to the foreign bribery offence (article 177 DCC) which largely conform to the requirements of Article 1 of the Convention. However, they are concerned that these did not address issues identified in previous evaluations and evaluations by other organisations and note that the foreign bribery offence has still not been tested before the courts. They therefore recommend that the Working Group follow-up on the interpretation of the offence in practice to ensure that: (a) the offer of a bribe is criminalised and enforced; and (b) the definition of 'foreign public official' is autonomous, sufficiently broad to cover employees of public enterprises and consistent with Article 1 of the Anti-Bribery Convention.

The lead examiners also recommend that the Netherlands continue providing training and awareness raising for prosecutors and judges on the standards of the Anti-Bribery Convention, including the definition of foreign public official, and liability for bribes paid through intermediaries and to third party beneficiaries.

b) Criminalisation in the Caribbean

98. The Kingdom of the Netherlands ratified the Anti-Bribery Convention on behalf of the European part of the Netherlands. 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'. Furthermore, 'Netherlands Antilles' does not exist anymore and now there are three

⁶⁵ [Third Evaluation Round: Compliance Report on the Netherlands](#) (GRECO RC-III (2010) 5E), 11 June 2010, p. 3.

⁶⁶ ECLI: NL: RBAMS: 2016:4520

autonomous countries and three ‘special municipalities’. The islands of Aruba, Curaçao and Sint Maarten are entirely independent countries and have their own autonomous criminal justice systems, whilst sharing the Supreme Court with the Netherlands and aligning criminal codes as much as possible. Curaçao adopted a new Criminal Code in November 2011; Aruba in February 2014 and Sint Maarten in 2015. All three islands therefore now criminalise bribery of foreign public officials. The BES Islands are special municipalities of the Netherlands and are directly administered by the Dutch government.⁶⁷

99. The BES islands have their own Criminal Code (legislated by Dutch Parliament), which sets out the criminal law applicable on those islands and its provisions closely resemble the Dutch Criminal Code.⁶⁸ Specifically, foreign bribery is criminalised (articles 183 and 183a, 184 and 184a) and the amended sanctions in the DCC have been reflected, including the new maximum sentence of ten per cent of the previous year’s annual turnover for legal persons (article 53). As described below, the Netherlands has taken a more proactive approach to ensure enforcement of the foreign bribery offence in the Caribbean. Part of the approach has been to allocate resources for investigative personnel at the BES Islands.

c) Enforcement of the Convention in the special municipalities in practice

100. As described above, the BES Islands present certain risks of money laundering predicated on foreign bribery. However, to date, foreign bribery investigations have not been opened on the islands. The Dutch MJS mandates the BES Islands’ authorities to investigate and prosecute offences under the BES Islands Criminal Code. The MJS is not allowed to interfere with cases but it is responsible for the legal system on the islands. In practice, the BES Islands have four public prosecutors, the majority of which (70-80%) come from the European part of the Netherlands and are posted to the Islands for a period of five years. The *Korps Politie Caribisch Nederland* (KPCN) has 100 local officers on the Islands. In order to identify, coordinate and identify investigative priorities with the Islands, additional funding of EUR 303 000 has been made available for the *Rijksrecherche* for the period 2020-2022. This will be used to cover the costs of stationing two experienced and specially selected *Rijksrecherche* detectives on Bonaire (but operating in all three special municipalities) for a period of three years, starting August 2020.

101. The core function of the *Rijksrecherche* detectives will be to perform and/or coordinate criminal investigations coming within their remit, under the authority of the chief public prosecutor on Bonaire. In addition, there are between six to eight FIOD officers and 20 officers from the Dutch National Police posted to Curaçao to manage a corruption and money laundering taskforce, which has jurisdiction over cases on BES Islands, Curaçao and Sint Maarten. The taskforce exists since 2016. Since the start, FIOD and police officers are participating in this taskforce. The taskforce investigated, among other things, several big corruption cases on Sint Maarten (Emerald, Larimar) which already led to convictions of politicians on Sint Maarten.⁶⁹ The FIOD-ACC also conducted a three-day workshop in Curaçao on investigating corruption. The Netherlands’ Supreme Court has jurisdiction for the entire Kingdom, including the Caribbean part of the Kingdom (special municipalities of the BES Islands and the autonomous countries of Curacao, Aruba and St Maarten).

Commentary

The lead examiners welcome the more proactive approach taken by the Netherlands to promote enforcement of foreign bribery and other financial crimes in the BES Islands, such as stationing Rijksrecherche and FIOD officers on the Islands. They are, however, concerned by the lack of detection of foreign bribery or related offences by BES Island authorities. The lead examiners

⁶⁷ [Evaluation](#) of the new administrative structure of the BES Islands 2015.

⁶⁸ [BES Criminal Code](#).

⁶⁹ For more details on the ‘Emerald-case’, please see: <https://www.sxm-talks.com/the-daily-herald/court-hears-first-suspects-in-so-called-emerald-case/>

therefore recommend that the Netherlands ensure that the BES islands have appropriate resources, training, expertise and capacity to investigate and prosecute foreign bribery and related offences.

d) Small Facilitation Payments

102. Paragraph VI of the 2009 Recommendation asks countries to conduct periodic reviews of their policy and approach to small facilitation payments to effectively combat the phenomenon, and to encourage companies to discourage their use. Small facilitation payments are criminalised in the Netherlands (article 177 DCC). At the time of Phase 3 and the Phase 4 on-site visit, the Directive on Foreign Corruption stated categorically that such payments will not be prosecuted, subject to certain criteria, despite recognising that they are technically illegal.⁷⁰ The Working Group recommended in Phase 3 that the Netherlands review this policy and continue to encourage Dutch companies to prohibit or discourage their use, and in all cases accurately record such payments in the companies' accounts (Recommendation 1(b)). At the time of the Netherlands Phase 3 Written Follow-up report, the Working Group considered recommendation 1 (b) partially implemented, noting that targeted measures to encourage companies to prohibit, discourage and record such payments were insufficient.

103. In Phase 2 and Phase 3, the Working Group raised concerns that the Directive on Foreign Corruption's guidance that small facilitation payments would not be prosecuted established a *de facto* exception to the foreign bribery offence, creating tensions between two sources of law, and, consequently, lack of clarity for stakeholders. There was also the concern that the Directive could incite passivity by law enforcement authorities when assured by companies or defence lawyers about a bribe being a facilitation payment. Questions were raised regarding compliance with the Convention and Commentary 9. The Directive on Foreign Corruption was revised and reissued on 1 October 2020. The revision removed references to a policy of not prosecuting small facilitation payments. In particular, section 1.2 of the Directive now expressly states that "[n]o criteria is laid down for distinguishing between gifts that would lead to a prosecution and those that would not".⁷¹ As the Directive was revised after the on-site visit, the evaluation team did not have the opportunity to discuss the changes with various stakeholders.

104. When discussing the previous version of the Directive, prosecutors at the on-site visit confirmed that it was indeed a matter of discretion whether to prosecute cases that involve facilitation payments. In the Netherlands, prosecutorial Directives have 'external effect' for issues eligible for such an effect and therefore can be referred to as a source of law in criminal proceedings and used by criminal defendant. Therefore, defendants could use the previous Directive's statement on non-prosecution of small facilitation payments as a potential defence in criminal proceedings for such payments. This suggests that *de facto* the Directive is a source of law and in its previous version was contradicting the prohibition on small facilitation payments in article 177 of the Dutch Criminal Code.

105. In its questionnaire responses, the Netherlands indicate that awareness-raising activities on this issue have focused on a brochure published in 2012 and updated in 2017 by the Ministries of Economic Affairs, Foreign Affairs and Justice and Security as well as the Code of Conduct of the MFA. The MFA, together with ICC Netherlands have organized roundtables with the private sector where small facilitation payments are discussed. Representatives from the business community at the on-site visit were uncertain about the legal status of these payments in the Netherlands and were unaware of the OM's previously stated policy not to prosecute them, including in situations where a company is investigated abroad for paying facilitation payments. Representatives from large Dutch companies nevertheless expressed that the conflicting approaches to small facilitation payments do not change their zero tolerance approach to

⁷⁰ For the list of criteria, see the [Netherlands Phase 3 evaluation](#), para. 25.

⁷¹ [Directive on Foreign Corruption, October 2020](#).

bribery, even though it sends a “*wrong signal to companies*” and “*makes matter more difficult from a compliance perspective*”.

106. Accounting and audit professionals were aware of the text of the previous version of the Directive and indicated that if they detected a small facilitation payment they would report to the client and probably to the FIU. If they realised that the payment was being made systematically, they would then report it to the FP. This places a significant burden on the auditor in determining when a facilitation payment becomes a bribe and therefore raises the ongoing issue of formal and systematic awareness raising activities to discourage facilitation payments.

Commentary

Lead examiners welcome the recent revisions to the Directive on Foreign Corruption to avoid inconsistencies between the Directive and the foreign bribery offence.

They recommend that the Netherlands, in the context of the recent amendment of the Directive, conduct more targeted efforts, including training and awareness raising activities, to encourage law enforcement officials, companies and professionals of the auditing and accounting profession to prevent, detect and report the use of facilitation payments.

2. Investigative and Prosecutorial Framework

a) Overview of institutional changes in investigative and prosecutorial framework

FIOD: A highly effective investigative agency dedicated to foreign bribery cases

Institutional arrangements

107. Since the Phase 3 evaluation, there has been a major restructure in the Dutch investigative framework with the FIOD, the criminal investigation service of the TCA having exclusive jurisdiction to conduct foreign and commercial bribery investigations. In Phase 3, foreign bribery investigations were handled by the *Rijksrecherche* which now focuses entirely on investigating bribery of Dutch public officials, along with cases of police criminal misconduct or negligence, use of firearms and serious use of force by the police. The FIOD and the *Rijksrecherche* are both criminal law enforcement agencies and therefore have the same range of investigative powers. Within the FIOD, the Anti-Corruption Centre is divided into three branches, responsible for: detection and acquisition; investigation and knowledge. It is staffed by FIOD employees and works to combat bribery and corruption, focusing mainly on bribery of foreign public officials and commercial bribery. FIOD-ACC also investigates related offences and conducts extensive training and awareness raising with other agencies and the private sector. In this respect, the FIOD has taken the initiative to publish information about investigations on its website with the aim of attracting greater public attention and raise awareness.

108. FIOD has developed training videos for the MFA and Dutch embassies abroad, it has presented to Atradius Dutch State Business (Atradius DSB), the Netherlands' export credit agency, and provided trainings to ODA officials and tax officials. FIOD-ACC can also liaise directly with other teams in the FIOD responsible for tax or money laundering investigations and share information accordingly. There was broad acknowledgement of the key role played by the FIOD in foreign bribery enforcement from all participants in the on-site visit. The recent update of the Directive on Foreign Corruption includes a reference to the role of the FIOD in the fight against foreign bribery in the Netherlands.

Resources and training

109. The Phase 3 evaluation noted that the *Rijksrecherche* had 100 officers and an annual budget of EUR 13.1 million to conduct both domestic and foreign bribery investigations and other cases of police

criminal misconduct or negligence, use of firearms and serious use of force by the police. Currently, 36 FIOD employees work permanently in FIOD-ACC at FIOD headquarters in Utrecht and an additional 24 are assigned from other regional teams to investigate cases. Seventy-five per cent of FIOD-ACC's staff in Utrecht are financial investigators. Other profiles include tax inspectors (previously employed by the tax authorities); accountants/auditors; lawyers; criminologists; economists; and analysts. The remaining 25 per cent of FIOD-ACC staff is active in detecting and processing corruption, gathering and sharing knowledge, administrative and management activities. FIOD-ACC can also call on other FIOD investigators to conduct foreign bribery investigations if necessary, including financial investigators in the six regional teams of the FIOD. While the specific financial resources of the FIOD were not provided, the Netherlands reported that EUR 20 million had been set aside to improve and intensify efforts to combat corruption and money laundering. As from 2018, this is a yearly budget.

Functioneel Parket

Institutional arrangements

110. The Board of Prosecutors General heads the OM, and is responsible for 10 regional departments, 3 national departments, an appeals department (*Resort Parket*) and the supervision of the *Rijksrecherche*.⁷² The Board determines the OM's internal policies regarding investigations and prosecutions by issuing guidelines under article 130(6) of the Judiciary (Organisation) Act. These guidelines take the form of Instructions (*Instructie*) and Directives (*Aanwijzingen*), the latter of which are published on the OM's website. Whereas Instructions are internal guidelines aiming to aid prosecutors in performing their functions, Directives are published in the Government Gazette and have external legal effect regarding the issues in them that are eligible for such an effect and citizens can therefore derive rights from Directives, for example as parties to proceedings (see below, Enforcement Policy).⁷³ The Prosecutor-General's Office prepares the text of new Directives or amends or revokes existing Directives in coordination with the public prosecutors of the relevant departments. These are then submitted to the Board of Procurators General for implementation.

111. The FP is the branch within the OM responsible for cases involving serious fraud, environmental crime and asset confiscation; it also leads foreign bribery prosecutions. The FP has offices in Leeuwarden, Zwolle, Amsterdam, Rotterdam and Den Bosch. As was the case in Phase 3, the NCPC is responsible for coordinating and carrying out foreign bribery prosecutions. The NCPC was transferred from the National Parket to the FP in 2016 and tasked with creating a team to focus specifically on prosecuting foreign and commercial bribery (the coordination of domestic bribery remained at the National Parket under the guidance of the *Rijksrecherche* prosecutor). This led to the creation of the FP's Anti-Corruption Team in 2017, made up of staff from several regional units of the FP as well as other units of the OM. The FP's Anti-Corruption Team is tasked with supervising the criminal investigations conducted by the FIOD-ACC on behalf of the FP.

112. At the time of Phase 3, the OM had a dedicated unit focused on criminal asset confiscation (*Bureau Ontnemingswetgeving Openbaar Ministerie* or BOOM) which was transferred to the FP in 2013. The transition of BOOM to the FP was based on the fact that it was primarily involved in financial crime cases, but this unit theoretically has jurisdiction for the entire country and all types of crimes. The BOOM is made up not only of prosecutors but also accountants, international advisors, and civil law experts, all of whom are specialised in proceeds of crime. The BOOM coordinates with the prosecutor responsible for a case in order to establish the confiscation strategy. Prosecutors at the on-site visit indicated that the Steering and

⁷² See [OM website](#).

⁷³ See [OM website: \(Aanwijzingen\)](#), (in Dutch).

Assessment Team decides whether to allocate a team from the BOOM to a case, and also its composition within the number of experts available, when designing a plan for an investigation.

113. The OM's appeals department handles appeals of FP cases, it is also responsible for appeals against decisions to terminate proceedings under art. 12 CPC (see below, Non-Trial Resolutions), pursuant to which there is judicial review by the Court of Appeal of large settlements or dismissals. In 2020, the appeals department appointed a senior prosecutor in appeal cases as a 'national specialist anti-corruption in appeal' (NSAP in appeal), who is –like the NCPC of the FP—responsible for coordinating and carrying out foreign bribery prosecutions. This NSAP in appeal is also responsible for anti-corruption. In addition, the appeals department has a Special Cases Team of mainly senior prosecutors who are, in principle, all capable of handling cases of foreign bribery and confiscation.

Resources and training

114. In Phase 3, the OM reported it had 35 prosecutors working on fraud and corruption cases. However, the team of the NCPC was only staffed with one prosecutor and a legal assistant and participants at the on-site voiced their concerns that insufficient resources could be resulting in the low levels of enforcement registered at that time. The Working Group thus recommended that the Netherlands provide adequate resources to Dutch law enforcement authorities to effectively examine, investigate and prosecute all suspicions of foreign bribery. This recommendation was deemed fully implemented during the Phase 3 Written Follow-up.

115. At the time of the on-site visit, the FP's Anti-Corruption Team was made up of three prosecutors, two stationed in the Rotterdam and one in the Amsterdam office, who are dedicated to foreign and commercial bribery cases, although they can be allocated to other cases based on expertise or capacity needs. However, the evaluation team was made aware that both the NCPC and a key prosecutor leading foreign bribery prosecutions in the Anti-Corruption Team had assumed different roles since then. The prosecutor has already been replaced, but it is currently unclear when the NCPC will be replaced. There is also a 'flexible shell' made up of currently eight prosecutors who are part of the Team but who are not exclusively allocated to corruption cases and also handle other fraud cases. The Netherlands reports that prosecutors outside the Anti-Corruption Team can also be assigned to corruption cases, with all units of the FP being able, in principle, to investigate cases of this kind, provided they have the requisite capacity and competence.

116. Human resources dedicated to foreign bribery prosecutions have somewhat increased since Phase 3. At the same time, the Netherlands has seen a significant increase in its foreign bribery caseload (from 4 ongoing investigations in Phase 3 to 24 at the present time): in Phase 3 the OM was only staffed with the NCPC for foreign bribery. Eight years later, in addition to the NCPC, there are three prosecutors working exclusively on foreign and commercial bribery cases and eight prosecutors who spend part of their time working on these cases. This allocation of human resources seems minimal compared to other WGB countries with similar-sized economies and foreign bribery risks and sometimes with smaller caseloads.⁷⁴ The FP's annual budget for 2019 was close to EUR 40 million, which includes a share of the additional EUR 20 million dedicated to improve and intensify efforts to combat corruption and money laundering.

117. In respect of training, the OM offers its prosecutors a one-day course on corruption, which deals specifically with all the elements of the criminal offence. The Training and Study Centre for the Judiciary, open for both prosecutors and judges, also conducts awareness raising activities. According to the Netherlands, these awareness-raising activities take place once or twice a year but it is unknown who participates in them. While these initiatives address detecting, investigating and sanctioning fraud, it is unclear whether there is specific content on foreign bribery cases. However, there does not seem to be specific or systematic training on how to deal with self-reporting, cooperation and non-trial resolutions,

⁷⁴ See also: Norway [Phase 4 Report](#), para. 74, and Australia [Phase 4 Report](#), para. 125.

calculate sanctions or confiscation, or prosecute legal persons and in particular corporate intermediaries (including with respect to the complicated issue of exercising jurisdiction). The OM published internal 'Knowledge Memos' on 'Indirect bribery of officials through local agents' and 'Jurisdiction in international bribery cases' in 2017 and 2019, respectively. Alongside further guidance on these issues, there should be specific and systematic trainings offered to both investigators and prosecutors.

Anti-Corruption Steering and Assessment Team

118. In January 2020, the FP and FIOD established a dedicated Anti-Corruption Steering and Assessment Team, which is a permanent body consisting of the NCPC and FIOD- ACC. The Steering and Assessment Team is the body in charge of making the decision of whether to open a formal investigation and drawing up a plan for the investigation, including the resources that will be allocated to the case. The role of the Steering and Assessment Team has been formalised, but there are no guidelines regarding the factors weighed when deciding whether or not to open a formal investigation. If necessary, Steering and Assessment Team meetings are also attended by prosecutors working in detection and project leaders from the FIOD. Decisions made by the Steering and Assessment Team are binding. The prosecutor allocated to the case will work closely with the project leader from FIOD. The revision of the Directive on Foreign Corruption does not reflect of the role of the Steering and Assessment Team, but the Netherlands has reported that it has been included in internal guidance.

b) Coordination between relevant agencies and attribution of cases

119. As noted above, since Phase 3 the *Rijksrecherche* is dedicated to investigating cases of domestic bribery of public officials and the FIOD handles cases of commercial bribery and foreign bribery investigations. Since the establishment of FIOD-ACC in 2016, the FIOD and the *Rijksrecherche* regularly cooperate in investigations and pass on indications of bribery to each other where this comes within the other agency's remit. There is no formal arrangement for cooperation between the *Rijksrecherche* and the FIOD and it is instead determined on a case-by-case basis. When a report of suspected foreign bribery is received through the *Rijksrecherche*, it will contact the FIOD-ACC or the FP. The FIOD and the *Rijksrecherche*'s financial economic crime (Finec) teams work together, and share knowledge and specific reports of corruption.

120. In 2013, the FIOD established an Anti-Money Laundering Centre (AMLC). This centre aims to be a platform where public and private entities involved in the fight against money laundering can share knowledge and expertise and work closely together. The AMLC adopts an annual plan to focus its activities and establish priorities for each year. The annual plan involves the adoption of a theme which addresses a particular money laundering problem and encourages the private and public sector to coordinate their activities more effectively. According to the questionnaires responses, whenever the AMLC receives incoming MLA requests concerning suspicions of bribes and/or the misuse of the Dutch financial system by politically exposes persons, they are forwarded to the FIOD-ACC.

Commentary

The lead examiners commend the Netherlands for the reorganisation of its investigative and prosecutorial agencies and, in particular, for the creation of specialised teams focusing on bribery within both the FIOD and the FP. They welcome the impressive efforts deployed by the staff in those units, with their work reflected in the exponential increase in the number of foreign bribery investigations since 2016. The lead examiners also note with satisfaction that cooperation between both agencies begins at early stages of the investigation process.

Nevertheless, the lead examiners remain concerned about the available resources, particularly the number of staff allocated to corruption cases in the FP, which several private sector representatives

present at the on-site visit considered insufficient. The Working Group will therefore follow-up on the adequacy of human and financial resources to investigate and prosecute foreign bribery.

c) Enforcement Policy

121. Prosecutions in the Netherlands are conducted according to the principle of prosecutorial discretion (*opportuïteitsbeginsel*) which has been formalised under article 167 DCPC. Prosecutors have discretion to dismiss a case, to settle a case out of court or to choose for which offences a suspect shall be prosecuted. This discretion is mitigated by a set of general guidelines issued by the Board of Prosecutors General that bind the actions of prosecutors and set the OM's internal policy: Instructions and Directives. The MJS is always consulted regarding the issuance of new Directives. As was already mentioned, Instructions are internal guidelines whereas Directives are public, have external legal effect and can form the basis of legal claims in criminal proceedings.

The Foreign Corruption Directive

122. The Directive on the Investigation and Prosecution of Corruption of Public Officials Abroad (Foreign Corruption Directive) raised several concerns from the Working Group during the Phase 2 and Phase 3 evaluations regarding compliance with Article 5 of the Convention, leading to its amendment. At the time of Phase 3, a revision of this Directive was underway and the Working Group recommended that the Netherlands proceed with its adoption and implementation in a way that would ensure that its interpretation is not contrary to Article 5 of the Convention (Recommendation 3(d)). This reform entered into force on 1 January 2013 and the Working Group considered the recommendation fully implemented. An additional reform was made on October 2020 addressing the issue of small facilitation payments and adding guidance on issues such as disgorgement and the usage of third parties in foreign bribery schemes.

123. The Foreign Corruption Directive provides the scope for the criminalisation of foreign bribery in the Netherlands and “describes the decision-making procedure for the selection of cases”.⁷⁵ The Directive addresses all aspects of a foreign bribery case, including investigation and prosecution (including responsible authorities), disgorgement, among others. .

124. The following factors laid out in the Foreign Corruption Directive are to be taken into account by prosecutors in order to determine the priority in prosecuting foreign bribery cases:⁷⁶

- Scale of the bribe, in absolute or relative terms;
- Involvement of influential officials or politicians (in the sense that the involvement of such persons in a bribery scheme is viewed as more serious due to their role in setting a good example and/or their position of power);
- The bribe is directly or indirectly (e.g. as government support, credit insurance, subsidies, etc.) at the expense of Dutch general public funds or at the expense of funds intended for international development aid;
- The damage to the country where the public official was bribed;
- The degree to which it resulted in unfair competition (in the sense that a bribery scheme resulting in a high distortion of market competition is viewed as more serious);
- Recidivism; and
- The possibilities for further investigation and the likelihood of successful prosecution.

⁷⁵ Foreign Corruption Directive, see Annex 2 to [Phase 3 Written Follow-up Report](#) p. 35.

⁷⁶ *Ibid.*, p. 41.

125. As mentioned in various parts of this report, a number of shortcomings have been identified in this Directive. The Directive does not provide guidance to prosecutors on the foreign bribery offence, including examples of the categories that could potentially constitute foreign public officials and liability for bribes through intermediaries. The Directive also lacks guidance regarding the application of sanctions and jurisdiction over legal persons (see below, Establishing jurisdiction). The Netherlands considers that these issues have been clarified in the abovementioned ‘Knowledge Memos’ available on the OM’s internal website and broader trainings available to prosecutors.

The Directive on Large Transactions: the instrument for sanctioning legal persons

126. The Directive on High and Special Transactions (*Aanwijzing hoge transacties en bijzondere transactie* (2008A021)) entered into force on 1 November 2008 and introduced a legal framework for offering non-trial resolutions under article 74 DCC in specific cases. It was revised and reissued as the Directive on Large Transactions (*Aanwijzing hoge transacties* (2020A005)) on 4 September 2020, at the time of finalising this report (see Annex 4: Directive on Large Transactions).⁷⁷ The revised Directive defines ‘high’ transactions as all cases involving a penalty component of EUR 200 000 or more (previously EUR 50 000 or more) and resolutions entailing a total of EUR 1 million or more in combined fines, confiscation, forfeiture or damages (previously EUR 500 000 or more). These thresholds are higher than the original version of the Directive but have removed the previous direct additional requirement that the case be in the public interest, instead indicating that ‘for offences that have caused public concern, a transaction will only be offered if there is a very good reason for doing so’. It is unclear whether the EUR 200 000 threshold corresponds to maximum fines available for specific offences under the Criminal Code, in which case it would preclude the use of ‘Large Transactions’ against natural persons in foreign bribery cases, given the maximum penalties available are below this amount (see below, Sanctioning a Foreign Bribery Case).

127. The revised Directive further states that ‘as a rule, high transactions only occur in relation to legal entities’ because of the potential for non-trial resolutions to have greater impact than criminal prosecution through their ability to impose remedial measures. The Directive is further explored below (Non-Trial Resolutions). The revised Directive no longer states that a resolution outside of court should only be offered in exceptional circumstances, suggesting a policy shift in the OM in favour of more systematic use of non-trial resolutions. As has been detailed in this report, all foreign bribery cases to date involving legal persons have been concluded through non-trial resolutions that fell under the scope of the previous version of the Directive. There have been additional resolutions with natural persons that did not fall under the scope of the Directive. The revised Directive is effective immediately but does not apply to non-trial resolutions that had already been submitted for approval to the Minister of Justice and Security. Dutch authorities have confirmed that it could apply to foreign bribery investigations that are already underway.

128. It is relevant to mention that there are currently no sentencing guidelines for prosecutors in relation to the foreign bribery offence and, therefore, there is no specific guidance regarding the amounts of the fines to be imposed in the context of non-trial resolutions. The revised Directive does not include guidelines on sanctions to be imposed in the context of non-trial resolutions.

Holding natural persons and gatekeepers accountable for their roles in foreign bribery cases

129. Civil society representatives at the on-site visit considered the enforcement policy with respect to natural persons very unsatisfactory, noting that only one natural person has been held liable in connection with a foreign bribery (*Ballast Nedam case*) and in other cases there were no investigations or prosecutions of natural persons. They considered that the OM had not been successful in holding individuals liable and referred also to the acquittals of members of corporate management in domestic

⁷⁷ OM Website, [Aanwijzing hoge transacties \(2020A005\)](#) (in Dutch).

bribery cases (namely, Dutch Railways).⁷⁸ They considered that the enforcement focus was firmly on companies, instead of individuals. The revised Directive on Large Transactions does not bring clarity to the official approach, prescribing in the introduction that “*large transactions are generally applied only in relation to legal persons*” then later in its general principles noting that “*a number of factors are relevant to the question of whether an offending natural or legal person is eligible for a transaction*” [emphasis added].

130. Representatives from companies at the on-site visit expressed their views that nowadays, a resolution would only be offered to a company if it agreed to cooperate with the authorities in bringing about the prosecution of the natural persons involved. Lawyers at the on-site stated that the OM has announced that it would be taking a similar approach to the United States along the lines of the Yates memorandum in respect to white-collar crime cases.⁷⁹ According to the prosecutors, companies that acknowledge the facts (not an admission of guilt) may be offered a non-trial resolution whereas individuals will in most instances be formally prosecuted. With the acknowledgement of facts cooperation often goes hand in hand and will be taken into account. Prosecutors indicated that one of the reasons they prefer taking natural persons to trial was the greater array of penalties available, such as disqualification from professional activities

131. Prosecutors at the on-site indicated that, in theory, members of company boards and executives could be held liable pursuant to the framework set out under article 51 DCC (see also below, Liability of Legal Persons). They indicated that, in practice, a formal investigation into the natural persons is conducted in parallel to investigations against a company. However, the termination of investigations into executives in the **Ballast Nedam** and the **Vimpelcom** cases suggests that Dutch law enforcement authorities are experiencing difficulties in establishing liability for natural persons. Similarly, the two only natural persons sanctioned for foreign bribery, both in connection to Case A, either played a small role in the bribery scheme, or were not high-level decision makers. As noted above (Concluded cases of money laundering predicated on foreign bribery), the non-trial resolution in the **ING case** has been challenged by an ING investor due to the lack of liability for the ING executives ultimately responsible for the compliance failures involved in the case. Prosecutors at the on-site indicated that a separate investigation had been conducted into natural persons involved but that there was not a ‘reasonable suspicion’ an offence had been committed sufficient to warrant initiating criminal proceedings (see below, Initiating an investigation). The court is expected to make a decision on the validity of the non-trial resolution and non-prosecution decision at the end of 2020.

132. Representatives from civil society and journalists at the on-site stated that there seems to be a trend to focus on legal persons and not to sanction corporate management in cases involving economic crime. Natural persons are rarely held liable, as evidenced by the data provided by the Netherlands. The perception was that this stems from a larger inability of the OM to prosecute individuals for corruption, including in domestic cases. According to the Netherlands, non-trial resolutions reached with legal persons do not extend to the natural persons involved and a separate decision is made regarding their prosecution. However, following the sanction of the company in the **Ballast Nedam case**, criminal investigations of six natural persons involved in the foreign bribery and money laundering were discontinued. Even though the OM seems to have adopted a policy of requesting legal companies being offered a resolution to cooperate,

⁷⁸ For more background on the case, see [State-Owned Enterprises and Corruption: What are the risks and what can be done? \(OECD, 2018\)](#), p. 36.

⁷⁹ Yates Memorandum is the name commonly given to a document issued in September 2015 by then US DOJ Deputy Attorney General Sally Yates entitled “Individual Accountability for Corporate Wrongdoing”. As its title suggests, the document served to re-state the DOJ’s commitment to holding individuals, and particularly executives, responsible for corporate misconduct. This came following public backlash over the failure of the DOJ to prosecute any senior officials in the wake of the 2008 financial crisis. One of the pillars of the memorandum regarding the DOJ’s enforcement policy is that companies will only be eligible for credit for cooperation with the DOJ if they provide all relevant facts about the individuals involved in the offences under investigation.

which can bring about the prosecution of natural persons, the OM has yet to succeed in holding any individual liable in court for a foreign bribery offence.

133. As noted above (Detection and reporting by accountants and auditors) the Netherlands has developed a policy of investigating and sanctioning not only the legal persons responsible for foreign bribery, but also the so-called ‘gatekeepers’ who may have been involved in auditing or facilitating the corrupt transactions. The **KPMG case** is a landmark case in that it is the first time a Party to the Convention sanctioned an auditing firm for its active role in helping conceal a bribery scheme. The individual auditors were not, however, held liable as the criminal proceedings against them were dismissed by the court of first instance. There are ongoing criminal proceedings against another audit firm for its alleged failure to report to the FIU eight unusual transactions in connection with the **Vimpelcom case**, its client at the time of the facts involving the Uzbekistan bribery scheme. As noted above (Detection and Reporting by Accountants and Auditors), individual auditors for a Dutch company and its Middle Eastern subsidiary were given a formal reprimand by the Dutch Audit Chamber on 17 June 2020, for failing to report cash commissions of over EUR 3 million paid to third parties, which raised red flags for fraud and corruption between 2007 and 2014. It is unclear whether the auditors are also under criminal investigation.

Confiscation is a key policy objective across the OM

134. The Netherlands reports that confiscation of the proceeds of crime is a core policy objective across all law enforcement agencies. In January 2019, following the presentation of the results of confiscation in the preceding year, the OM identified four areas where it could strengthen the agency’s capacity and collaboration with the FIOD, police and the *Rijksrecherche*:

- Reinforcing systematic financial investigations in all criminal law investigations;
- Increasing expertise and adapting to swift societal and technological changes;
- Further internationalisation; and
- Monitoring

135. These topics were also included as key areas of action in a letter sent to Parliament in March 2019 by the Ministers of Justice and Security and Finance. The letter also called for effective integrated collaboration in confiscation matters by combining criminal law interventions with fiscal and administrative law interventions. The MJS and the Ministry of Finance monitor annually the progress of national key performance indicators. From 2020 onwards, the seizure results for each (regional) prosecutor’s office and police region will be reported, as well as the results of national criminal law confiscation. The Dutch Parliament also recently adopted a motion on the seizure of criminal assets calling on the MJS to take control of the confiscation chain to ensure that more criminal assets are confiscated.⁸⁰ This comes as part of a general plan which includes a new Multidisciplinary Intervention Team established in April 2020 with a focus on exposing the illegal revenue models of criminal structures.⁸¹ The Netherlands indicates that concrete plans are currently being developed.

136. The Directive on Confiscation provides prosecutors with the different options legally available to confiscate proceeds of crime. All involved agencies determine the best legal option for confiscation and prosecutors attempt to prevent dissipation of assets as early on in the case as possible. The OM’s confiscation policy prioritises victim compensation over payments to the state. Offering a resolution out of court which includes an amount of more than EUR 5 000 must be reported to the TCA. The Directive also sets out the principles for financial investigations into assets and money flows and for confiscation itself,

⁸⁰ Netherlands Parliamentary Monitor, [Motion on the seizure of criminal assets](#), 16 June 2020 (in Dutch).

⁸¹ Netherlands Government Website, [About 400 MIT specialists to join the fight against subversive crime](#), 16 June 2020.

by determining, for example, that no confiscation claim shall be filed where the person concerned has no financial means.

Impact of COVID-19 on foreign bribery enforcement

137. Since the on-site visit, the Coronavirus (COVID-19) pandemic has sparked unprecedented challenges for law enforcement agencies around the globe and generated foreign bribery risks associated with action taken to mitigate the health and economic crisis. The Netherlands indicated that foreign bribery investigations and prosecutions have been particularly affected, due to the inability to travel to the executing country to help obtain information requested through international cooperation. There is also a prioritisation of cases focusing on misuse of COVID-19 response and recovery funds in the Netherlands and heightened risks of money laundering.

138. The Temporary Act COVID-19 Justice and Security was enacted on 24 April 2020. It provides for the use of (group) telephony in criminal cases for the hearing, interrogation or questioning of persons instead of video conferencing in which a direct audio and video link is established (article 27); and temporary replacement of physical hearings in criminal proceedings with an oral hearing by (group) telephony (article 28). Some investigations and prosecutions were or are delayed due to the COVID-19 crisis and only urgent searches are being conducted, although prosecutors report that new cases have been opened since the start of the crisis. On the other hand, preliminary investigations, gathering and assessing information that can lead to new cases, continues.

139. The courts were closed between March and May 2020 and have been dealing with priority cases relating to the deprivation of liberty, juvenile (criminal) cases and family law matters. Judges, prosecutors and lawyers endeavour to advance individual cases going by conducting video interviews or exchanging positions in writing instead of oral exchanges in court. The FP established a working group to analyse the impact of COVID-19 on investigations and prosecutions, and is sharing solutions and best practices with other agencies, including the FIOD.

Commentary

The evaluation team commends the OM on its initiative to issue Directives addressing foreign bribery, non-trial resolutions and confiscation. Reforms to the Directive on Foreign Corruption and the recent revisions of the Directive on Large Transactions demonstrate a willingness to bring the Netherlands' enforcement policy in line with Working Group standards and each are examined elsewhere in this report.

The lead examiners also applaud the OM's success in addressing the role of gatekeepers in foreign bribery cases. They are further encouraged by its policy regarding the prosecution of natural persons, but are nevertheless concerned that it has yet to bear fruit considering the very low levels of enforcement against natural persons and continuing opacity as to the availability of non-trial resolutions to individuals. The lead examiners recommend that the Working Group follow up as caselaw develops to ensure that natural persons involved in foreign bribery schemes are held liable.

3. Investigating Foreign Bribery

a) Initiating an investigation

140. As noted in Phase 3, pursuant to article 27 DCPC, an investigation can be opened if information collected creates a 'reasonable suspicion' that an offence has been committed. The existence of a 'reasonable suspicion' is also required to trigger the use of special investigative tools. FIOD-ACC and the FP intelligence coordinator assess foreign bribery allegations for criminal investigation. The Anti-Corruption Steering and Assessment Team then checks whether the case is serious and a priority (relative to other

cases), has a reasonable chance of success and whether there is a ‘good mix’ of commercial and foreign bribery cases and coverage of different sectors and takes the final decision whether to open an investigation. Decisions of the Steering and Assessment Team cannot be appealed and are binding. A preliminary report is drawn up, including an investigation plan.

141. The Dutch authorities resort to a range of different sources to detect possible cases of bribery of foreign public officials (see also above, Detection of the Foreign Bribery Offence). In cases where evidence of corruption arises from a criminal investigation into other offences, such as money laundering, FIOD and FP consult on the facts, the desirability of mounting an additional corruption investigation and the dividing line between the two investigations. A decision is then taken as to how to pursue the investigation and whether FIOD’s ACC or money laundering team should lead.

142. As noted above, 44 individuals and 41 legal persons are currently under investigation for suspected bribery of foreign public officials in connection with 21 cases. This volume of cases appears inconsistent with the significant risks of foreign bribery posed by the nature of the Dutch economy (see above, Netherlands Economy and Foreign Bribery Risks). Prosecutors described a ‘selection’ system for foreign bribery investigations. They indicated the need to prioritise as there are always more cases than there are people to investigate them. The first consideration is whether there is a concrete suspicion the offence has been committed, as well as the potential impact a case can have, such as its deterrent effect. Investigators also indicated that ‘wealth tracing’, for the purposes of seizure and confiscation, is taken into consideration in the weighting and selection of cases. They indicated that resource considerations have an impact the intake of cases: if the Steering and Assessment Team knows that there is not capacity to investigate and prosecute, cases will be prioritised. Discussions at the on-site visit also indicated that resource implications led to less proactivity in detecting potential foreign bribery cases.

143. For example, the Netherlands reported that 70 STRs originating from auditors over the last five years have involved possible corruption offences. Of these 70 cases, FIOD, FIU and FP ‘selected’ seven for criminal investigation. Two of these cases involve bribery of foreign public officials. The cases were selected for various reasons including involvement of a range of sectors and an assessment of the potential impact of the case and its potential to trigger change. However, the number of cases selected for investigation represents only 10% of a large body of possible cases, suggesting that there were other potential cases that were not investigated.

b) Establishing jurisdiction

144. The framework for exercising territorial, nationality or other forms of extraterritorial jurisdiction over the foreign bribery offence has not changed since Phase 3, although article numbering has changed following unrelated reforms. Articles 2-8d DCC and the Extraterritorial Jurisdiction (International Obligations) Decree govern the exercise of jurisdiction by law enforcement authorities in the Netherlands. Jurisdiction is based on the territoriality principle, that is, the Netherlands has jurisdiction if the offence is wholly or partly committed in its territory. As noted below (Liability of Legal Persons), the legal position on whether active or passive nationality is required to exercise jurisdiction over companies in the Netherlands is evolving.

145. Extraterritorial jurisdiction is invoked where an offence takes place outside the Netherlands, but the circumstances are such that Dutch criminal law may still be applied by the Dutch criminal courts, because the offence was committed by a Dutch national. Article 7 DCC requires dual criminality to exercise extraterritorial jurisdiction over Dutch nationals (natural or legal persons) for bribery offences. Prosecutors confirmed during the on-site visit that in foreign bribery cases it would be sufficient for the foreign country to criminalise domestic/passive bribery, making it a flexible approach on ‘equivalent conduct offences’. Prosecutors further confirmed that the dual criminality requirement does not extend to corporate liability, and therefore jurisdiction could be established over a company for foreign bribery if the foreign jurisdiction did not provide for corporate liability, or had an administrative form of liability.

Commentary

The lead examiners consider that the Netherlands' framework for exercising jurisdiction in foreign bribery cases is consistent with the standards in the Convention. Nevertheless, they recommend that that Working Group follow up on the application of the dual criminality requirement for exercising extraterritorial jurisdiction, to ensure that it does not provide an impediment in foreign bribery cases.

c) Limitation Periods

Statute of limitations

146. Article 70 DCC establishes the statutory limitation period for prosecuting an offence, which varies according to the maximum penalty for the corresponding offence. The statute of limitation applicable to the foreign bribery offences therefore varies between 12 years (bribery of public officials) and 20 years (bribery of judges to obtain a criminal conviction). The period of the statute begins to run on the day following the day on which the offence is committed. Under article 72(1) DCC, 'any act of prosecution' interrupts the period of limitation which starts anew. The defendant's knowledge of this 'act of prosecution' is not necessary and the consequence is automatic. The right to prosecute a crime expires once the original period of limitation has expired twice. This means that, as long as there is a 'prosecution act' within the original 12 years of the limitation period, the actual period of limitation for the foreign bribery offence under article 177 DCC is 24 years.

147. According to the Netherlands, no case of foreign bribery has been terminated due to the expiration of the statute of limitations, although two cases were not formally investigated because the facts were time-barred. In a decision dated 11 February 2020 in interlocutory proceedings in a foreign bribery case, the Rotterdam District Court ruled that a request for mutual legal assistance and acts carried out by foreign authorities in response could be considered an 'act of prosecution' and therefore interrupt the limitation period.⁸² While the interlocutory decision cannot be appealed, the defence could nevertheless raise the issue again at trial. The case relates to facts that took place in 2006.

Investigation time limits

148. While the statutory limitation period seems sufficient for foreign bribery cases, the Dutch courts apply an additional 'reasonable time' criterion when sentencing (in keeping with article 6 of the European Convention on Human Rights). If the investigation, prosecution and first instance trial of a suspect are not completed within a reasonable time, this could be used to justify a mitigation of the sentence imposed by the courts, including confiscation.⁸³ The Dutch Supreme Court has held that "*a suspect should be tried within two years of the moment when the Dutch authorities take such action against a suspect that he can infer that he will be prosecuted by the OM for a criminal offence*".⁸⁴ Additional Supreme Court jurisdiction has clarified this requirement and created certain exceptions.⁸⁵ An example of the criteria of 'reasonable

⁸² Judgment of the Rotterdam District Court, 11 February 2020 ([ECLI:NL:RBROT:2020:2579](#)).

⁸³ Supreme Court judgment of 17 June 2008, ECLI:NL:HR:2008:BD2578 and confirmed in Supreme Court judgment of 17 April 2018, ECLI:NL:HR:2018:558

⁸⁴ Supreme Court judgment of 17 June 2008, ([ECLI:NL:HR:2008:BD2578](#)).

⁸⁵ The starting point can be when the suspect is taken into custody or subpoenaed ([ECLI:NL:HR:2008:BD2578](#), para. 3.12.1). The time limit for the confiscation starts when the prosecutor indicates to the suspect that he/she intends to submit an application for confiscation under article 311(1) DCPC. The time limit for the confiscation, therefore, does not start at the same moment as the time limit for the trial ([ECLI:NL:HR:2008:BD2578](#), para. 3.12.2). The two year time limit relates only to the verdict of the court in first instance. For appeal another period of two years starts. A delay in

time' being applied in practice is the dismissal of the prosecution of three KPMG accountants in connection with the **Ballast Nedam case**. Although it was not the sole reason for dismissing the case as inadmissible, the court clearly stated as one of its reasons that the alleged criminal facts took place 12-17 years earlier and the trial only started in 2019. At the on-site visit, investigators indicated that most foreign bribery investigations take longer than two years. The Supreme Court ruled in 2008 that the reasonable time period could be extended to 5 years in complex cases.⁸⁶ However, prosecutors expressed concerns that the excessive time taken to deal with legal privilege claims (see below, Legal Privilege) could be problematic for the requirement to complete proceedings within a reasonable time.

d) Investigative techniques

FIOD has expansive investigative powers and tools

149. In the Netherlands, the special investigative powers of law enforcement authorities are set out in the DCPC and are available to investigate offences carrying penalties of at least four years' imprisonment. Special investigative tools include surveillance methods, search powers, wiretapping and the interception of communications, covert investigations and controlled deliveries. The Special Investigative Powers Act has been amended several times since Phase 3 to provide for further investigative tools, such as systemic observation (article 126g DCPC); recording communications with a technical device (article 126m DCPC); searching in a computer system (article 126nba DCPC); and requisitioning security camera images by investigating officers – a tool previously only available to prosecutors (article 126nda DCPC). In addition, article 126m DCPC was amended in 2017 to allow a wiretaps to be authorised by name (rather than by number). This avoids the need to apply for a new authorisation each time a suspect uses a different phone. The examining magistrate is responsible for deciding whether a tap should be authorised by name or number. FIOD investigators at the on-site visit indicated that the prosecutor who is handling the case must seek approvals for certain special investigative techniques. In terms of investigation plans, where there are legal or tactical issues, the NCPC helps direct cases. Investigators and prosecutors working on the case also organise 'reflection groups' every few months to coordinate and develop joint plans.

150. In foreign bribery cases, to date, FIOD-ACC has used mostly the following techniques: examination of hard copy books and records; analysis of digital data using Forensic Toolkit (FTK) to search through records, emails and other forms of digital information (such as the minutes of board meetings); search and seizure; scrutiny of internal investigation information; and interviewing witnesses and suspects, wiretapping and the interception of communications. The FIOD has also used external accountants to assist with its investigations. FIOD investigators at the on-site visit underlined the usefulness of FIOD being institutionally housed within the TCA for access to tax information. This means that FIOD investigators can enter TCA systems to access tax information (including information on foreign bank accounts held by Dutch nationals disclosed under the Automatic Exchange of Information (AEOI) framework) and open investigations of their own accord. They indicated that guidance and procedures on self-reporting would be helpful as currently companies self-report to both prosecutors and FIOD-ACC investigators. In the context of settlement procedures resulting from self-reports, the role of the FIOD is to investigate and substantiate financial information for the purposes of calculating fines and confiscation for use by prosecutors.

the first instance can be compensated by a quick trial of the case in appeal ([ECLI:NL:HR:2008:BD2578](#), para. 3.14 and 3.16.). The basic two year limit can be extended in special circumstances, including: (a) the complexity of the case; (b) the influence of the suspect on the case; (c) the way the case is being handled by the authorities ([ECLI:NL:HR:2008:BD2578](#), para. 3.13.1-3.14).

⁸⁶ Ibid.

The use of 'self-investigations'

151. In certain fraud and corruption cases in the past, defendant companies instructed a law or consultancy firm to conduct a 'self-investigation' (*zelfonderzoek*) in parallel to the FIOD's criminal investigation. The evaluation team only became aware of this practice during the preparation of the report due to the public debate described below.

152. Dutch prosecutors indicate that the use of 'self-investigations' is determined on a case-by-case basis and can occur either prior to a self-report (i.e. at the company's own initiation); following a dawn raid; or in parallel to an ongoing criminal investigation by the FIOD-ACC. There have been cases in which the OM agreed the parameters of the investigation in advance with the defendant company, which in turn committed to sharing the findings with the FP undergoing further verification and investigation by the FIOD-ACC. The OM reports that, to date, self-investigations have been used in seven corruption-related cases and the results shared with FIOD and the OM. It is unknown how many of these related to foreign bribery.

153. In June 2019 the Minister of Justice and Security responded to Parliamentary questions about the use of self-investigations by the OM and FIOD, noting that the practice is subject to preconditions and review of the information and reduced demands on FIOD and FP resources and could result in more expedient resolution of cases.⁸⁷ However, certain cases have raised concern about the use of private law firms in criminal investigations, and potential conflicts of interest particularly when the firm undertaking the investigation also represents the defendant company.⁸⁸ On 2 July 2020, the Dutch House of Parliament passed a motion requesting the Minister of Justice and Security to conduct an independent review of the use of 'self-investigations' and the reliability and usefulness of these for Dutch law enforcement authorities.⁸⁹ The Ministry has already commissioned the Research and Documentation Centre (WODC) to conduct the review and is preparing the terms of reference with relevant agencies. The timeframe for completion is likely to be in 2021.

Commentary

The lead examiners welcome the expansive investigative powers granted to the FIOD-ACC and their proactive use in foreign bribery cases. They note with interest the use of so-called 'self-investigations' to use information obtained through internal investigations commissioned by dependent companies in economic crime cases and ongoing public debate about the pros and cons of this practice. However, the lead examiners were not informed of the use of self-investigations before or during the on-site visit and therefore could not obtain information about the approach to using 'self-investigations' in criminal proceedings and how they have been used in foreign bribery cases, to date. They therefore recommend that the Working Group follow up on the use of 'self-investigations' in foreign bribery cases.

Access to beneficial ownership information in the near future

154. The Netherlands introduced a central registry for ultimate beneficial ownership (UBO) as part of the legislative package to transpose the Directive (EU) 2018/843 of the European Parliament and the Council of 30 May 2018 (amended Fourth EU AML Directive). The Act Implementing a Register of Ultimate

⁸⁷ Report of Parliamentary discussions, [Lower house of the States General 2018-2019 no. 88, Item 4](#), 18 June 2019 (in Dutch), see also Global Investigations Review, ["Dutch parliamentary probe to clarify role of law firms in criminal investigations"](#), 22 July 2020.

⁸⁸ Avocatenblad, ["Can lawyers do objective fact-finding if they have to represent the interests of their client? Or do lawyers as corporate investigators engage in 'vagueness finding'?"](#), 18 April 2019 (in Dutch).

⁸⁹ Parliamentary Website, ["Motion by members Groothuizen and Van Nispen for independent research into the advantages and disadvantages of "self-investigation,"](#) 2 July 2020 (in Dutch).

Beneficial Owners of Corporate and Other Legal Entities to amend the Wwft and the Commercial Register Act entered into force on 27 September 2020. On 2 July 2020 the EU Commission referred the Netherlands to the Court of Justice of the European Union for failing to fully implement the Fourth EU AML Directive, notably with respect to “*the information to be provided on the beneficial ownership of corporate and other legal entities.*”⁹⁰ The Netherlands notified the EU Commission of the recent amendments to the Wwft to implement the UBO register and was awaiting a response at the time of drafting. A separate bill has been submitted to set up the central register of information on beneficial owners of trusts and similar legal arrangements.⁹¹

155. Beneficial ownership data will be centrally registered in the company register of the Dutch Chamber of Commerce. Existing corporate and other legal entities incorporated in the Netherlands (approximately 1.6 million already existing legal entities) will have 18 months to register their UBOs after the legislation enters into force on 27 September 2020. Legal entities created after that date have to register their beneficial owners straight away. Legal entities that fail to register or update their UBO within the legal timeframe will be subject to administrative or criminal sanctions. Legal entities incorporated in the BES islands will not have to submit their UBO information to a central register since they are not subject to EU legislation.

156. The general public will be able to access the information in the register instantly through the internet by paying a minor fee. Dutch competent authorities will also have instant access through direct communication channels with the Chamber of Commerce. Law enforcement authorities will therefore be entitled to access and use the information on the UBO registry in the context of a criminal investigation, including into foreign bribery. In addition to the information that is available to the general public, competent authorities of other States (both EU Member States and non-EU Member States) will be able to access the publicly available UBO information themselves directly in the UBO registry and to request from the Dutch competent authorities information on beneficial owners that is only available to those authorities.⁹² The UBO registers of the EU member states will be linked in the near future to further streamline the sharing of UBO information.

157. Civil society representatives at the on-site visit considered that the proposal for an UBO registry was limited, in that access required payment of a fee. Investigators were not convinced it would bring substantial advantages to foreign bribery investigations given that in most cases, they need to determine the UBO of foreign, rather than Dutch, incorporated companies.

Commentary

The lead examiners congratulate the Netherlands on the recent introduction of a register of ultimate beneficial ownership for companies and other legal entities incorporated in the Netherlands. They hope that this will help facilitate greater detection and enforcement of the foreign bribery offence. They therefore recommend that the Working Group follow up on the implementation of the UBO register in the Netherlands, including in the BES Islands, to ensure that it records adequate, accurate and current beneficial ownership information on companies incorporated in their

⁹⁰ [Anti-Money Laundering: Commission decides to refer Austria, Belgium and the Netherlands to the Court of Justice of the EU for failing to fully implement EU anti-money laundering rules](#) (European Commission, 2 July 2020).

⁹¹ [Implementation Act registration ultimate beneficial owners of corporate and other legal entities](#) (Senate website, 7 July 2020, in Dutch); [Wwft: UBO Register from 27 September](#) (NBA Website, 6 July 2020, in Dutch).

⁹² In accordance with the amended Fourth EU Anti-Money Laundering Directive, be publicly available: name, month and year of birth, nationality, country of residence and birth, foreign tax identification number, nature of the beneficial interest held and extent of the beneficial interest held. The following information will be available only to competent authorities: address, full date of birth, country and place of birth, citizen service number/tax identification number, copy of identification documents and copy of documents detailing the nature and extent of the beneficial interest held.

jurisdictions, and provides sufficient access by law enforcement authorities in foreign bribery cases.

Processes for assessing legal privilege claims cause major delays in foreign bribery law enforcement actions

158. The protection of client-attorney communications in the Netherlands is guaranteed in article 11a(1) and (2) of the Counsel Act, which provides that a lawyer must maintain confidentiality with regard to all information that is entrusted to the lawyer in his/her professional capacity. This applies regardless of the client. Rule 3 of the Rules of Professional Conduct 2018 establishes that a lawyer is obliged to maintain confidentiality with regard to all information about clients and cases. Consideration, however, has to be given to whether the lawyer was entrusted with this information by virtue of practising in the legal profession. Violation of legal privilege gives rise to disciplinary sanctions under article 46 of the Counsel Act and criminal sanctions under article 272 DCC.

159. The DCPC establishes the parameters for claims of legal privilege in criminal proceedings. Article 218 provides a lawyer the right to refrain from giving evidence and from answering questions in relation to information that the lawyer received in his/her professional capacity. Articles 96a(3(b)) and 105(3) establish that a lawyer does not have to comply with requests from investigating authorities or the investigating judge to hand over documents which fall within the scope of lawyer-client privilege. In the Netherlands, lawyers can claim privilege over certain communications and it is then up to the investigative judge to decide whether the documents are, in fact, covered by privilege (article 98(1) DCPC). In practice, this means that documents seized during corporate raids are sealed and taken to the investigative judge for a decision. The investigative judge takes the ultimate decision as to which documents are covered by privilege, often following consultation with (but not bound by the views of) the dean of the local bar association. In accordance with Supreme Court precedent, the assertions of the lawyer in question should be followed unless “*there is reasonable doubt about the attorney’s standpoint being incorrect*”.⁹³ Privilege cannot be invoked if the documents have been used to commit the crime or are part of the crime (article 98(5) DCPC), or if there are particular circumstances in which the importance of having access to the documents outweighs the importance of the lawyer-client privilege (e.g. the lawyer is suspected of having committed crimes (together with the client)).⁹⁴ In its judgement of 16 June 2020 (ECLI:NL:HR:2020:1048) the Supreme Court ruled that privilege will not be violated if the investigative judge – in cases where large datasets have to be searched – orders a specially designated investigative officer to use search terms to filter out information that falls within the scope of legal professional privilege. This is subject to certain conditions, such as the involvement of the person invoking privilege when the search terms are determined. This precedent therefore removes the requirement for investigative judges to assess each individual document in the dataset and could lead to greater efficiency. The Dutch authorities indicated that the judgment also clarified that blanket claims on legal professional privilege which are not substantiated, cannot block the use of the information that is filtered by the investigative team.

160. The investigation into payments by Royal Dutch Shell in the context of the OPL 245 oil field in Nigeria illustrates some of the challenges presented by the Dutch legal framework for privilege. The FIOD raided Shell’s headquarters in the Hague in 2016 and seized data and financial records. Shell and its in-house lawyers claimed the documentation was covered by legal privilege, giving it contained communications between in-house lawyers based in Nigeria, the Netherlands, the United Kingdom, the United States, Canada and Switzerland. The examining judge of the Rotterdam District Court ruled on 7 October 2019 that Shell’s in-house lawyers could not claim professional privilege because they were

⁹³ ECLI:NL:HR:2010:BJ9262 and ECLI:NL:HR:2013:CA0434.

⁹⁴ ECLI:NL:HR:1986:AC3769, NJ 1987/490, ECLI:NL:HR:2002:AD9162, NJ 2002/439 and ECLI:NL:HR:2009:BH7284, NJ 2009/443

expatriate lawyers working in the Netherlands as visiting attorneys and had not signed the professional statute as required by the Dutch Bar. The Court also found that as Shell's General Counsel sits on its Executive Committee, the Legal Department did not have sufficient independence to assert privilege over its communications.⁹⁵ Counsel for the in-house counsel appealed the decision of the examining judge. The Rotterdam District Court will hear the appeal on 15 October 2020.

161. Company representatives and lawyers at the on-site visit stressed the importance of privilege to maintain control over information obtained in the context of internal investigations. They considered this particularly relevant in the Dutch context, where there is no guidance on the implications of self-reporting to the OM nor frameworks for subsequent cooperation and companies could not be guaranteed that information disclosed in a self-report would not be used against them or their employees in a criminal trial.

162. The issue of protracted processes for assessing legal privilege claims is not new, however. In 2014, the legislation was amended to introduce a shorter time period (90 days for the Supreme Court; 30 days for lower courts; arts. 552a(8) and 552d(3) DCPC) for assessing privilege claims to ensure that they did not hinder investigations.⁹⁶ However, the reforms did not provide for consequences for failure to meet the reduced timeframes and, in reality, the new timeframes are not being met due to the large amounts of data that need to be assessed to determine privilege. The Netherlands indicated that the WODC is conducting a review of the reason for these time limits not being met and the "*improper use and abuse of the right of non-disclosure to delay and complicate criminal investigations*".⁹⁷ The report will be published and shared with Parliament by the end of 2020. Law enforcement officials at the on-site visit indicated that they agreed in principle with the need for a strong framework for legal privilege, but that the practical implications for upholding it meant delays of between 2-3 years in investigations. Law enforcement authorities are particularly concerned about the implications of these delays for the 'reasonable time' test applied by the courts and the statutory limitation period (see above, Limitation Periods). In particular, they referred to the inordinate amount of time required to sift through huge amounts of data seized on servers and the inadequacy of investigative judges' resources and technological tools and expertise to conduct this analysis. Investigators and prosecutors at the on-site visit indicated that blanket privilege claims over data seized in the context of foreign bribery investigations were the principle obstacle to effective enforcement. In the short term, the Dutch authorities are exploring whether artificial intelligence and other data analytics could be used to filter out privileged material from large electronic databases. There are concerns, however, at the margin for human error in the parameters that would need to be defined in such an exercise.

163. FIOD investigators also referred to use of privilege that hinders the investigations, referring to a foreign bribery case where the company wanted to disclose information to the authorities but the external lawyer asserted privilege over the information. In other cases, lawyers have asserted privilege over information seized from third parties or even over witnesses, preventing from testifying. The FP is able, however, to use information provided from foreign authorities in response to MLA requests that contains information in respect to which privilege was waived in the other jurisdiction.

164. In a statement dated June 2019 OM and FIOD indicated they were considering proposals to improve procedures applying to the right of non-disclosure, because of delays in criminal investigations due to such blanket privilege claims and their use as a 'procedural weapon'. The OM claimed that if no changes were made to the legal framework for privilege, it would be unable to pursue large cases against

⁹⁵ Judgment of the Rotterdam District Court of 7 October 2019 (ECLI:NL:RBROT:2019:7856 - Rechtbank Rotterdam, 07-10-2019 / 10/997376-16 16/605).

⁹⁶ [FATF Netherlands MER 2014](#), p. 26.

⁹⁷ See WODC website (in Dutch): www.wodc.nl/onderzoeksdatabase/2981-verschoningsrecht.aspx.

international companies.⁹⁸ Officials from the MJS indicated that the issue of privilege would be addressed in the broader context of a major reform to modernise the DCPC, which is conducted in close consultation with the concerned parties. However, they also indicated that due to the scale of this reform, it is unlikely to be enacted in the near future. There are also initiatives to look into technical solutions to filter out more effectively the privileged information. The judgement of the Supreme Court described above could help these developments in the near future and could lead to greater efficiency. The Dutch Bar Association amended the Code of Conduct (*gedragsregels*) in 2018, to clarify which information falls within the scope of lawyer-client privilege, notably information ‘that is entrusted to him/her in his/her capacity as a lawyer’. The Code specifically warns against copying a lawyer on email correspondence or including a lawyer in a conversation for the sole purpose of claiming privilege over the communications. It also indicates that privilege is not absolute and does not extend to ‘*corpora*’ and ‘*instrumenta delicti*’, including documents that are the subject of the criminal offence or have been instrumental in its perpetration.

Commentary

The lead examiners are seriously concerned that processes for assessing legal privilege claims over large datasets obtained in the context of investigations are causing major delays in foreign bribery cases. While they are conscious of the need to uphold the confidentiality of lawyer-client communications, the lead examiners are nevertheless disappointed that the Netherlands has not taken measures to address this longstanding issue. Some attempts have been made to rectify the problem through amending the Bar Association’s code of conduct and embarking on a study of the root causes, however these fall short of carrying out the necessary reforms. While relevant legislative amendments are in the pipeline, these will not be enacted in the near future and processes for assessing privilege claims continue to create delays in major foreign bribery cases. The lead examiners recommend that the Netherlands take urgent measures, as appropriate within its criminal justice system, to address undue delays caused by processes for assessing legal privilege claims in foreign bribery investigations.

4. Concluding a Foreign Bribery Case

a) Judicial awareness, training and specialisation

165. There are no specialised economic or financial crime courts in the Netherlands. However, several courts (including courts of last resort) have specialised chambers for hearing economic crime cases, which preside foreign bribery cases. All 11 district courts have economic crime chambers. Moreover, the FP has established agreements with the Council for the Judiciary such that prosecutions brought by the FP will be concentrated in four courts: Amsterdam, Rotterdam, Den Bosch and Zwolle, guaranteeing that the more complex fraud and foreign bribery cases will always be handled by a court familiar with these types of offences.

166. Judges present at the on-site mentioned that magistrates at the appeal level and first instance level are specialised and that they feel judges are sufficiently qualified to tackle complex financial issues by combining expertise in different fields. A specific case was mentioned where the trial was presided by a collective of judges, each of them with a different specialisation (one judge specialised in tax, another was a civil law judge and the third’s expertise was in financial market’s crimes). As has been mentioned throughout this report, the foreign bribery offence has yet to be tested in the course of a trial before a court. Judges at the on-site expressed their views that courts would be prepared to deal with these cases as the elements of the offence have been tested in other cases, particularly domestic bribery cases.

⁹⁸ OM Website, [“The Public Prosecution Service and FIOD want to make procedures for non-disclosure rights more effective and clearer”](#), 7 June 2019 (in Dutch).

167. One of the biggest issues identified was an insufficient number of judges, which contributes to cases taking a very long time in court. Prosecutors indicated that, from their experience in similar economic crime proceedings, a foreign bribery case could potentially take several years to be resolved in court. Judges at the on-site visit indicated that the Court in Rotterdam is particularly affected, as it is where most of the cases of the FP are brought at first instance and, the Court of Appeals in The Hague on appeal.

168. The Netherlands has a training centre in Utrecht catering to both judges and prosecutors. According to the judges at the on-site visit, there have been several seminars on foreign bribery, and often external lecturers are invited to participate in these sessions and provide their knowledge.

b) Independence

The legal framework for Ministerial instructions in specific cases and previously in non-trial resolutions

169. Article 5 of the OECD Anti-Bribery Convention prohibits “*considerations of national economic interest*”, the “*relations with another State*”, or the identity of the persons involved from influencing the investigation and prosecution of foreign bribery. As noted above (Investigative and Prosecutorial Framework), the Judiciary Organisation Act provides that the Minister of Justice and Security may issue general and specific instructions on the tasks and competence of the OM (article 127). In relation to the investigation or prosecution of criminal offences in specific cases, the Minister must give the Board of Prosecutors General written, reasoned notice of the proposed instruction. The Minister may make oral instructions only because time is of the essence and the instruction must subsequently be recorded in writing within one week. If the Minister issues an instruction to discontinue an investigation or prosecution, the Minister must give notice of the instruction and the views of the Board to both Houses of Parliament (article 128). In the responses to the Phase 4 questionnaire, the Dutch authorities reported, to date, there have not been any ministerial instructions relating to foreign bribery cases.

170. As outlined above (Enforcement Policy) and below, non-trial resolutions in foreign bribery cases are largely governed by the Directive on Large Transactions. The Directive was revised and reissued and is effective from 4 September 2020. The revised Directive establishes a Review Committee to review and approve proposed non-trial resolutions, replacing the previous requirement for approval of the Minister of Justice and Security. However, in theory and even though the Directive is now silent on the role of the Minister of Justice and Security in non-trial resolutions, in accordance with articles 127-129 of the Judiciary (Organisation) Act, the Minister may nevertheless issue an instruction to take the case to trial. Furthermore, pursuant to article 129 of the Judiciary (Organisation) Act, the Board of Procurators General is required by law to provide the Minister ‘with the information he needs’ and OM prosecutors must, in turn provide the Board with information needed by the Board. The Dutch authorities indicate that the Directive has been revised and reissued as an interim measure in the context of broader legal reforms to the DCC and the Dutch non-trial resolution regime, which propose to introduce, *inter alia*, judicial oversight. These reforms are described below (Non-Trial Resolutions).

Political and hierarchical influence in foreign bribery case management

171. Prosecutorial independence considers both ‘internal’ and ‘external’ perspectives: the independence of the prosecution as an institution and the independence of individual prosecutors. The procedure set out previously in the Directive on High and Special Transactions raised concerns with respect to both internal and external independence. Discussions with prosecutors and defence lawyers at the on-site visit revealed that, in practice, prosecutors offered a non-trial resolution to defendant companies on the proviso that the resolution was subject to final approval both from the Board of Prosecutors and the Minister of Justice and Security. This Directive was revised and reissued on 4 September 2020 to remove the requirement for ministerial approval (see below).

172. The ongoing foreign bribery case involving Royal Dutch Shell raises serious concerns about the involvement of the Minister of Justice and Security in decisions to prosecute or settle foreign bribery cases that go beyond what is set out in the Judiciary (Organisation) Act or the previous Directive on High and Special Transactions. In response to a Freedom of Information request by a lawyer acting on behalf of four civil society organisations, the Minister of Justice and Security released documents on 27 January 2020 containing heavily redacted email and WhatsApp exchanges about the criminal investigation of Shell's acquisition of the OPL 245 oil and gas field in Nigeria. The documents reveal repeated interactions and in-person meetings between the Minister of Justice and Security, the Chief Public Prosecutor, members of the Board of Procurators General and OM prosecutors about the case. These interactions date from October 2015 to January 2019. One specific message addressed to the Minister of Justice and Security, dated 22 July 2018 contains an item on 'Etosha' (code name for the Shell investigation) and notes, "*concerns large settlement Shell. A meeting with the Minister took place last week. Presumably there will be a follow-up meeting on Friday.*" In 2016, FIOD raided Shell headquarters in The Hague in connection with the Etosha investigation.⁹⁹ Shell issued a press release on 1 March 2019 stating that it had been informed by the OM that the investigation was nearing conclusion and preparing to prosecute.¹⁰⁰ Shell, Eni and executives from both companies are also undergoing a criminal trial in Italy in relation to the same facts.

173. The document disclosure in the OPL 245 case generated significant interest in the Netherlands and the Minister of Justice and Security was asked a number of parliamentary questions in relation to his involvement in the Shell investigation. The Minister responded on 2 March 2020 that the OM considered the case "*sensitive*" and that "*I need to be informed by the Public Prosecution Service about issues that are (may be) sensitive and about which I could or should be accountable.*"¹⁰¹ The Dutch authorities emphasised the legal authority set out in article 129 of the Judiciary (Organisation) Act for the Board to inform the Minister of sensitive cases (see above, Independence). On 25 February 2020, Shell issued a statement that the company had never asked the OM for a discussion about a possible non-trial resolution of the OPL 245 investigation.¹⁰²

174. Since the on-site visit, further developments in the OPL 245 investigation became public. Media articles reported that at the end of 2017, the Dutch ambassador to Nigeria informed the local Shell director of an impending visit by the FIOD to the Nigerian Economic and Financial Crimes Commission in the context of the confidential OPL 245 investigation. A senior policy officer at the Embassy alerted the Embassy's police liaison officer to this incident at the time, along with other integrity breaches including the Ambassador having used the company's private jet.¹⁰³ The Dutch Ministry of Foreign Affairs investigated the incident in 2018 and fired the whistleblower in July 2019. The Ambassador was recalled in January 2019 but remained Head of Mission until later that year.¹⁰⁴ In September 2020, a court in The Hague ruled that the former senior policy advisor was wrongly dismissed.¹⁰⁵ The retaliatory measures imposed by the MFA against the Embassy official who used official reporting lines to raise concerns about integrity breaches is cause for concern. The involvement of the Dutch ambassador—a representative of the

⁹⁹ The Guardian, "[Shell faces corruption probe over \\$1bn oil deal in Nigeria](#)" (30 March 2016).

¹⁰⁰ Shell Press release, "[OPL 245 – RDS Plc informed of DPP preparing to prosecute](#)" (1 March 2019).

¹⁰¹ Parliamentary website (Tweede Kamer), "[Answer to questions from members Groothuizen and Sneller about the possible settlement with Shell](#)" (2 March 2020, in Dutch).

¹⁰² Shell press release, "[Reaction due to Dutch parliamentary questions on settlement OPL245](#)" (25 February 2020).

¹⁰³ Premium Times, "[Nigerian whistleblower dismissed by Dutch foreign ministry](#)" (11 July 2020).

¹⁰⁴ NL Times, "[Dutch ambassador to Nigeria leaked confidential info to Shell: Report](#)" (4 June 2020).

¹⁰⁵ Court of The Hague, 09/09/2020, 8429332 RL EXPL 20-5528

executive branch of government—in the Shell OPL 245 case raises further serious concerns under Article 5 of the Convention about interference in foreign bribery investigations and prosecutions.

175. In response to public backlash about non-trial resolutions, including impunity for the natural persons involved, and in the context of a review of the penalty order (*strafbeschikking*) framework, the Minister of Justice and Security submitted a letter to Parliament in September 2019 informing the Parliament of a legislative reform to the non-trial resolution process to set out a legal framework for large settlements (*hoge transacties*) in the Criminal Code. Part of these reforms would remove the requirement for Ministerial approval of High and Special Transactions, and replace it with judicial oversight. There was unanimity among participants in the on-site visit that the move to judicial oversight would bring more transparency, predictability and accountability to the Dutch legislative framework for non-trial resolutions. In the interim, the Directive on Large Transactions has been revised and reissued, establishing a Review Committee to provide advice to the Board of Prosecutors General on proposed non-trial resolutions, thereby removing the requirement for ministerial approval. The revised Directive and proposed legislative reforms are discussed below (Non-Trial Resolutions).

Commentary

The evaluation team was seriously concerned that the Directive on High and Special Transactions mandated involvement of the Minister of Justice and Security in the resolution of foreign bribery cases (and indeed required ministerial approval of non-trial resolutions) which could involve considerations prohibited in Article 5 of the Convention. The recent revision of the Directive to replace the requirement for ministerial approval with advice by a Review Committee for Large Transactions (pending legal reforms to introduce judicial oversight) allays these concerns. However, the role, function and status of the Review Committee, its members and its advice need to be clarified, as does the timeframe for the broader legal reforms to the Dutch non-trial resolutions regime.

The ability of the Minister of Justice and Security to request information from the OM in specific cases, and the exercise of these powers in a foreign bribery case, merit follow-up. Concrete examples of direct political or hierarchical involvement in foreign bribery case management and reporting raise further concerns. In light of the disclosure of confidential information relating to ongoing criminal proceedings by a Dutch ambassador and the recent decision of the Court of The Hague on the wrongful dismissal of the whistleblower who reported the incident, the lead examiners have serious Article 5 concerns. Therefore, they recommend that the Ministry of Foreign Affairs conduct systematic training among Dutch officials posted abroad on its protected reporting framework, the standards set out in the Convention, including Article 5, and the confidential nature of criminal investigations.

c) Non-Trial Resolutions

176. In Phase 3, the Working Group decided to follow up on the use of out-of-court settlements in foreign bribery cases (Follow-up Issue 11(b)). At the time of the Phase 3 Written Follow-Up Report, two foreign bribery cases had been concluded by non-trial resolution (***SBM Offshore*** and ***Ballast Nedam***). Since then, an additional two resolutions have been reached with companies in relation to the same foreign bribery scheme (***Vimpelcom*** and ***Teliasonera***).

Legal Framework for Non-Trial Resolutions

177. There are two legal frameworks for non-trial resolutions under Dutch law: article 74 DCC ('transaction'; *transactie*) and article 257a DCPC ('penalty order'; *strafbeschikking*), which was introduced in 2008. Both frameworks apply to offences carrying a maximum penalty of not more than six years' imprisonment (which includes the foreign bribery offence). The 2008 Public Prosecutor Settlement Act (*Wet*

OM-Afdoening) introduced the penalty order to gradually replace non-trial resolutions under article 74 DCC. The January 2019 Directive on Penalty Orders (2018A010) notes that the aim of introducing the penalty order was to scale back the use of transactions under article 74 DCC. The Directive indicates, however, that in exceptional cases such as the —so-called ‘Large and Special Transactions’—prosecutors can still use resolutions under article 74 DCC as a mode of disposal.

178. Penalty orders imposed by the public prosecutor under article 257a DCPC involve an act of prosecution, which means that, among other things, the payment of a possible fine can be enforced and the order amounts to a criminal conviction and entails an admission of guilt. Unlike a transaction, a penalty order is a unilateral decision by the public prosecutor that does not require consensus between the prosecutor and the defendant. The order becomes final in the absence of active opposition by the defendant after a delay of two weeks.¹⁰⁶ Transactions under article 74 DCC, on the other hand, are out-of-court settlements to avoid criminal prosecution. Whilst they have the flexibility of attaching certain conditions to the penalty imposed by the public prosecutor, such as asset confiscation and behaviour-changing measures (e.g. corporate monitorships, self-cleaning or compliance measures), these conditions are not enforceable under the current framework.¹⁰⁷ Article 74 does not require an admission of guilt in order to pursue a non-trial resolution. Furthermore and as noted in the Phase 3 report, a non-trial resolution under article 74 DCC in a foreign bribery case does not constitute a corruption conviction for the purposes of debarment (including in relation to implementation of the EU procurement directive debarment provisions).

179. All foreign bribery cases, to date, have been resolved using transactions under article 74 DCC. Prosecutors and legal professionals at the on-site visit expressed doubt that penalty orders would ever be used to resolve foreign bribery cases, despite a clear criminal justice policy to institutionalise their use in other cases. Transactions in foreign bribery cases are, in practice, governed by the Directive on High and Special Transactions which was revised and reissued as the Directive on Large Transactions on 4 September 2020. In terms of the availability of transactions for natural persons and as noted above (Enforcement Policy), prosecutors at the on-site visit indicated that they would in most cases prosecute natural persons instead of offering an out-of-court settlement. One of the primary public criticisms of the non-trial resolutions concluded in the Netherlands is the lack of prosecution of natural persons.

Criteria for proposing non-trial resolutions

180. In addition to the criteria described above, all cases involving a ‘penalty component’ of EUR 200 000 or more (previously EUR 50 000 or more) and resolutions entailing a total of EUR 1 million or more (previously EUR 500 000 or more) in combined fines, confiscation, forfeiture or damages—there are additional principles that apply to proposing non-trial resolutions under the revised Directive:

- There must be sufficient grounds to issue an indictment;
- The OM must make the decision based on an objective assessment, taking into account the interests of victims and injured parties;
- The conduct must be reasonably expected to be punished with a fine if the case were brought to trial;
- The defendant must acknowledge the conduct, which forms the basis of the non-trial resolution. This, however, does not amount to a recognition of guilt for a criminal offence; and
- The defendant must also voluntarily accept the proposed non-trial resolution.

¹⁰⁶ See: [Dutch ‘ZSM Settlements’ in the Face of Procedural Justice: The Sooner the Better?](#), P Jacobs, Utrecht Law Review (2014).

¹⁰⁷ [UNCAC Country Review Report of the Netherlands](#) (2013), p.104.

181. Prosecutors can also take into consideration the following measures when determining whether to propose a non-trial resolution: remedial measures taken by the defendant; self-reporting; multijurisdictional investigations and joint resolutions; and compensation (or willingness to compensate) for damage. The revised Directive deals with the important issue of recidivism, providing that “*criminal recidivism is a contraindication to offering a large settlement.*”

Oversight

182. The **Ballast Nedam case** (2012) illustrates how the previous framework for oversight and approval of non-trial resolutions could jeopardise the administration of justice in foreign bribery cases. In this case, the company’s auditors (three KPMG accountants) were separately investigated for money laundering and forgery offences in connection with issuing an unqualified audit report and failing to report fraud in the context of the bribery of public officials from Saudi Arabia and Suriname. Following discussions in late 2013, the auditors agreed to a non-trial resolution with the OM and deposited the agreed upon amount in the State Advocate’s account, following a specific request by the OM via email dated 20 December 2013, which also noted “[I]f the state does not authorise the resolution penalty, the amount will of course be refunded to your client.”¹⁰⁸ The non-trial resolution offer was subsequently retracted and the payment refunded, following a message from the OM on 23 December indicating that “no authorisation had been received from ‘up the line’”.¹⁰⁹ The three defendants were then prosecuted. The Midden-Nederland District Court, in a judgement on 19 April 2018, held the case was inadmissible. In its decision, the court found, *inter alia*, that “in view of the entire course of events during this settlement process, the Public Prosecution Service acted improperly towards the suspect”.¹¹⁰ The OM has appealed the decision and judgment is still pending.

183. Part 5 of the revised Directive instructs prosecutors to submit their intention to offer a large settlement to the chief public prosecutor of the relevant prosecutors office (in foreign bribery cases, this would be the head of the FP). This creates a requirement for approval at an earlier stage in the process than the previous Directive, which required prosecutors to submit the proposed resolution “at a time when the resolution is not yet irreversible”. This should hopefully avoid repeating the scenario described above, such as in the case against the KPMG auditors, where the settlement offer was withdrawn after the amount of the agreed penalties had been deposited.

184. It is unclear to what extent there was public consultation in developing this new framework for approving non-trial resolutions. As it was not public at the time of the on-site visit, the evaluation team did not have the opportunity to obtain perspectives from various stakeholders. According to the revised Directive, once the chief public prosecutor of the relevant OM office approves the settlement, the transaction proposal is submitted to the Board of Prosecutors General for approval. The Board then requests the advice of the Review Committee for Large Transactions. The Review Committee is made up of three members appointed by the Board from candidates who must be either a former lawyer, former judge, professor of criminal law and procedure, or former public prosecutors. The Board of Prosecutors General appoints the Committee members although the criteria and term of the appointment are not defined in the Directive or elsewhere, nor is the basis for dismissing a member of the Committee. There is no reference to what would constitute a conflict of interest, nor is there a procedure to follow in case such a conflict arises. The members of the Committee had been appointed but not been publicly announced at the time of drafting this report. In the absence of a clearer, publicly available framework for the appointment and tenure of Committee members, the process for assessing non-trial resolutions and the legal status of

¹⁰⁸ Judgment of the Midden-Nederland District Court, 19 April 2018 (ECLI:NL:RBME:2018:1616).

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

the Committee's advice, the evaluation team considers that there are risks of conflicts of interest and consideration of factors prohibited by Article 5 of the Convention.

185. In terms of the role of the Committee in proposed non-trial resolutions, the Board submits to the Committee a substantiated transaction proposal; statement of facts including the applicable criminal provisions; and the draft press release. This is less information than was submitted to the Board under the previous version of the Directive, which required a description of the: facts; offences; proposed manner of resolving the case against all offenders (i.e. both natural and legal persons); reasons for not bringing the case to trial; and explanation of the amount imposed in penalties. The Review Committee assesses the documents and conducts hearings with the chief public prosecutor, the defendant company and its legal counsel before advising the Board of Prosecutors General. It is unclear whether the Committee can suggest amendments to proposed resolutions or merely agree or disagree with the proposal. If the advice is in favour of the resolution, the Board of Prosecutors General decides whether the resolution will be proposed to the defendant. This suggests that even if the Committee is in favour of the proposed resolution, the Board retains discretion to deny approval to offer it to the defendant. However, if the Review Committee advises against a resolution, the case is handed to the chief public prosecutor to take a new prosecution decision. The Directive is not clear about what this means, namely, if it is possible for the prosecutor to re-submit an amended proposal for a non-trial resolution in relation to the same case. It is also unclear whether there are avenues for prosecutors (or defendants) to appeal the decisions of the Board or the advice of the Committee, or at what stage of the process the defendant is informed of the proposed resolution. Prosecutors indicated that the timeframe for a decision to be taken on a proposed settlement under the former Directive varied depending on how complicated the case was, but usually took 6 weeks. The revised Directive does not stipulate a timeframe for deciding on proposed non-trial resolutions.

Guidance

186. As was the case with the previous version, the Directive on Large Transactions provides very little guidance to prosecutors as to how to negotiate and determine penalties in non-trial resolutions (see below, Sanctioning a Foreign Bribery Case). The original Directive did not address the range of penalties to be imposed in non-trial resolutions. The revised Directive on Large Transactions sets out factors to determine the amount to be paid to resolve the case, including: financial capacity of the defendant (article 24 DCC); self-reporting; cooperation; victim compensation; penalties imposed in similar cases through court decisions and non-trial resolutions; and sanctions imposed by foreign authorities. There is no reference, however, to confiscation of the instrument and proceeds of the crime nor to consideration of pre-existing or remedial compliance measures. It also introduces the concept of external supervision of compliance with the non-trial resolution by supervisory authorities such as DNB or the Dutch Data Protection Authority. In addition, it provides for internal supervisory measures to be agreed with defendants, such as compliance monitors or instructions to report regularly to the 'Supervisory Board'. This addresses issues heard from participants at the on-site visit with respect to the absence of a framework for enforcing undertakings of defendant companies in the context of non-trial resolutions.

187. As described above (Enforcement policy), the revised Directive is unclear on how to approach cases involving both natural and legal persons. On the one hand it states that large settlements can, as a rule, only occur in relation to legal entities, and on the other, it indicates that while the basic principle remains prosecution of individual defendants, 'the case of each suspect will be judged on its own merits in relation to the prosecution decision to be taken'. When discussing the previous version of the Directive, lawyers, investigators and prosecutors all considered that there was a need for further guidance on the procedure for concluding foreign bribery cases via non-trial resolution in the Netherlands. The evaluation team did not have the opportunity to discuss the revised framework with them and it is therefore unknown whether it fully responds to this need for guidance. It is clear that there will need to be training and awareness activities to accompany the introduction of the revised Directive, both for law enforcement officials and private sector stakeholders.

Transparency

188. In terms of transparency, the revised Directive provides that, in principle, a press release will be published and should include the amount of the transaction and a statement of facts setting out the investigation findings, the criminal conduct that is the subject of the resolution and applicable criminal offences and the role of the defendant. According to the revised Directive, this holds the OM publicly accountable for the handling and settlement of the case and compensates for the lack of publicity following a public hearing and court decision and will have a preventive effect. Settlements in the Ballast Nedam, SBM Offshore, Teliasonera and Vimpelcom cases were all made public by a press release on the OM's website.¹¹¹ The ING case in 2018 was the first case where a full statement of facts and the settlement agreement were both published.¹¹² Civil society representatives at the on-site visit noted the increasing transparency of information on non-trial resolutions. However, non-trial resolutions with natural persons in another foreign bribery case were not made public. Non-trial resolutions that fall outside the scope of 'Large Transactions', or in other words, cases that involve penalties of less than EUR 200 000 (previously EUR 50 000) do not fall under this regime and are therefore not always made public.

Proposed reforms to the non-trial resolutions framework

189. The Minister of Justice and Security presented a proposal to the House of Representatives on 19 December 2018 for amendments to the existing framework for non-trial resolutions. Specifically, article 74 DCC would be amended to provide for judicial oversight of non-trial resolution of criminal proceedings. The stated purpose of the amendments is to ensure greater transparency for the general public.

190. The Netherlands indicates that under the proposed amendments—which the MJS will develop in consultation with the OM and the judiciary—judicial oversight may only apply to large transactions in accordance with the revised Directive. Judicial oversight could be carried out through a closed hearing of the parties (the OM and the defendant) in chambers. Mandatory legal aid could be made available to defendants. The court could apply a reasonableness test to factors such as the presence of sufficient evidence, the procedure by which the settlement comes about and compliance with the conditions for a large transaction. The court could apply the test of reasonableness based on the information supplied by the OM and FIOD, rather than conducting any further investigation itself. The Netherlands indicates that it would be foreseeable for the final result of the judicial review to be made public, including publication of the offences for which the resolution was confirmed after judicial review. It is to be determined whether this would apply to all non-trial resolutions or only those with penalties above EUR 200 000 (as is the case under the revised Directive). A working group has been convened within the MJS to develop the proposed legislation, which is expected to be issued for public consultation as soon as possible, in close consultation with relevant parties. In general, the legislation process in the Netherlands takes two years from initial drafting to enactment, depending on the specific circumstances.

191. In parallel, the revised Directive on Large Transactions became effective on 4 September 2020 and applies as an interim measure to replace ministerial approval with the Review Committee for Large Transactions, in advance of the proposed reforms to article 74 DCC to introduce judicial oversight. The Directive provides “[f]or some time now, there has been a political desire to establish legally that the judge will review large transactions before they can be offered to the suspect. Until this has been legally regulated, the regulation included in this instruction, in which a proposed large transaction is assessed by

¹¹¹ [SBM Offshore N.V. settles bribery case for US \\$240,000,000](#) (12 November 2014); [International fight against corruption: Telia Company pays 274.000.000 US Dollars to the Netherlands](#) (21 September 2017); [Vimpelcom pays close to 400 million dollars to the Netherlands for bribery in Uzbekistan](#) (18 February 2016).

¹¹² OM website, [“ING pays 775 million due to serious shortcomings in money laundering prevention”](#) (4 September 2018).

an independent committee, applies". When discussing the proposed revision of the Directive at the on-site visit, MJS representatives considered that this interim solution would also serve to test the proposed new framework for settlements and, if necessary, improve the draft legislation. It is unclear to what extent the Directive will be further revised once the reforms have been enacted. It is unknown whether the Committee has already received requests for advice on non-trial resolutions in foreign bribery cases or if any are likely to be submitted before the further reforms are enacted to replace the Committee with judicial oversight.

192. There were no plans to conduct a public consultation on the proposed revisions to the Directive and this interim solution and no such consultation occurred before the revised Directive was issued. Non-government representatives at the on-site visit were completely unaware of proposed reforms to the settlement framework and the interim solution of a revision of the Directive in the short-term and independent review committee, other than the initial letter addressed to Parliament in 2019, despite being unanimous on the need for greater clarity and guidance.

Appeal mechanisms: Another challenge for effective enforcement?

193. Article 12 DCPC provides for individuals or companies who are 'interested parties' to file a complaint against a non-prosecution decision (including settlements) with the competent Court of Appeal. The article 12 DCPC mechanism has for example been invoked in relation to the settlement in the ING case by a group of investors, seeking prosecution of the ING executives involved. On 8 July 2020, the Hague Court of Appeal decided to question ING and its former CEO in order to determine whether to annul the settlement and send the case to trial.¹¹³ The court is expected to make a decision on the validity of the non-trial resolution and non-prosecution decision at the end of 2020. In light of the significant controversy surrounding major financial crime cases settled in the Netherlands, to date, particularly with respect to liability of natural persons involved, it is possible that settlements in foreign bribery cases will be challenged through article 12 claims in future. Judges at the on-site visit indicated that the proposed reforms to the article 74 DCC framework for non-trial resolutions would introduce judicial oversight of non-trial resolutions by appellate court judges which would not be subject to appeals. It remains to be seen if and how article 12 DCPC will be amended in the context of this proposed reform. The revised Directive on Large Transactions does not indicate avenues to appeal the decisions of the Board of Prosecutors General on proposed non-trial resolutions; nor to appeal advice from the Review Committee on Large Transactions that forms the basis of those decisions. The revised Directive stipulates that a complaint under article 12 DCC must be made within three months after the interested party has become aware of the non-trial resolution. It is unclear whether this will be considered to be the date of publication of the press release and statement of facts.

Commentary

The lead examiners welcome efforts by the Dutch authorities to conclude foreign bribery enforcement actions through non-trial resolutions since Phase 3, along with increased transparency through publication of press releases and statements of facts. They congratulate the MJS for its initiative to revise the Directive on Large Transactions to remove the requirement that the Minister of Justice and Security approve proposed non-trial resolutions and provide greater clarity on the criteria, procedure and penalties to be imposed in non-trial resolutions. They are concerned about the lack of clarity as to the role, members and functions of the new Review Committee on Large Transactions, noting that it is an interim measure pending proposed reforms to the Criminal Code to introduce a formal legal framework for non-trial resolutions with judicial oversight. The lead examiners therefore recommend that the Netherlands pursue the proposed reforms to its non-trial resolution framework as a priority and in this context:

¹¹³ Reuters, "[Dutch court to question ING and ex-CEO Hamers in money laundering case](#)" (8 July 2020).

- a) ***publish, as necessary and in compliance with the relevant rules, the essential elements of resolutions in all foreign bribery cases, including resolutions under EUR 200 000;***
- b) ***introduce, as planned, appropriate oversight of proposed non-trial resolutions in foreign bribery cases;***¹¹⁴
- c) ***provide guidance on procedures for self-reporting and the level of cooperation expected from defendants;***
- d) ***clarify if and under which conditions non-trial resolutions are available to natural persons in foreign bribery cases, including under the Directive on Large Transactions;***
- e) ***provide further guidance and training on factors to be taken into account when determining penalties in non-trial resolutions, and imposing and enforcing additional measures such as compliance monitors and remedial compliance actions.***

5. Sanctioning a Foreign Bribery Case

194. In Phase 3, the Working Group recommended that the Netherlands proceed with proposed amendments to the DCC to increase the level of sanctions (Recommendation 4(a)) and decided to follow-up on the application in practice of sanctions and confiscation measures in the context of ongoing and future foreign bribery investigations in the Netherlands (Follow-Up Issue 11(c)). At the time of the the Phase 3 Written Follow-up, the Netherlands had passed amendments to the foreign bribery offence in the DCC which entered into force on 1 January 2015. The maximum term of imprisonment was increased, and an additional, optional penalty of maximum 10% of previous annual turnover included for legal persons. The Working Group considered Phase 3 recommendation 4(a) fully implemented but decided to conduct a full evaluation of the amended law in Phase 4.

a) Sanctions applicable to natural persons for foreign bribery

195. The foreign bribery offence is punishable by imprisonment or, alternatively, a fifth category fine. The maximum amounts attributed to the categories of fines are set out under article 23(4) DCC and are updated every two years based on the consumer price index. In Phase 3, the foreign bribery offence included a distinction between bribes to act in breach of the official's duty, punishable by a maximum of 4 years of imprisonment, and bribes to act within the scope of duty, punishable by a maximum of 2 years of imprisonment. The alternative fifth category fine was set to a maximum of EUR 78 000 (article 177 DCC).

Table 1. Maximum sanctions in foreign bribery cases

Offence	Sanction
Active bribery of a public official (article 177(1) DCC)	Imprisonment up to 6 years OR fine up to EUR 87 000
Active bribery against a person who has prospects of becoming a public official (article 177(2) DCC)	Imprisonment up to 6 years OR fine up to EUR 87 000
Active bribery of a judge (article 178(1) DCC)	Imprisonment up to 9 years OR fine up to EUR 87 000

¹¹⁴ The Netherlands is already planning the introduction of judicial oversight over non-trial resolutions.

Active bribery of a judge to obtain a criminal conviction (article 178(2) DCC)	Imprisonment up to 12 years OR fine up to EUR 87 000
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196. In the event that the person who committed the crimes under articles 177 and 178 did so in the course of exercising a professional activity, the courts can impose an additional sanction of professional disqualification, which amounts to the person in question being deprived of exercising their professional activity (articles 177(3) and 178(3) DCC). On the basis of articles 177(4) and 178(4) DCC it is also possible to impose the added sentence of deprivation of certain rights. On the basis of article 31 DCC, this can be imposed for a period of at least two and a maximum of five years if the individual is sanctioned with a prison sentence or a fine.

b) Sanctions imposed on natural persons in practice

197. As of the time of adoption of the Phase 3 report, the Netherlands had not concluded a foreign bribery case. Since then, the approach to the prosecution of natural persons has not been consistent, with very few cases being concluded with the imposition of sanctions on natural persons. The data provided by the Netherlands regarding cases involving foreign bribery and money laundering predicated on foreign bribery indicates that 63 natural persons have been investigated for at least one of the two offences since 2006. However, to date, only four natural persons have been sanctioned, two for foreign bribery, in the context of **Case A**, currently still ongoing; two for money laundering, in connection with the **Ballast Nedam case**. Only one of the natural persons sanctioned for money laundering involved foreign bribery as a predicate offence and it was resolved in 2014 by means of a non-trial resolution that imposed a fine of EUR 40 000. Not a single natural person has been sanctioned for foreign bribery in the context of the four foreign bribery cases concluded by non-trial resolution (see, Sanctions imposed on legal persons in practice).

198. The Netherlands is yet to obtain a criminal conviction of a natural person for the foreign bribery offence, the amended sanctions regime has therefore not yet been tested by the courts. Similar difficulties with bringing successful prosecutions of natural persons seem to exist also in the context of domestic bribery. Participants at the on-site visit referred to the Dutch Railways case (which involved commercial bribery and forgery) to illustrate this reality, noting that the former CEO and senior managers were all acquitted of the bribery charges. Dutch Railways (NS) was sanctioned by the Dutch competition authority (ACM) in connection with the case. However, the Netherlands reports that the company was also acquitted and this was because the court ruled there had been no bribery.

199. As noted above, under article 74 DCC, non-trial resolutions cannot impose prison terms, but can include financial sanctions, the surrender of objects seized or the payment of their assessed value, as well as payment of the estimated proceeds of crime. Fines imposed by non-trial resolution need to be calculated in accordance with the statutory maximum established under articles 177 and 178 by reference to the categories set out under article 23(4) DCC. Therefore, a foreign bribery case concluded against a natural person via non-trial resolution will carry a maximum sanction of EUR 87 000 per each individual crime, which can be imposed cumulatively if there are numerous bribe payments or additional offences (such as money laundering).

200. Two natural persons have been sanctioned for foreign bribery by non-trial resolution under article 74 DCC in the context of **Case A**. Two legal persons and two natural persons are still under investigation in connection with the case. This investigation was discontinued against two other natural persons in 2016 due to their very small role in the facts. A total amount of USD 434 983.30 was paid in bribes, namely 11 small payments in order to obtain 11 different contracts, the value of which ranged between USD 580 600 and USD 1 495 000. One natural person was sanctioned in 2016 with a EUR 20 000 fine and 40 hours of community service for bribery regarding one of the contracts. The second person, who had a minor role in the company and no decision-making powers, was sanctioned with a EUR 5 000 fine and 80 hours of

community service. These sanctions are on the lower end of the spectrum of the available sanctions against natural persons. Although this may be justified by the small role that these two individuals played in the overall bribery scheme, it is still illustrative of the Netherlands' failure to impose sanctions on senior management.

201. According to the Netherlands, non-trial resolutions reached with legal persons do not extend to the natural persons involved and a separate decision is made regarding their prosecution. However, according to information provided by the Netherlands on enforcement data, in the *Ballast Nedam case*, a criminal investigation into foreign bribery and money laundering was discontinued against six natural persons following the conclusion of the case with the company and because of it. To date, one natural person has been sanctioned for partly foreign bribery-predicated money laundering, also through a non-trial resolution, in the context of the *Ballast Nedam case*. Another natural person was convicted at trial and sanctioned for money laundering predicated in commercial bribery in connection with the same case.

202. Although the FP's policy is to prioritise prosecution of natural persons over non-trial resolutions, the case data so far only allows for the assessment of sanctions imposed in the context of resolutions. It is not clear how courts will apply the new sanctions framework in foreign bribery cases involving natural persons and, consequently, in which circumstances prison sentences will be preferred over fines and vice-versa. There is also no legal impediment to more serious instances of foreign bribery committed by natural persons to be resolved via non-trial resolution. It appears, therefore, that in these circumstances, where a fine is the only applicable sanction, the current statutory maximum of EUR 87 000 (excluding confiscation), although able to be applied cumulatively in cases involving multiple offences, may not prove sufficiently effective, proportionate and dissuasive, as per the standards set out under Article 3 of the Convention.

c) Sanctions available for legal persons for foreign bribery

203. Under article 23(7) DCC, the sanction applicable to a legal person corresponds to the next category as the one applicable to natural persons. Therefore, as the maximum fine applicable to natural persons under articles 177 and 178 DCC is a fifth category fine, the maximum fine applicable to a legal person is a sixth category fine which corresponds to an amount of EUR 870 000. Importantly, the 2015 reform of the DCC also allowed for the imposition of a fine up to ten per cent of the legal person's annual turnover in the preceding fiscal year, provided the maximum amount of the sixth category fine is not deemed appropriate in the particular circumstances of the case.

204. Under article 57(2) DCC, fines can be imposed cumulatively if several offences occur. This is the case whether different offences concur in the criminal action (false accounting and money laundering for example, which are also punishable by sixth category fines) or whether the multiple foreign bribery offences are committed through several bribe instalments. According to Dutch authorities at the on-site, when calculating the amount of the fines, prosecutors will first look at the total amount of the fine after all the individual offences have been cumulated, each individual offence being capped at a maximum of EUR 870 000. If the overall amount is not deemed appropriate, prosecutors will make use of the second part of article 23(7) and impose a fine up to ten per cent of the legal person's annual turnover for the preceding fiscal year. Currently, there are no sentencing guidelines available to prosecutors in relation to foreign bribery cases (see, Enforcement Policy). Prosecutors at the on-site visit indicated that in cases involving corporate liability for the acts of subsidiaries, the penalty would be calculated based on the annual turnover of the parent company. As noted above (Self-reporting), self-reports can also be taken into account when determining penalties in a non-trial resolution, subject to certain criteria.

205. In Phase 3, the Working Group also recommended that the Netherlands consider introducing additional sanctions against legal persons, such as suspension from public procurement or other publicly funded contracts. The legislative amendments to the DCC in 2015 did not implement any changes in this matter, and the recommendation was thus deemed not implemented in the Phase 3 Follow-up. The situation has remained unchanged (see also below, Public Procurement).

206. Civil society interviewed on-site called for the courts to be given greater tools to require companies to take remedial corporate compliance measures. On the subject of corporate monitors, judges at the on-site suggested that a proposal for introducing them should have monitors answer to the OM, given how difficult it would be for courts to oversee monitoring. There have been some instances where compliance matters have been included as conditions in the context of a non-trial resolution, such as the **SBM Offshore case**. However, prosecutors at the on-site confirmed that there is no framework under Dutch criminal law for these conditions and, therefore, although they are negotiated as part of the conditions of the resolution, their legal nature is that of a civil agreement. Thus, a breach of the compliance conditions imposed would not represent a breach of the resolution but only a breach of the agreement under civil law.

207. Private sector and law enforcement representatives at the on-site visit were in favour of creating a legal possibility for such measures to be imposed, and enforced, in the context of the proposed reforms to the non-trial resolution framework in the Netherlands. Corporate representatives at the on-site visit referred to the example of the Dutch Railways case mentioned above, where the company was sanctioned by the Dutch competition authority in relation to a tender for sprint trains. In that case, the Dutch government (as a shareholder of the company) commissioned a full audit, which included the effectiveness of the compliance program, and the company was issued with 200 recommendations for remedial measures, including the imposition of a compliance monitor.

d) Sanctions imposed on legal persons in practice

208. In Phase 3, no foreign bribery cases had been concluded and the Working Group had therefore not been able to assess the level of sanctions imposed on legal persons for foreign bribery. Fines had been imposed on seven legal entities by means of non-trial resolutions in the context of the **Oil-for-Food Cases**, although the companies were charged with violation of sanctions regulation and not the foreign bribery offence. Additionally, the low level of sanctions imposed at the time was hardly deterrent, with the Dutch authorities themselves recognising that the amount of the fine was viewed by companies as a cost of doing business, given that the amounts imposed were exceedingly low when compared to the profit obtained from engaging in corrupt practices.¹¹⁵

209. The data provided by the Netherlands regarding cases involving foreign bribery and money laundering predicated on foreign bribery indicates that 53 legal persons have been investigated for at least one of the two offences since 2006. Since Phase 3, the Netherlands has sanctioned seven legal persons for the foreign bribery offence by means of non-trial resolution. One legal person (Takilant) was convicted by a trial in absentia for passive bribery in connection with the **Vimpelcom case** and the **Teliasonera case**. Please see Table 2 below for further details.

Table 2. Sanctions imposed on legal persons in cases of foreign bribery and related offences

	Legal Person	Approx. value of the bribe	Approx. value of the advantage	Sanctions
Foreign Bribery	Ballast Nedam (non-trial resolution 2012)	EUR 1 billion	EUR 45 billion across several military and construction contracts	Total EUR 17.5 million Fine EUR 5 million; Confiscation EUR 12.5 million

¹¹⁵ [Netherlands Phase 3 report](#), para. 50.

SBM Offshore (non-trial resolution 2014)	EUR 200 million	USD 2.8 billion in contracts with SOEs in 3 different countries	Total USD 240 million Fine USD 40 million Confiscation USD 200 million
Vimpelcom Limited Silkway Holdings BV	USD 114.5 million	USD 335 million in gross earnings since entering the Uzbek market in 2012	Total USD 397.5 million paid to the Netherlands (Total including resolution with other jurisdictions : USD 795 million) Fine USD 230 million Confiscation USD 167.5 million
Sonera Holding BV Teliasonera UTA Holding BV Teliasonera Uzbek Telecom Holding BV (non-trial resolution 2017)	USD 314.2 million in bribes and approx. 27.3 million in 'sponsorship' and 'charitable contributions' in Uzbekistan	USD 457 million in gross earnings since entering the Uzbek market in 2014	Total USD 274 million paid to the Netherlands (Total including resolution with other jurisdictions: USD 965 million) Fine USD 100 million Confiscation USD 174 million + USD 208.5 million (which originally should have gone to Sweden but reverted to the Netherlands when the parent company was acquitted in Sweden)

210. The OM has no internal guidelines regarding the calculation of the amounts of a criminal fine in the context of a foreign bribery case. There are also no formal guidelines on how to take into account self-reporting and subsequent cooperation with the investigation or existing or remedial compliance measures in mitigation of applicable sanctions. According to prosecutors at the on-site, the applicable rules are the same as if the case were being tried before a court. Consequently, the same potentially aggravating and mitigating circumstances are taken into account, as well as rules regarding the maximum sanctions set out under article 23(7) DCC. It is, therefore, worth noting the very high amounts of the fines that were imposed in the four foreign bribery cases set out in the table above, considering that the criminal investigations into all of them commenced before the legislative amendment to article 23(7). The maximum sanction of ten per cent of a legal person's annual turnover was only applicable to the **ING case**, as all the other cases above have facts that pre-date the entry into force of the 2015 amendments.

211. This is particularly relevant in the context of the **Vimpelcom** and the **Teliasonera** cases. In both cases, the authorities in the Netherlands cooperated with their United States counterparts not only in the context of the investigation but also at the time of imposing sanctions. The companies concluded their respective non-trial resolutions in the Netherlands concurrently with a deferred prosecution agreement with the U.S. Department of Justice for violations of the U.S. Foreign Corrupt Practices Act. According to the FP, in both cases the amount of the fine and the amount of confiscation were the same amount in the two

countries. This raises questions as to how the calculation of sanctions was orchestrated within the Dutch legal framework and the specific method used by the Dutch authorities to reach the amounts imposed as fines in these two cases. Even in the event of an accumulation of offences and penalties under article 57(2) DCC, it is difficult to establish how the fines reached these amounts of hundreds of millions of euros.

212. The amounts of the fines imposed in the *Vimpelcom* and the *Teliasonera* cases bring to light a lack of transparency in the calculation of fines in the Netherlands in the context of non-trial resolutions. (for the calculation of the fine in the *ING case*, see Money Laundering). Particularly when considering the contrast between the amounts imposed in non-trial resolutions and the amounts imposed by courts in convictions following a trial. The maximum monetary sanction ever imposed on a company in the Netherlands by a court was against Odfiel in 2013 for environmental offences and totalled EUR 3.5 million, a strikingly lower amount than any of the recent fines imposed by the OM. Both lawyers and judges at the on-site expressed their view that the fines in the *Vimpelcom* and the *Teliasonera* cases had been set to very high amounts due to influence from United States' prosecutors and the SEC, as the companies were reaching agreements of non-prosecution with both jurisdictions simultaneously.

213. It is also relevant to note that since the amendment to the maximum sanction for legal persons entered into force in 2015, the new limit of ten per cent of a legal person's annual turnover has never been applied by the courts and, therefore, no case law has been established regarding this threshold. Judges in the Netherlands do have sentencing guidelines in the context of fraud cases, which also includes foreign bribery cases, which apply both to sanctions imposed on natural and legal persons.¹¹⁶ Judges present at the on-site mentioned that, at the present time, it is not clear how the sanctioning guidelines will apply to the new maximum sanction, although establishing an 'appropriate penalty' should take into consideration the same factors in terms of aggravating and mitigating circumstances as are taken into account within the regular statutory maximum.

e) Confiscation of the bribe and the proceeds of foreign bribery

214. The legal framework for confiscation in the Netherlands has remained unchanged since Phase 3, with articles 33 and 33a DCC regulating ordinary confiscation and article 36e regulating the special confiscation regime. The Directive on Confiscation issued by the Board of Prosecutors' General sets out the rules and options available to prosecutors regarding the confiscation of illegal proceeds of crime. The recent revisions to the Directive on Foreign Corruption provide that all investigation plans prepared for foreign bribery cases "*should include a section on the scope for depriving offenders of their illegally obtained advantage.*" Law enforcement agencies at the on-site visit stated that the legal framework in place was sufficiently robust to allow them to confiscate illegal proceeds of crime. They noted, however, that resources were insufficient to deal with every case and asset confiscation prosecutors therefore needed to focus on the most important cases (see, Functioneel Parket).

215. When determining amounts for confiscation in foreign bribery cases, FIOD-ACC provides FP prosecutors with the necessary information and expertise to calculate the appropriate amounts that should be considered as illegal proceeds of criminal activity. In particularly complex or sensitive cases, a prosecutor specialising in confiscation will aid the lead prosecutor in this task (for further information, see Overview of investigative and prosecutorial authorities in charge of foreign bribery enforcement). The OM sets annual targets for the total amount of proceeds of crime it aims to confiscate (EUR171 million in 2018 and 2019), which are established based on results of previous years. There are no crime-specific annual targets. Prosecutors at the on-site visit confirmed that in recent years the target has always been met mostly due to the amounts confiscated in the context of foreign bribery cases. As discussed below, in relation to tax measures for combating bribery, the Netherlands officially allows for the tax deductibility of

¹¹⁶ [Judicial Sentencing Guidelines 2020](#), p.22 (in Dutch).

confiscated amounts however, in some non-trial resolutions companies have undertaken not to claim tax relief on confiscation.

No confiscation of unlawful proceeds of crime in foreign bribery cases for natural persons

216. Confiscation measures have not been imposed on any natural persons for the foreign bribery offence, including against the two natural persons who were sanctioned for foreign bribery by means of a non-trial resolution. The only confiscation measure imposed to date in connection with a foreign bribery case was in the context of the **Ballast Nedam case**. Its former CFO was prosecuted and convicted of money laundering predicated on commercial bribery and a total of EUR 5.1 million were confiscated as illegal proceeds.¹¹⁷ Interestingly, the court considered that the illegal proceeds did not derive from the money laundering offence, but rather from the compensation received in the context of the non-official bribery. The judgment of the court of 10 July 2018 mentions the defendant as guilty of commercial bribery, even though the defendant was not charged with that offence because the facts were time-barred. Article 36e DCC (in this case in the version in force prior to 2011, since the facts of the case preceded the article's amendment) allows the court to assess whether it is plausible that other offences have led the convicted person to obtain an unlawful advantage. The fact that the other offence in itself is time-barred does not prevent confiscation from being decreed.¹¹⁸ Confiscation has been imposed on natural persons in commercial bribery fraud cases.¹¹⁹

Authorities in the Netherlands have been successful in confiscating large sums in the context of non-trial resolutions

217. As illustrated in Table 2 above, the four foreign bribery cases concluded by means of a non-trial resolution confiscated large amounts from the companies involved. The method for calculating the amounts for confiscation varied, depending on the specific circumstances of each case. As with monetary penalties, there has been no court-ordered confiscation in a foreign bribery case, to date. Investigators from the FIOD-ACC at the on-site visit clarified their methods for calculating the proceeds of crime in foreign bribery cases and considered that these would hold up in a court, if the case went to trial.

218. In the **Ballast Nedam case**, the OM confiscated EUR 12.5 million. By December 2012, when the resolution agreement between the company and the OM was signed, Ballast Nedam was approaching insolvency. The company was due to receive a EUR12.3 million tax refund that year, so this 'tax claim' was waived and the amount was forfeited in the form of confiscation. In the **SBM Offshore case**, USD 200 million was confiscated as unlawful proceeds of foreign bribery. The Netherlands reports that there were some practical difficulties establishing the exact profit obtained from the bribe due to the complexity of the company's structure and determining the specific year to attribute the profits derived from the bribe. The calculations were made with the aid of FIOD accountants, experts from the TCA and an external forensic accountant. KPMG paid EUR 3.5 million in confiscation of illegal proceeds related to Ballast Nedam's bribery. The amount correlates to KPMG's fees for the audit conducted for Ballast Nedam, the prosecutors of the case considering that these constituted the profit derived from the criminal activity.

219. In the **Vimpelcom case**, the company paid bribes to gain access to the Uzbek telecommunications market and obtain licences. The authorities considered that all profits made by the company in the context of its operations in Uzbekistan constituted illegal proceeds of crime. The authorities in the Netherlands, in

¹¹⁷ Middle-Netherlands Court (Utrecht, 10 July 2018), [ECLI: NL: RBMNE: 2018: 3173 \(in Dutch\)](#).

¹¹⁸ Supreme Court 7 July 2009, ECLI: NL: HR: 2009: BI2307.

¹¹⁹ See, for example, Judgment of the Court of Amsterdam of 6 January 2017 ([ECLI: NL: RBAMS: 2017: 3801](#), in Dutch); OM Website, "[Deprivation of 1.1 million euros due to 7 000 hours of undelivered care](#)" (19 December 2019, in Dutch).

cooperation with their US counterparts, took into account Vimpelcom's gross earnings in Uzbekistan from the time it entered the market until the beginning of 2012 and confiscated USD 335 million. Both countries received an equal amount. To trace the proceeds generated by the commission of the foreign bribery offence, FIOD used the reports drawn by the company's accountants, as well as the results of Vimpelcom's internal investigation. Similarly, in the **Teliasonera case** (which shares the same facts as the **Vimpelcom case**) the FP also considered that all profits made in Uzbekistan constituted illegal proceeds and confiscated the company's gross profits in Uzbekistan from the time it entered the market until the beginning of 2014. Teliasonera paid USD 457 million in confiscation which was evenly divided between the authorities in the Netherlands and the United States.

220. In the **ING case**, EUR 100 million were confiscated as unlawful proceeds of crime. Investigators from FIOD-ACC at the on-site commented that the ING case involved a different type of calculation method, as it was too difficult to calculate direct profits from the bank's criminal misconduct. The approach adopted was to look not at what the bank gained but rather the amounts it 'saved' in not employing sufficient staff to carry out adequate AML controls. The amount of the confiscation was calculated as the amount ING wrongfully earned through "savings accumulated over a period of years on expenditure of personnel whose task would have been to ensure the implementation of the compliance policy".¹²⁰

Commentary

The lead examiners welcome the amendments to the Dutch Criminal Code that increased the maximum imprisonment term for natural persons and incorporated an additional, optional penalty of 10% of previous annual turnover for legal persons for foreign bribery.

Regarding sanctions imposed on legal persons, the lead examiners note the high level of fines imposed in the context of the four foreign bribery cases concluded by non-trial resolutions, to date. However, they are concerned about the lack of transparency in the method of calculating these fines. They would welcome the implementation of guidelines for the OM in the context of foreign bribery cases, which could be established under the current revision of the framework for non-trial resolutions (see the commentary on Non-Trial Resolutions).

In relation to natural persons, despite the increase in the maximum prison sentences, the lead examiners note that the very few cases concluded to date have involved out-of-court resolutions and, consequently, the imposition of fines. In this context, concerns therefore remain that the level of fines available is too low to ensure that criminal penalties for natural persons are effective, proportionate and dissuasive in practice. The lead examiners therefore recommend that the Netherlands increase the maximum fines available for natural persons for foreign bribery or take other measures to ensure that the sanctions imposed in practice meet the standards set out under Article 3 of the Convention of effective, proportionate and dissuasive sanctions.

The lead examiners commend the Netherlands on its proactive and innovative approach to confiscation in major foreign bribery and related money laundering cases which has yielded impressive results. They note, however, that there are no examples of confiscation imposed on natural persons thus far, and encourage the authorities in the Netherlands to ensure the same level of proactivity when sanctioning individuals.

¹²⁰ ING non-trial resolution [press release](#) by the OM.

6. Mutual Legal Assistance and Extradition in Foreign Bribery Cases

a) Overview of framework for international cooperation

221. Since Phase 3, the DCPC provisions governing MLA were amended in 2018 to remove the requirement for a specific international cooperation treaty in order to provide MLA in criminal cases (article 5.1.4 DCPC). This has major consequences for cooperation with other countries, as the Netherlands can now cooperate with more countries in cases where no MLA treaty applies. As in Phase 3, MLA requests from or to EU countries may be handled directly at the law enforcement level.

222. In the Netherlands, the MJS is the Central Authority for the receipt, assessment and transmission of requests for international cooperation. The role of the Central Authority is delegated to the Department of International Affairs and Legal Assistance in Criminal Matters (AIRS). As it relates to non-EU countries and as explained in the Phase 3 evaluation, a team of 20 officials in the Central Authority handle MLA requests, assess if the requirements are met and then forward them to the competent prosecuting authorities. The OM has an international legal assistance centre at national level (LIRC), which advises on and oversees international cooperation in criminal matters. The LIRC consists of a public prosecutor, a prosecutor's clerk, legal support staff, police detectives and clerical staff. These members of the team assist the OM in drafting and sending European arrest warrants, and MLA and extradition requests from non-EU countries. The LIRC also handles the execution of foreign requests for international cooperation to the Netherlands.

223. In addition to regional IRCs and the LIRC, a dedicated IRC was set up within the FP in 2018. The IRC FP's prosecutor and legal officers process MLA requests, which they then forward to FIOD's international department for execution. Once executed by FIOD, the response to the MLA request is sent back to the IRC FP to forward to the requesting country.

224. The IRC FP received almost 1 000 requests in 2019 relating to tax crime, financial crime and economic crime. When the national or a regional IRC receives MLA requests relating to foreign bribery, they forward these to the IRC FP. In turn, the IRC FP forwards any incoming MLA request relating specifically to foreign bribery to the NCPC. The Netherlands also permits police-to-police cooperation, so that FIOD or police officers can have informal discussions with their counterparts before a formal MLA request is issued. Officials at the on-site visit indicated that they use the range of existing networks including INTERPOL, EUROPOL, and the network of police liaison officers.

225. All incoming and outgoing MLA requests and their status are registered nationally in a system known as Luris, which is accessible to the police, OM, FIOD and AIRS (as central authority). When registering incoming MLA requests in Luris, the IRC selects the type of offence. Information about incoming MLA requests can be gathered annually or upon request by reference to corruption as a category of offence.

226. Recent cases have raised concerns about human rights implications for the Netherlands providing MLA, such as a Report of the National Ombudsman in the case of a Dutch citizen against the Dutch government, as well as an MJS Inspectorate Report on the exchange of information during an expulsion

procedure involving a Bangladeshi citizen, which was extensively discussed in Parliament.¹²¹ ¹²² In response to these concerns, the Minister of Justice and Security and the Attorney General's Office issued a new Protocol on International Cooperation and MLA which entered into force on 1 March 2020. The OM and the police were also consulted on the Protocol. The MJS indicated that the Protocol is soft law and does not have a specific legal basis; it serves as a clarification of existing practice and acts as an agreement between parties involved in MLA and extradition requests. The Protocol is intended to “*arrive at more checks and balances in the considerations surrounding requests for international legal assistance to countries outside the EU*”. It describes the relevant agencies responsible for MLA, namely the IRCs (including the IRC FP, see below); AIRS; and the police. There is no reference to the role of the FIOD. The Dutch authorities indicate that this will be addressed in a revised version of the Protocol.

227. The Protocol sets out a procedure for requesting MLA, which, amongst others, permits exploratory consultations with foreign authorities before making the formal MLA request. According to the procedure, the public prosecutor must submit an MLA request through the national IRC to AIRS for assessment (if necessary in consultation with the MFA and/or police liaison officers posted abroad) based on a prescribed framework. The framework for assessing whether the MLA request is legal or desirable is to be applied primarily in relation to countries with which the Netherlands does not have a long-term or stable international cooperation relationship and countries outside the EU. The factors to be assessed are as follows:

- the possibility that foreign authorities will conduct their own investigation as a result of the information disclosed in the MLA request;
- the absence of an independent judiciary;
- the possibility of the death penalty being imposed for the facts disclosed in the MLA request;
- exceptionally poor detention conditions;
- an asylum status or an ongoing immigration law process of persons referred to in the MLA request;
- whether the person concerned belongs to a vulnerable group in view of race or ethnicity, political beliefs, religious or philosophical beliefs, membership of a union, sexual orientation or occupation;
- the risk of other blatant human rights violations, such as an unfair trial;
- inadequate medical care or inadequate access to counsel;
- the possibilities of obtaining guarantees from the requested country against any of these outcomes.

228. In the event of a disagreement between the public prosecutor, IRC and AIRS in the assessment of the feasibility of the MLA request, the agencies consult with each other to reach a solution. The Minister of Justice and Security, on the advice of AIRS, will take the ultimate decision whether the international

¹²¹ A Dutch citizen who ran several cannabis cafés in the Netherlands and was convicted and sentenced to 103 years' prison (reduced to 50 on appeal to the Supreme Court) in Thailand for money laundering offences in connection with his activities in the Netherlands. The Thai authorities opened their investigation following an MLA request from the Netherlands informing them that he had earned his money selling marijuana and requesting assistance with a criminal investigation. The Dutch National Ombudsman issued a report criticising the OM's handling of the case, noting that it was “*well aware of the risks that a drugs-related criminal investigation in Thailand might bring.*” The issue was also the subject of parliamentary debate in the Netherlands.

¹²² In 2018, a foreign national was forced to return to Bangladesh. He was escorted by the Royal Netherlands Marechaussee, but on arrival in Bangladesh he was, to the surprise of the Royal Netherlands Marechaussee, awaited by Bengali investigative authorities. The investigative authorities were in possession of the Dutch criminal record of the foreign national. Consequently, the MJS Inspectorate examined the manner in which information was exchanged between the Dutch and Bengali authorities and the way in which the criminal justice and immigration authorities informed one another. The Inspectorate recommended the creation of a clear process and information channels between agencies with respect to the assessment and provision of information to foreign law enforcement authorities. See: [International Legal Aid Report](#).

cooperation is desirable with the specific country outside the EU, “*and whether the risks outweigh the importance of the Dutch investigation.*”¹²³ The Dutch authorities indicated that all decisions are based on cooperation with all parties involved. Prosecutors at the on-site visit indicated that while the Protocol is silent as to the consequences for a case if prosecutors request MLA in violation of the new assessment framework, it was clear that prosecutors are expected to follow the protocol. It is therefore possible that evidence obtained through MLA requests issued in breach of the Protocol could be deemed inadmissible in criminal proceedings.

229. The evaluation team is concerned, particularly in the broader context of political intervention in foreign bribery cases discussed above (see, Independence) that the Protocol grants power to the Minister of Justice and Security to veto MLA requests in certain cases thereby risking the consideration of factors prohibited in Article 5 of the Convention in making these assessments. Furthermore, the first ground that can be taken into consideration in refusing to issue an MLA request is the possibility that foreign authorities will conduct their own investigation – a practice that is encouraged by the Working Group on Bribery, noting that MLA requests are an important source of detection. This assessment framework could lead either to prosecutors not issuing MLA requests for fear of the consequences (or indeed in anticipation of denial of authorisation) or to MLA requests for vital evidence in foreign bribery cases being denied on the grounds of a potential investigation in the requested country, thereby creating significant impediments to foreign bribery investigations and prosecutions.

b) Incoming and outgoing MLA in foreign bribery cases

230. With respect to outgoing foreign bribery-related MLA requests, the Netherlands indicated that, between 2015 and 2018 (inclusive), it had made 21 requests (to 16 Parties to the Convention). Of the 21, five were granted and one was withdrawn. With respect to incoming foreign bribery-related MLA requests, the Netherlands indicated that, between 2013 and 2018 (inclusive), it had 67 incoming MLA requests (from 42 to Parties to the Convention). It granted 65 and only one was rejected due to the witness not being in the Netherlands. On average, the Netherlands took 10.5 months to answer the incoming MLA requests. Among the measures that were requested were search and seizure of financial and company records, witness statements and court records. A number of incoming foreign bribery MLA requests are still pending.

231. For Phase 4 evaluations, the Secretariat has conducted surveys of MLA practice among the other parties to the OECD Anti-Bribery Convention. Nine countries responded to the survey and their responses indicated that the Netherlands appears to be performing well in facilitating MLA to Parties to the Convention. However, some countries mentioned challenges in relation to cooperation with the Netherlands. These included issues of data protection for information provided in response to the MLA request. In accordance with Dutch data protection laws, responding countries could not include any identifying information in their replies to MLA requests (for example, name, photo, and address of bank account holders). Judicial approval is required for prosecutors who wish to obtain identifying information in the context of an MLA request. Another challenge relates to the inability to provide international legal assistance in criminal matters with administrative authorities. Between 2014 and 2019, the Netherlands denied two MLA requests from Parties to the Convention in foreign bribery cases because those countries had an administrative, rather than criminal, framework for liability of legal persons and therefore the administrative authority issued the request. Other difficulties cited by prosecutors at the on-site visit included: the time taken to process MLA requests; higher thresholds for initiating criminal investigations than the Dutch standard of ‘reasonable suspicion’ (see above, Investigating Foreign Bribery); and the inability to request MLA from countries where there is a human rights risk.

232. In relation to international cooperation related to the identification, freezing, seizure, confiscation and recovery of the proceeds of bribery of foreign public officials, the Netherlands has cooperated with 17

¹²³ [Protocol on International Legal Assistance.](#)

countries, to date, in efforts to seize and confiscate proceeds of crime. A request to a foreign country to freeze or seize assets as part of a criminal investigation in the Netherlands needs to have as starting point Dutch legislation. Requests to foreign authorities can only be sent if the prosecutor has the power to perform the acts in question under his/her jurisdiction. In that sense, certain actions performed by prosecutors that require judicial authorisation (such as attachment of assets before judgement), will require that same authorisation before the request is made to a foreign country. Requests to foreign authorities may be made by means of MLA or, in the case of an EU country, a European asset freezing order. Only after a final decision has been made by a Dutch court can the authorities transmit the judgement to foreign authorities for execution.

233. The Dutch, U.S. and Swedish authorities cooperated to confiscate and seize assets in the Vimpelcom and Teliasonera cases. Together these three countries examined the scope for confiscation in each country (based on legal procedures and jurisdiction). Dutch law enforcement authorities seized and confiscated assets in the Netherlands and, following MLA requests, in three other countries. The Netherlands and other countries involved then negotiated the return and distribution of the confiscated assets. All the foreign bribery cases concluded thus far have been by means of a non-trial resolution and not a final court decision.

c) Investigating and concluding multi-jurisdictional cases

234. The Directive on Foreign Corruption previously provided that if criminal inquiries have been started abroad, the OM should contact foreign counterparts and to consult on jurisdiction and a prosecution strategy and seek cooperation as early as possible. This provision was removed in the recent revision of the Directive. The Dutch authorities indicated that consultation on jurisdiction was possible via MLA requests, and also parallel investigations or through the formation of a Joint Investigation Team (JIT). The Dutch authorities successfully concluded a multijurisdictional investigation in one foreign bribery case (relating to the bribery scheme involving Vimpelcom, Teliasonera and Takilant), to date. The FIOD cooperated with its counterparts in 17 countries in the criminal investigations. In the context of this investigation, coordination meetings were held within the Eurojust framework and the OM met with five other national prosecution services to discuss the alleged facts and how they concerned each country. The Dutch authorities indicated having used a JIT inside the EU for a foreign bribery case and outside the European framework for cases not related to foreign bribery.

235. The Dutch authorities also appear to have a positive approach to spontaneous information sharing. FIOD officers indicated wiretap information disclosed potential criminal offences abroad, which the Netherlands did not have jurisdiction to prosecute. The FIOD then gathered that wiretap information and shared it with the country in question. In another case concluded by non-trial resolution, the natural persons were all located abroad so the Dutch authorities went through Eurojust to spontaneously share the information that had been obtained in the context of the resolution.

d) Extradition

236. In Phase 3, the Working Group decided to follow-up the issue of extradition to ensure that the Netherlands takes any measures necessary to assure either that it can extradite its nationals for foreign bribery or that it can prosecute its nationals for foreign bribery (Follow-up Issue 11(d)). This was because under Dutch law, where the court decides to grant an extradition request, the Minister of Justice and Security has the discretion to refuse the application if s/he considers there are good grounds for believing that the person in question would be prosecuted on account of her/his religious or political convictions, and where the offence is of a political nature. The Minister had overruled a court decision to grant extradition of a Dutch national in a corruption case in 2008, but the case pre-dated the enactment of the foreign bribery offence in the Netherlands and could therefore not be prosecuted. In its responses to the questionnaire, the Netherlands indicated that the Luris system did not store information on extradition cases and it was therefore impossible to ascertain whether any extradition requests in bribery cases have been rejected by

the Netherlands since Phase 3. MJS representatives indicated that the Luris system will be replaced by a new system, Dias, which will be able to organise cases more efficiently and generate more detailed data.

Commentary

The lead examiners commend the Netherlands for its strong and effective framework for international cooperation in foreign bribery cases, which embraces informal cooperation and spontaneous exchange of information. They note, however, the difficulties in providing full international cooperation, especially in countries with non-criminal forms of corporate liability. They therefore recommend that the Netherlands, to the fullest extent possible within its legal system, ensure that a broad range of MLA can be provided to Parties to the Convention that apply civil or administrative (and not criminal) liability to legal persons for foreign bribery and take necessary measures to ensure that information covered by data protection can be disclosed to the fullest extent possible.

While the lead examiners recognise the need to balance human rights considerations with the public interest in investigating and prosecuting offences, they are concerned at the powers granted to the Minister of Justice and Security in the new Protocol on International Cooperation to refuse to issue an MLA request. They further note that the Protocol is silent as to the role and powers of the FIOD in international cooperation. They recommend that the Netherlands amend the Protocol to reflect the role of the FIOD in international cooperation and to ensure that the opening of an investigation in the requested country is not the sole ground for refusing to issue an MLA request.

Finally, with respect to extradition, the lead examiners are disappointed that the Netherlands was unable to provide information on extradition requests in bribery cases since Phase 3. In this respect, and further to Phase 3 follow-up issue 11(d), they recommend that the Netherlands take necessary measures to ensure that the database for requests for international cooperation records information on the existence and status of extradition requests, by category of crime including bribery, to monitor whether any Dutch nationals not extradited for foreign bribery offences are prosecuted, as appropriate.

C. Liability of legal persons

1. Scope of Corporate Liability for Foreign Bribery and Related Offences

237. The Netherlands' legislation on liability of legal persons for foreign bribery is unchanged (apart from the increase in available sanctions described above) since Phase 3 and is governed by article 51 DCC. In Phase 3 the Working Group made five recommendations on liability of legal persons. Among those, the Working Group considered two fully implemented at the 2015 Written Follow-up report and three remained partially or not implemented. The recommendation to take all possible measures to ensure that mailbox companies are considered legal entities for the purposes of prosecuting foreign bribery (recommendation 2(a)) was considered partially implemented pending cases. Recommendations to develop guidance on the application of probationary periods (recommendation 2(d)) and introducing additional sanctions against legal persons (recommendation 4(b)) were considered not implemented. Several questions remain concerning compliance with the standards on liability of legal persons in the Anti-Bribery Convention and 2009 Anti-Bribery Recommendation, as well as concerning the effectiveness of enforcement against legal persons in practice.

a) A broad legal framework for corporate liability that remains to be tested in foreign bribery cases

238. Article 51(2) DCC states that if an offence is committed by a legal person, criminal proceedings may be instituted against (a) the legal person, or (b) those who ordered the commission of the offence, and those who were in control of such behaviour, or (c) the persons mentioned under (a) and (b) together. In its questionnaire responses, the Netherlands indicated that, pursuant to article 51 DCC a legal person commits a criminal offence if it can be attributed to it. As described in the Phase 3 report, a 2003 Supreme Court ruling in the Zijpe case set out the criteria for control, including introducing a doctrine of failure to prevent, and defined criteria for acts carried out 'within 'the sphere of the legal entity.' Behaviour may be said to be within the sphere of the legal person in one or more of the following circumstances¹²⁴: (i) the act or omission was committed by someone working for the company; (ii) the behaviour was related to the normal business operations or the exercise of its activities ('*taakuitoefening*'); (iii) the behaviour benefited the company in its normal business operations or exercise of its activities; (iv) the behaviour was under the control of, accepted or deemed to have been accepted, or failed to have been prevented by the company. This 2003 decision remains the landmark case setting the precedent in the Netherlands. The Zijpe Case doctrine has been confirmed and further clarified on a Supreme Court decision in April 2016.¹²⁵

239. The Dutch authorities have confirmed that, based on the Zijpe case, the prosecution of a natural person is not a prerequisite to engaging the liability of the legal person and that, in theory, a legal person

¹²⁴ Netherlands [Phase 3 Report](#), para. 36 taken from: Supreme Court (Hoge Raad_HR) 21 October 2003, NJ 2006, 328 (Zijpe case).

¹²⁵ HR 26 April 2016, ECLI:NL:HR:2016:733, r.o. 3.4.2.

could be convicted in the absence of a natural person to whom liability can be attributed. When questioned how the requisite of intent to commit the crime could be attributed to the company in the absence of a related natural person, prosecutors indicated that the relevant standard was knowledge and that this could be attributed, for example, by proving significant omissions (i.e. wilful blindness) within the entity. While corporate liability for foreign bribery remains to be tested in the Dutch courts, judges interviewed on-site were of the opinion that this jurisprudence would be applied in foreign bribery cases in the same way as it has been applied to other economic and financial crimes.

240. The Phase 3 report of the Netherlands discussed the issue of ‘probationary periods’ and recommended clearer guidance on their use in foreign bribery cases (recommendation 2(d)). Probationary periods, as set out in article 167 (2) DCPC allow a ‘deferred prosecution’ on the condition of remedial action to be undertaken by a company. Should the company violate the terms of probation or reoffend, it will be prosecuted for that offence, as well as for the offence for which it was conditionally dismissed. In the questionnaire responses, the Netherlands indicated that probationary periods are used on a case-by-case basis and when certain pre-conditions are fulfilled (avoiding possible bankruptcy by the company or adverse social impact). However, the evaluation team heard from both prosecutors and private sector representatives that the use of such probationary periods is unusual and they had not been applied to companies involved in large economic or financial crimes, let alone foreign bribery. In particular, private sector representatives at the on-site were of the view that instead of probationary periods it would be more useful to include the possibility of so-called declinations based on a thorough compliance system and general guidelines on self-reporting and settlements.

b) In principle, Dutch companies are liable for foreign bribery by related legal persons

241. In Phase 3, the WGB expressed concern that article 51 DCC may not extend liability to parent or sister companies for bribery by related legal persons, since the law only provides for liability of the bribery “*in connection with the regular business of the company.*” At the on-site visit, legal practitioners considered that a company could be held liable for acts of related legal persons because the offence must be interpreted in a broad functional sense and that this position is supported by Supreme Court case law.¹²⁶

242. Prosecutors indicated that in a foreign bribery case where a non-Dutch subsidiary was involved, the Dutch parent company could be prosecuted if it could be proven that the act was carried out “*in the sphere of the legal entity.*” Prosecutors also indicated that it would be easier to prosecute the parent company as the ‘factual leader’ who commissioned the offence relying on article 51(2) (ii) DCC or use the DCC conspiracy offences. There is no case law confirming either of these approaches in foreign bribery cases, to date and therefore the relevant test to attribute knowledge is unclear. Authorities indicated that there are several ongoing investigations into legal persons suspected of using intermediaries to bribe foreign public officials that would potentially lead to case law developments.

c) Case law developments in jurisdiction over legal persons, including mailbox companies, but confusion remains

243. In relation to exercising jurisdiction over legal persons, the Phase 3 evaluation found that it would be difficult to establish jurisdiction when a Dutch legal person uses a non-Dutch person (natural or legal) to bribe a foreign public official while outside the Netherlands. The Netherlands confirmed in its Phase 4 questionnaire responses that a foreign subsidiary could not be prosecuted in the Netherlands for acts it commits abroad. However, the Dutch parent company could be held liable for the illegal conduct of its subsidiary abroad if such conduct can be proven to be in the sphere of the Dutch parent company.

¹²⁶ Court of Overijssel 22-11-2018 ECLI:NL:RBOVE:2018:4453 (commercial bribery case regarding the bribe of a google employee).

Prosecutors at the on-site visit explained that they would indeed try to pursue a case against the parent company but evidentiary thresholds could potentially be a difficulty.

244. As noted in the Phase 3 evaluation, companies incorporated in the Netherlands are considered Dutch legal persons in accordance with the Civil Code (articles 1-3). However, the Court of Appeal stated in the 2011 **Chemical Waste case** that the Netherlands might not be able to exercise jurisdiction over Dutch legal persons in cases where “*the company only has its formal registered office in the Netherlands*” but carried out its commercial activities abroad.¹²⁷ When the evaluation team raised the issue of exercise of nationality jurisdiction over legal persons at the on-site visit, there were differing views, particularly from representatives of the legal profession, as to whether active (‘seat’ of operations) or passive (place of incorporation) nationality applied when establishing jurisdiction over legal persons.

245. The confusion between the Civil Code definition of Dutch legal entities and the Court of Appeal precedent remains an issue. This issue is particularly important given the large numbers of mailbox companies registered in the Netherlands and the difficulties when establishing jurisdiction. Lawyers and prosecutors at the on-site referred to the 2016 **Takilant case** where a court considered that there was a sufficient nexus to exercise jurisdiction for passive bribery because the bribes had been paid through a Dutch notary’s escrow account, to exercise jurisdiction over the company, a Gibraltar-based mailbox company. However, this case was tried *in absentia* and the court therefore heard no arguments in defence of the company. It was also not a case involving prosecution for the foreign bribery offence.

246. In a decision on interlocutory proceedings related to another foreign bribery case dated 11 February 2020, the Rotterdam District Court confirmed a broader approach to jurisdiction. The court found that the company in question was a Dutch legal person within the meaning of article 7 DCC, as it had been incorporated under Dutch law and was administered by a TCSP (who was the director of the company at the time of the alleged offence). The bribes were allegedly paid through the company’s head office in country X via a subsidiary in country Y, but the OM is prosecuting the company on the basis that it was a Dutch national as it had its legal seat in the Netherlands. The defence asserted that the prosecutors did not have jurisdiction because the relevant test was the location of operations. This argument could be raised again at trial stage despite the ruling in this interlocutory hearing.

d) Successor liability applies in theory but remains to be tested in foreign bribery cases

247. Article 51 DCC does not cover legal persons in the situation when there is a statutory change to the legal entity, for example through merger or acquisition processes. Changes affecting the legal person, such as dissolution, bankruptcy, merger or demerger, are regulated by case law, not legislation. Supreme Court case law developed the ‘social reality’ criteria to establish a right to prosecution in cases where a legal person is survived by another legal person.¹²⁸ This criteria sets out a material test in order to identify the successor legal entity with the extinct legal entity by taking into consideration factors such as the name it uses, similar business operations or same workforce. Depending on what the court determines to be the ‘social reality’, a prosecution may be instituted either against the company that has succeeded the legal person that committed the offences or against the latter if it is deemed to have continued to exist despite the succession. The evaluation team heard several stakeholders at the on-site visit, such as prosecutors and judges, confirm that successor liability is covered by legislation and case law in the Netherlands. However, this has not been applied in foreign bribery cases, particularly, when it may involve companies in multiple jurisdictions and in cases where the material test might be difficult to overcome.

¹²⁷ Netherlands [Phase 3 Report](#), para. 91

¹²⁸ Supreme Court 28 October 1980, Supreme Court 6 April 1999 and Supreme Court 22 February 2011.

e) Clarity needed on compliance as an affirmative defence

248. As noted above, the Supreme Court in the Zijpe case established autonomous liability of legal persons. The Court explained that a legal person could be held liable for a criminal offence committed by its employees, if it was conducted within the sphere of the legal person. One of the factors taken into account is whether the behaviour was under the control of, accepted or deemed to have been accepted, or failed to have been prevented by the company. Acceptance would be deemed to exist if the legal person did not prevent the act although it was in its power to do so. This could potentially allow compliance to be pleaded as an ‘affirmative defence’; where a compliance program would determine liability or be taken into account by a prosecutor in a decision to prosecute. According to the Dutch authorities, if a company had adequate procedures (not only a good compliance program) to prevent its natural persons from undertaking criminal conduct, it could potentially escape liability.

249. Private sector representatives interviewed at the on-site were adamant that the possibility of compliance being an affirmative defence, although promising, was still surrounded by a lot of uncertainty and echoed questions already raised in Phase 3, in particular what adequate procedures or compliance measures would suffice to avoid liability. Private sector representatives reiterated the need to introduce guidance for assessing compliance or any other preventive mechanism as a defence and stated that it would be beneficial to know what a satisfactory compliance program would look like from a prosecutor’s point of view. Law enforcement officials also expressed the need for guidance and training on how to assess the effectiveness of compliance programmes, including enhanced compliance after the facts occurred or whether a company took enough measures to prevent it from happening again in the future. These positions echo those already expressed in Phase 3 when lawyers indicated the need to formalise this defence in law, given the lack of jurisprudence.¹²⁹

2. Engagement with the Private Sector

250. In Phase 3 the Working Group called on the Netherlands to continue its efforts to encourage companies, especially SMEs, to develop internal controls, ethics and compliance systems to prevent and detect foreign bribery, including by promoting the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance (Recommendation 8).¹³⁰ This recommendation was considered partially implemented at the time of the Written Follow-up, as the Working Group considered that more could be done to engage the private sector.¹³¹

251. Various authorities play a role in engaging with the private sector to prevent, detect and promote reporting of foreign bribery. The MJS and MFA are primarily responsible for this. Foreign bribery awareness raising is conducted with external stakeholders such as law and accountancy firms, compliance officials and audit and fraud specialists through presentations by FP prosecutors, FIOD-ACC investigators and publications (i.e. press releases about settlements). In addition, ICC Netherlands has set up the Week of Integrity, a multi-stakeholder platform on ‘integrity encouragement’. This platform is intended for financial and compliance professionals and includes specific content on foreign bribery, along with meetings twice a year and its annual Week of Integrity. During the Week of Integrity, private and public sector representatives, academics and NGOs join forces to raise awareness of the importance of ethical behavior. The FP and the FIOD also hold presentations for the private sector to enhance knowledge and awareness.

252. For listed companies, the Corporate Governance Code Monitoring Committee published the revised Corporate Governance Code on 8 December 2016, providing guidelines for effective collaboration

¹²⁹ Netherlands [Phase 3 Report](#), para. 37.

¹³⁰ Netherlands [Phase 3 Report](#), recommendation 8, p. 53.

¹³¹ Netherlands [Phase 3 Written Follow-up Report](#), para. 7.

and management. The revised Code was drawn up at the request of the Confederation of Netherlands Industry and Employers, the Association of Listed Companies, Eumedion, the Dutch Investors' Association, the Trade Union Confederation, the National Federation of Christian Trade Unions and Euronext. Elements of the Code that have an important bearing on corruption include risk management, corporate culture, abuses, irregularities, and preventing conflicts of interest.

253. Overall, discussions with private sector representatives during the on-site visit demonstrated that the adoption of anti-corruption corporate compliance measures by companies is advanced. The recent settlements of foreign bribery cases and publication of press releases and case information appear to have prompted substantial progress in this regard. Companies also recognised that the social landscape has changed and mentioned the considerable reputational risks that accompany corruption allegations. In particular, discussions at the on-site on issues such as self-reporting and sector-specific compliance tools and programmes, showed a strong level of awareness of foreign bribery risks and the tools available to address them.

254. However, several company representatives called for clearer guidance, particularly with regard to self-reporting and consequences for multijurisdictional investigations. For example, one private sector participant suggested a system similar to the one in the U.S. where points were given to companies who self-report, and another suggested the government might have a role in communicating more clearly on small facilitation policies to deter this sort of behaviour. Moreover, all private sector representatives expressed need to have clarity on the weight a compliance program may have when determining the liability of legal persons, or on a future settlement. In particular, given the 2003 Supreme Court ruling described above that established that “*failure to take reasonable care to prevent the occurrence of such behaviour*” could trigger corporate liability. The evaluation team considers that as case law develops, it would be helpful if the FP publishes information in cases where it finds that adequate procedures are in place.

255. Companies also indicated a need for guidance on remedial measures to be taken, noting that currently the OM relies on the good faith of sanctioned companies to put in place remedial compliance measures. In this respect, participants were in favour of harmonising approaches with other jurisdictions (e.g. United States and United Kingdom) that have more principle-based frameworks setting out what is expected to prevent, detect and respond to corruption in business activities.

256. One major gap identified in the Netherlands' engagement with the private sector concerns its support of SMEs. The MFA supports responsible business conduct (RBC) measures by SMEs, particularly in risk management and the identification of sustainable, responsible business activities and suitable local trading partners. The RBC Risk Checker enables companies to identify risks related to their business activities, corruption being one of the specific risks that the RBC Risk Checker identifies. However, SMEs interviewed on-site mentioned that they are in a difficult position when doing business abroad, in particular, when confronted with small facilitation payments. SMEs representatives at the on-site visit considered that the Government should devote more time, energy and resources on awareness raising for SMEs, particularly given that SMEs have fewer resources than larger companies to set up compliance procedures.

Commentary

The evaluation team considers that the legal framework set out in the DCC and Supreme Court precedent largely complies with corporate liability standards in the Convention and 2009 Recommendation. It welcomes important case law developments confirming a broader approach

to exercising nationality jurisdiction over legal persons. However, the Working Group should follow-up of relevant case law developments to ensure that:

- a) Parent companies can be held liable for the acts of foreign subsidiaries;*
- b) Jurisdiction can be exercised over mailbox companies for the purposes of prosecuting foreign bribery; and*

The lead examiners are also encouraged by the efforts of various Dutch authorities to engage the private sector and note strong awareness of foreign bribery risks among large companies. However, they are concerned that guidance is lacking on what is expected of a company in terms of adequate procedures and an anti-bribery compliance program, in particular given that this can be a relevant factor when establishing liability or calculating penalties and imposing remedial measures, particularly in the context of settlements. They are also concerned about SMEs being left behind in anti-bribery compliance measures, and therefore consider that Phase 3 recommendation 8 concerning awareness raising among SMEs remains partially implemented. The evaluation team recommends that the Netherlands issue guidance for companies on effective anti-bribery compliance programmes, and disseminate more targeted information for SMEs on implementing anti-bribery compliance measures to effectively prevent and detect foreign bribery.

D. Other issues

1. Money laundering

a) Prosecuting the money laundering offence

257. In addition to the Steering and Assessment Team for corruption, there is also a Steering and Assessment Team for money laundering made up of representatives from the FIOD, the NCPC and the National Coordinating Prosecutor on Money Laundering. At a preliminary phase, this team will decide whether to open a formal investigation into a file and STRs submitted by the FIU. The participation of the NCPC in this SAT means that the possibility of opening a corruption investigation will also be considered.

b) Cases of money laundering predicated on foreign bribery

258. The Phase 3 evaluation notes that the money laundering offences (arts. 420*bis*, *ter* and *quater* DCC) are drafted such that any DCC offence, including foreign bribery, is a predicate offence to money laundering. The Phase 3 report refers to Supreme Court jurisprudence from 2004 establishing knowledge or imputed knowledge of the criminal origin of the assets as the relevant evidentiary standard. Both the law and the Supreme Court confirm that the Dutch money laundering provisions are also applicable to predicate offences that have been committed abroad. At the time of the Phase 3 evaluation, the Netherlands had not concluded a foreign bribery-based money laundering case and the application of the offence to predicate offences abroad had therefore not been tested. Since Phase 3, there have been two major cases involving foreign-bribery based money laundering.

259. In the context of the **Ballast Nedam case**, an investigation against six natural persons for foreign bribery and money laundering offences was discontinued following the non-trial resolution concluded with the company in 2012. The former CFO of Ballast Nedam was prosecuted for laundering EUR 3.1 million in bribe payments from subcontractors in return for providing corporate information on Ballast Nedam and the Saudi Arabia project. He was convicted in July 2018 by a court in Utrecht for money laundering predicated on commercial bribery. This decision was handed down 6 years after the conclusion of the Ballast Nedam non-trial resolution in 2012. The former CFO was sentenced to a 2 month prison sentence, a 10 month suspended prison sentence and the payment of a EUR 100,000 fine. He was also barred from working on the board of a company for 5 years. In determining the sentence of Ballast Nedam's former CFO, the Court took into consideration the fact that the criminal acts had occurred a long time ago and the defendant's advanced age. In addition, the amount of EUR 5.1 million were confiscated as illegal proceeds resulting from the bribery.¹³² In the same court procedure, another former Ballast Nedam director was under prosecution for laundering USD 1.1 billion through a Swiss bank account in connection with the case but

¹³² Middle-Netherlands Court (Utrecht, 10 July 2018), [ECLI: NL: RBMNE: 2018: 3173 \(in Dutch\)](#).

was acquitted due to the conduct predating enactment of the money laundering offence in the Netherlands.¹³³

260. Ballast Nedam's accounting firm and three of its accountants were investigated on charges of money laundering and forgery in the **KPMG case**. The charges were in connection with the unqualified audit opinion, which concealed the bribe payments made by Ballast Nedam in Saudi Arabia and Suriname. The case against the accounting firm was resolved by means of a non-trial resolution in December 2013. KPMG paid EUR 7 million to the authorities in the Netherlands, of which half was confiscated as proceeds of crime, calculated as the profits derived from facilitating the bribe payments as a service provider for Ballast Nedam. The proceedings against the individual accountants are ongoing following the OM's appeal of a first instance dismissal of the case in April 2018 (see above, Non-Trial Resolutions).

261. The largest penalty imposed in the context of a non-trial resolution in the Netherlands to date was the **ING Bank case**. An investigation by the FIOD into several of the bank's account holders revealed that hundreds of millions of euros were being laundered through those accounts. Among the accounts investigated were those connected to the **Vimpelcom case**. The sanctions imposed on ING in this case were therefore related to foreign bribery-based money laundering although the bank was charged with violating the AML compliance and due diligence requirements of the Wwft. ING was also charged with negligent money laundering for failing to prevent bank accounts held by its clients from being used to launder money between 2010 and 2016. ING paid a EUR 675 million fine and EUR 100 million in confiscated proceeds of crime. According to the OM press release, and as confirmed by the authorities at the on-site, the amount for confiscation was calculated based on "*savings accumulated over a period of years on expenditure of personnel whose task would have been to ensure the implementation of the compliance policy*".¹³⁴

2. Tax measures for combating bribery

a) Non-deductibility of bribes needs to be ensured post-enforcement

262. The Netherlands received only one recommendation on tax measures in Phase 3 (recommendation 7), which the WGB deemed fully implemented during its Phase 3 Written Follow-up report. The recommendation asked the Netherlands to encourage law enforcement authorities to promptly share information on foreign bribery enforcement actions with the tax administration to verify whether bribes were impermissibly deducted.

263. Section 3.14(1)(h) of the Income Tax Act lists the following costs excluded from deductions: "*gifts, promises or services if it appears that a criminal act has occurred as referred to in Articles 126(1), 177, 178, 178a, 328ter(2) or 328quater(2) of the DCC.*" The extended definition of public official in article 178a DCC is included and therefore the non-deductibility of bribes applies to bribery of foreign public officials. As noted in the Phase 3 evaluation, small facilitation payments are criminalised and would therefore not be tax deductible; a conviction is not required to deny tax deductibility; and taxpayers are required to substantiate legitimate business expenditures.

264. If a taxpayer is sanctioned in a foreign bribery case, the tax authorities should re-examine the tax returns for the relevant years to determine whether the bribes had been deducted. The TCA can impose an additional assessment within 5 years of the original tax return (article 16(3) General State Taxes Act). The 5-year period can be extended to 12 years in case of income or capital components held or raised abroad (article 16(4)), this provision would apply to some foreign bribery cases, depending on the circumstances. The Netherlands' responses to the Phase 4 questionnaire and discussions with TCA

¹³³ Ibid.

¹³⁴ ING non-trial resolution [press release](#).

officials on-site confirmed that the TCA considered re-assessment of tax returns of the companies sanctioned for foreign bribery to date to ensure the non-deductibility of bribes throughout the relevant period. The reasons given for not re-opening the tax returns to ensure the non-deductibility of bribes include that the relevant tax returns related to a foreign subsidiary or because the bribes were paid via shares/participations which in the Netherlands is part of the 'participation exemption' (not taxable). However, the broader tax implications of these settlements were discussed and indeed agreed upon (see below, Tax Treatment of Confiscation).

b) An inconsistent approach to tax treatment of confiscation

265. Under section 3.14(1)(c) of the Income Tax Act, “costs and expenses connected with” prosecution are not deductible, this includes legal fees, fines and other amounts paid to avoid prosecution. However, amounts paid to the State by way of disgorgement of the proceeds of crime are deductible (section 3.14(3)(a)). This is confirmed by the explanatory memoranda to the legislation, which state that the purpose of disgorgement is not to punish the offender but to nullify any advantage obtained from crime, or in other words put the offender back in the situation s/he was in before the crime was committed. Arguably, if the disgorgement payment were not tax deductible, the offender would be in a worse position financially than before committing the offence.¹³⁵ In the Netherlands, tax deductibility of confiscation translates to a deduction of the amount paid in confiscation from the sanctioned company’s revenue declared in the year that the confiscation payment is made, rather than an adjustment in the year the illegal profits were declared. Depending on the amount confiscated, this can result in a significant ‘reimbursement’ of the overall financial implications for the company following a foreign bribery enforcement action.

266. In practice, it appears that law enforcement officials have taken the approach of enforcing non-deductibility of confiscated criminal proceeds in the context of settlement negotiations in certain cases. TCA and FIOD-ACC officials at the on-site visit indicated that prosecutors coordinate with TCA agents on a case-by-case basis to determine the specific tax implications. In some cases, the exact effect of the tax arrangements is set out in the settlement agreement concluded by the OM, although as noted above this is difficult to enforce in the absence of an overarching legal framework for these kinds of agreement. For example, the settlement agreement in the **ING case** sets out the exact effect of tax arrangements and involved voluntary undertakings by ING not to claim any tax reduction regarding the amounts confiscated in the context of those settlements. It is unclear whether similar arrangements were made in other cases.

Commentary

Noting the close involvement of the TCA in foreign bribery cases, both through the investigative role of FIOD-ACC and TCA’s involvement in addressing tax implications of settlements, the evaluation team is concerned that post-enforcement non-deductibility of bribes is not being implemented systematically. The Working Group should follow up on the re-assessment of tax returns to ensure non-deductibility as foreign bribery case law developments.

The evaluation team is also concerned that the current enforcement approach to tax treatment of confiscation could result in inconsistencies, particularly between cases concluded by settlement and those taken to trial. In order to address potential legal uncertainty for defendants, the Netherlands should ensure a consistent approach to tax treatment of confiscated amounts in foreign bribery cases.

¹³⁵ Memorandum of Reply (*Parliamentary Papers, House of Representatives, 1988/89, 20857, no. 6, pp. 7 and 8*).

3. Export credit and public advantages

267. This section considers the denial of public advantages as administrative sanctions for foreign bribery. It also addresses the prevention; detection and reporting of foreign bribery by agencies involved in officially supported export credits and guarantees as well as ODA.

268. The Working Group recommended in Phase 3 that the Netherlands take sufficient steps to achieve a more systematic approach by its agencies, in particular those in charge of public procurement and export credits to ensure that companies that have been convicted of bribery do not receive public benefits (*Recommendation 10*). In particular, it recommended the use of the MJS database of convictions. This recommendation was deemed not implemented during the Written Follow-Up Report and the Working Group considered that efforts could be made to raise awareness of the MJS database of convictions. This list produces a Certificate of Conduct (GVA; *gedragsverklaring aanbesteden*), the equivalent to a criminal record that could potentially be useful in determining whether applicants are eligible to participate in public tender processes and also in the due diligence processes conducted for export credit insurance.

a) Public Procurement

269. The Public Procurement Act of 2012 comprises mandatory and optional grounds for exclusion that could potentially include convictions for foreign bribery (article 2.87). Article 2.86 refers to “*bribery within the meaning of Article 3 of the Anti-Corruption Convention involving officials of the European Communities or of the Member States of the EU*” meaning that a conviction of foreign bribery involving a public official of a country outside of the EU may not be a ground for mandatory debarment. As noted above, non-trial resolutions under article 74 DCC do not constitute convictions for the purposes of mandatory debarment from public procurement processes. However, they can be considered as an optional ground for exclusion (namely grave professional misconduct). PIANOo representatives at the on-site mentioned the case of a Spanish contractor being debarred in the Netherlands because of possible bribes paid in Spain.¹³⁶ However, None of the companies sanctioned for foreign bribery in the Netherlands, to date, have been excluded from public procurement as all cases were concluded through non-trial resolutions

270. The Phase 3 report noted increased anti-corruption efforts in public procurement processes, in particular a requirement for bidders to provide a pledge of non-conviction for foreign bribery, the GVA for legal persons and the VOG (*Verklaring Omtrent Gedrag*) for natural persons.¹³⁷ Although still not mandatory, VOG/GVA are habitually used by contracting authorities and business and are valid for two years. In 2019, 835 GVAs were requested from the issuing authority JUSTIS per month (a total of about 10 000 for the year). The Dutch authorities acknowledged the importance of the VOG/GVA to ensure that applicants do not have a criminal record for any of the exclusion grounds set out by the contracting authority and checked in the European Single Procurement Document. Foreign companies tendering for Dutch procurement projects may present a different certificate, such as those provided by their local authorities. Based on the directive 2014/24, a contracting authority is allowed to disregard a mandatory or optional exclusion ground in three situations:

- Compelling public-interest reasons; (article 57 sub 3 Directive 2014/24)

¹³⁶ De Volkskrant, “[A Spanish company operating in road construction projects is the subject of numerous corruption investigations](#)” (11 October 2019)

¹³⁷ Regarding the VOG, there is a special department within the Ministry of Justice and Security (the screening authority JUSTIS) that is responsible for the issuance of VOG’s. Upon receiving a request for a VOG, JUSTIS will, among other things, consult the Criminal Records System. This system contains data on the conclusion of criminal proceedings (convictions, dismissals, out-of-court settlements, etc.) Additionally, JUSTIS can also use data from police records and obtain information from the Public Prosecution Service and the Probation Service. The Criminal Records System is, however, also used for other purposes (for instance by the Public Prosecution Service).

- The bidder has taken adequate measures to restore the betrayed confidence (article 57 sub 6 Directive 2014/24);
- Exclusion is not a proportionate sanction, in light of the time that has passed since the conviction and given the subject matter of the contract (article 57 sub 3 Directive 2014/24).

271. Finally, Dutch authorities at the on-site visit mentioned the need for more resources and support, in particular for PIANOo (the Netherlands' procurement agency) to increase knowledge and usage of the VOG/GVA and in general on the risk of foreign bribery in public procurement.

Commentary

The lead examiners note that Phase 3 recommendation 10 is only partially implemented and recommend that the Working Group follow up on the use of the Ministry of Justice and Security's database of convictions among public agencies to enhance due diligence and the application of exclusion rules. They also recommend that the Netherlands:

- take steps to promote the use of the Certificate of Conduct (VOG/GVA) by contracting institutions on both natural and legal persons to verify that tenderers have not been convicted of foreign bribery; and**
- conduct training and awareness raising activities with procurement agencies on the debarment framework with respect to foreign bribery convictions, including in relation to the database of convictions and Certificates of Conduct (VOG/GVA).**

b) Export Credit

272. Atradius DSB is the only official export credit agency for the Dutch State. Atradius DSB insures Dutch exporters of capital goods, contractors that operate internationally, banks and investors. The Dutch government is the insurer and guarantor of the policies and guarantees issued by Atradius DSB. The Netherlands is a member of the OECD Working Party on Export Credit and Credit Guarantees. The Phase 3 Report detailed its efforts to implement the 2006 Recommendation on Bribery and Officially Supported Export Credits (the 2006 Export Credit Recommendation).

Improved due diligence processes but further measures necessary

273. Due diligence and enhanced due diligence efforts have recently been increased to reflect the 2019 Recommendation of the Council on Bribery and Officially Supported Export Credits (2019 Recommendation).¹³⁸ Export Credit Agencies (ECAs) also have a responsibility to promote anti-bribery compliance measures and to make sure that, both before and after the credit, appropriate due diligence measures are undertaken to identify if foreign bribery has taken place. Some ECAs have developed processes, which can lead to the identification of foreign bribery red flags.¹³⁹

274. To implement the 2019 Recommendation, Atradius DSB has improved its due diligence processes by requiring additional information in an application form that includes the financial risks of a transaction, including bribery and extensive inquiries about both the prospective insured and any third party involved in representing the exporter (often an agent) as well as disclosure of business partners, the amount and purpose of commissions and fees paid, and the country where such commissions will be paid. This is standard business practice, whereas it is only mandatory according to the 2019 Recommendation to require some of the aforementioned aspects where enhanced due diligence is necessary.

275. If the information disclosed in the application form or the initial screening warrants further investigation, enhanced due diligence will be implemented for the exporter and third parties involved. In

¹³⁸ [2019 Recommendation of the Council on Bribery and Officially Supported Export Credits \(OECD/LEGAL/0447\)](#).

¹³⁹ OECD (2017), [The Detection of Foreign Bribery](#), chapter 7, section 2.

that case, information can also be requested about how the prospective insured mitigates the risk of bribery in the course of its business operations. In addition, account interviews are conducted with clients that regularly purchase export credit insurance.

276. One of the subjects discussed in these interviews is the operational management, including compliance/control mechanisms. It appears that Atradius DSB's enhanced due diligence process includes verification of appropriate internal corrective and preventative measures such as anti-bribery management control systems. To implement the 2019 Recommendation, the internal due diligence procedures have been adapted and additional sources used. Furthermore, all relevant parties to a transaction, such as joint venture partners, shareholders, sponsors and beneficial owners are identified and checked. In addition, a declaration is required from the insured party prior to policy issue in which the insured party states that there is no bribery involved with regard to the transaction and that all relevant information for the insurance has been provided. The general conditions of the export credit insurance scheme include an audit right.

277. Atradius DSB has a complaints procedure, which can be used for complaints with regard to the export credit insurance. Complaints will be dealt with confidentially, but if a complainant so wishes, his/her report can be filed anonymously. Additionally, Atradius DSB requests applicants to declare in the application form whether they have been involved in bribery, if they have been convicted for bribery in the past five years, if there are any equivalent measures (such as settlements) with regard to bribery over the past five years or if there are ongoing investigations with regard to bribery. If any of these questions are answered positively, this leads to an enhanced due diligence process. As stated by Atradius DSB, Ministry of Finance and Ministry of Foreign Affairs officials during the on-site visit, consideration is being given to the use of a GVA Certificate as part of the application process.

278. Atradius DSB has not denied official export credit to companies sanctioned for foreign bribery through non-trial resolutions, to date, but instead has taken an approach that allows them to review the corrective measures undertaken. Cases in which Atradius DSB has continued to provide export credit to companies sanctioned for bribery raise concerns over the assessment of the effectiveness of corrective measures. For example, SBM Offshore Case was sanctioned in the Netherlands (2014), the United States (2017) and Brazil (2018) for bribery of foreign public officials with respect to bribery of Petrobras officials in Brazil (see also above, Foreign Bribery Cases in the Netherlands). In 2015 (one year after SBM Offshore was sanctioned in the Netherlands), Atradius DSB along with a consortium of other national export credit agencies, provided USD 800 million (out of a total USD 1.55 billion) in project financing insurance to SBM Offshore in what was the largest project financing in the company's history.¹⁴⁰ Dutch authorities assert that an external consultant was hired by Atradius DSB to assess the corrective measures undertaken by SBM Offshore. A positive conclusion of the assessment by the consultant was precedent for providing the insurance.

279. The evaluation team heard Atradius DSB, Ministry of Finance and Ministry of Foreign Affairs officials indicate that while criminal convictions and settlements in foreign bribery cases are taken into consideration in due diligence processes, there are no legal grounds to debar companies convicted or sanctioned through non-trial resolutions from receiving insurance credit permanently.

Atradius DSB's foreign bribery identification of red flags and referral processes need review

280. Atradius DSB, Ministry of Finance and Ministry of Foreign Affairs representatives at the on-site visit indicated that if, following an export credit, they became aware of an exporter's engagement in possible foreign bribery (e.g. through media reports), Atradius DSB officials would conduct enhanced due diligence and have a 'conversation with the client'. If this gave rise to further concerns, they would present the information to its guardian authorities accompanied with advice for potential next steps. Those may among

¹⁴⁰ SBM Offshore Press release (27 July 2015), "[SBM Offshore completes US\\$1.55 Billion financing of Ciudad de Saquarema](#)".

others include termination of the insured's right to indemnification, cancellation of the policy and/ or temporary debarment from export credits. Atradius DSB refers the information to the Ministry of Finance's Head of Division on Export Credits who will then evaluate whether this information will be referred to law enforcement authorities. In addition, if the information renders this necessary, the insurance policy may be cancelled.

281. The evaluation team is concerned that this identification of red flags and referral process involves an enhanced due diligence by Atradius DSB and the Ministry of Finance on whether an insured party has fulfilled its obligations under the policy; agencies that are not necessarily equipped with sufficient investigative tools or powers to analyse the criminal offence of foreign bribery. Of additional concern is the potential for this process to alert the company to possible misconduct before it reaches law enforcement authorities and result in asset, evidence or witness flight. These elements raise questions about the effectiveness in practice of Atradius DSB' referral process.

Concerns about failure to deny or suspend support in foreign bribery cases involving export credit

282. Atradius DSB provided export credit support to Dutch dredging company Van Oord and ING bank for the Marginal da Corimba multi-billion dollar real estate and highway development project in Luanda in 2016. The recent Luanda Leaks investigation revealed alleged bribery of Angolan public officials, as well as human rights violations (such as forced resettlement) in the execution of the project.¹⁴¹ These allegations were the subject of parliamentary questions addressed to the Ministers of Finance and Justice and Security on 19 March 2020.¹⁴² Atradius DSB, Ministry of Finance and Ministry of Foreign Affairs officials on-site indicated that following media reports in January 2020 about this case, they had started conversations with the companies involved and that only if there was a conviction for bribery could they consider suspending the credit or imposing temporary debarment for future credit.

283. Damen Shipyards was debarred by the World Bank for 18 months in March 2016 after failing to disclose payments to an agent in a tender to supply fisheries patrol boats, this project was not insured by Atradius DSB.¹⁴³ After debarment by the World Bank, Atradius DSB temporarily debarred Damen from the export credit insurance scheme and all applications that were not decided upon yet were suspended. An enhanced due diligence was launched in March 2016 to look into the policies of the company. Fourteen cases were found where the company had not provided all the relevant information for the export credit insurance. The enhanced due diligence was concluded in October 2016, and temporary debarment was lifted under strict conditions that do not apply to other companies. In January 2017 Damen HQ was raided by Dutch law enforcement investigators. To date, no formal charges have been filed against Damen.

284. In September 2019, the Dutch Ministry of Finance responded to Parliamentary questions that Atradius DSB had conducted an enhanced due diligence in 2016.¹⁴⁴ Civil society representatives at the on-site visit noted that following Atradius DSB's implementation of the updated 2019 Recommendation, it now has greater powers to suspend and deny credit. Of particular relevance is that in October 2018, the new anti-bribery policy for the export credit scheme was launched, including all the steps that were needed to implement the 2019 Recommendation. Part of the new anti-bribery policy includes more stringent clauses

¹⁴¹ Janene Pieters "[Dutch companies linked to human rights abuses in Angola: Report](#)", NL Times (20 January 2020).

¹⁴² House of Representatives website, "[The consequences of Luanda Leaks for Dutch companies and policy](#)" (19 March 2020, in Dutch).

¹⁴³ World Bank website, "[World Bank debars B.V. Scheepswerf Damen Gorinchem \(Damen Shipyards Gorinchem\) for 18 months](#)" (16 March 2016).

¹⁴⁴ Rashad Rolle, "[Dutch Ship Firm Kept Fees Secret](#)", The Tribune (12 November 2019).

in the general conditions of the export credit insurance. It was decided that the policy would be evaluated after two years and will therefore be reviewed at the end of 2020.

Awareness raising activities and coordination needs to be enhanced at Atradius DSB and other partners

285. Atradius DSB, RVO and the DFI FMO have been sharing information and best practices including in relation to due diligence procedures for a number of years. Institutional changes are envisaged as the FMO has a subsidiary that will become part of a joint venture with the Dutch State and a new financial institution will provide export credits, investment loans and support to project development abroad. The law is being prepared, and will possibly be approved by parliament before the end of 2020.

286. The FP and the FIOD recently held one seminar on raising awareness of corruption risks and recognising possible signs of corruption in the application process for Atradius DSB staff involved in the due diligence process. This is a step in the right direction, however in light of the cases described above, more systematic and specific training on preventing, identification of red flags, reporting and sanctioning foreign bribery in the context of export credit contracts is necessary.

Commentary

The lead examiners welcome the policies developed by Atradius DSB to implement the 2019 Recommendation of the Council on Bribery and Officially Supported Export Credits, including requiring disclosure of information on third parties involved in representing the exporter. They are also encouraged by Atradius DSB actions to temporarily suspend credit to a Dutch company and conduct enhanced due diligence following its debarment by the World Bank. However, the lead examiners remain concerned about a lack of proactivity where it relates to companies sanctioned for foreign bribery in the Netherlands through non-trial resolutions. They note that, in spite of its disclosure requirements, Atradius DSB has never itself identified foreign bribery – even though some of the companies receiving support are the subject of alleged bribery and human rights violations in connection with transactions insured under the export credit scheme.

They recommend that, in the context of the evaluation of its new anti-bribery policy planned for end-2020, Atradius DSB undertake a comprehensive review of its policies to identify how they could better be applied in practice to enable identification of foreign bribery red flags and provide regular training to its staff.

4. Official Development Assistance

287. This Phase 4 evaluation is the first time the Netherlands' ODA framework is reviewed in light of the 2016 Recommendation for Development Cooperation Actors on Managing Risks of Corruption (the 2016 Recommendation) and in particular sections 6-8 and 10, which more directly pertain to foreign bribery.¹⁴⁵

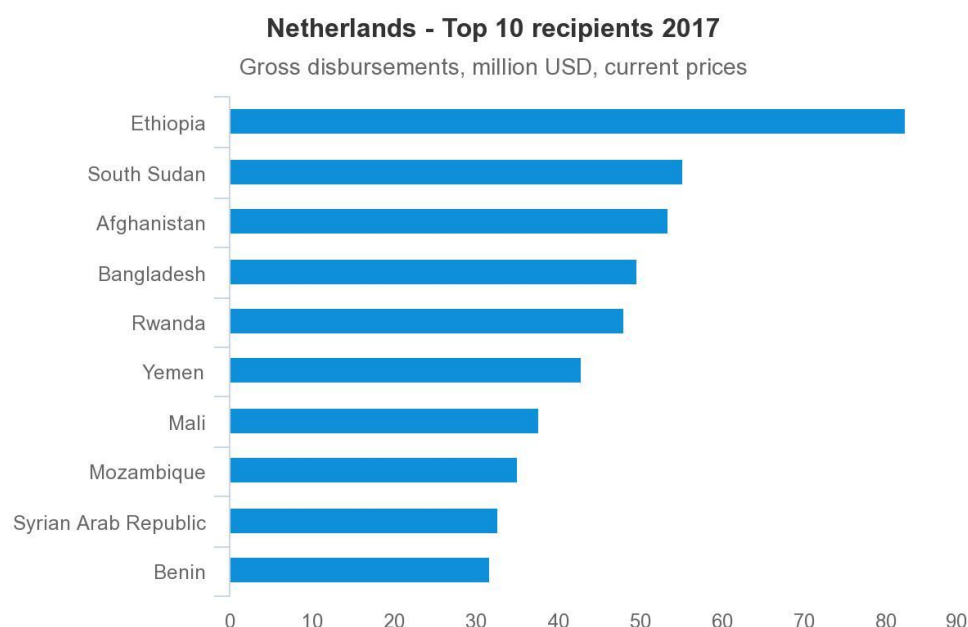
a) The Netherlands' ODA Profile

288. In 2018, the Netherlands was the seventh largest ODA donor, and provided a total of USD 5.6 billion in ODA (the equivalent of 0.61% of gross national income (GNI)). In 2018, 67% of the Netherlands' gross ODA was provided bilaterally. The Netherlands' development co-operation focused on the Sahel, Horn of Africa, Middle East and North Africa, with a view to tackling the root causes of poverty, migration, terrorism and climate change. All of the top 10 ODA destination countries in these regions (with

¹⁴⁵ The [2016 OECD Recommendation for Development Co-operation Actors on Managing Risks of Corruption](#) replaces the 1996 DAC Recommendation on Anti-Corruption Proposals for Bilateral Aid Procurement.

the exception of Rwanda) are perceived to have a high to very high risk of corruption in the Transparency International 2019 [CPI Index](#).

Figure 4. Netherlands: Top 10 ODA Recipients 2017



Source: Netherlands Development Cooperation Profile (OECD, 2019)

289. In 2017, 32% of bilateral ODA commitments (USD 1.1 billion) was allocated to social infrastructure and services, with a focus on government and civil society (USD 435 million), water and sanitation (USD 260 million), and health and population policies (USD 225 million).¹⁴⁶ All of these sectors are considered as subject to high or even, in certain countries, systemic risks of corruption. The Netherlands' priority ODA projects therefore involve significant risks of bribery of foreign public officials, both in terms of geographic and sectoral focus.

290. The MFA, in particular the Directorate-General for International Cooperation, is responsible for development co-operation policy and for its co-ordination, implementation and funding. The MFA collaborates with other government departments and with the Dutch Development Bank (FMO) and the RVO, which administer several ODA-funded instruments and, respectively, EUR 1.3 billion and EUR 159.5 million in volume of ODA. The MFA in The Hague runs and oversees ODA projects as well as Dutch embassies abroad.

b) Pre-grant prevention: Anti-corruption clauses and risk assessments

291. In terms of measures to manage corruption risks and prevent and detect corruption in ODA contracts (Recommendations 5 and 6, 2016 ODA Recommendation), the MFA conducts a mandatory fraud and corruption risk assessment on the project appraisal document for all project proposals. This assessment includes an identification of risks, how these risks affect the implementation of the project and the results. If necessary, mitigating measures for each identified risk must be included in the contract or

¹⁴⁶ [OECD Development Cooperation Profiles, Netherlands](#) (2018).

grant decision. For ODA contracts valued at greater than EUR 1 million the MFA performs an Organisational Risk and Integrity Assessment (ORIA). This assessment considers the applicant organisation's anti-fraud, anti-corruption and integrity policy, along with its organisational structure, culture, internal controls, monitoring and evaluation system and risk management system. The MFA indicated that one-third of ODA contracts are above this threshold and therefore undergo an ORIA. An audit is mandatory for ODA projects over EUR 5 million and for projects between EUR 500 000 and EUR 5 million, an audit can be requested following the results of the risk assessment.

292. RVO officials at the on-site visit indicated that they assess projects by the types of risks presented. RVO checks whether the company has a code of conduct and how its anti-corruption policy is implemented. In this context, it verifies the multilateral development banks' lists of ineligible firms and individuals.¹⁴⁷ If the company has been debarred, it cannot receive funding until the debarment is lifted. If RVO identifies corruption as a salient risk in the country the company will be operating in, it will discuss this with the company and inform the company about this risk and its responsibilities under Dutch Law. The RVO also runs a risk check on the company using risk analysis software. RVO officials indicated that they were in regular contact with Dutch embassies abroad, who assist with assessing local implementing partners and whether local public officials are involved in the project and present a risk of foreign bribery.

c) Audit, detection and reporting

293. Section 7 of the 2016 ODA Recommendation addresses reporting mechanisms and whistleblower protection. In its questionnaire responses, the MFA did not indicate what internal and/or external reporting mechanisms have been put in place to for reporting persons to report misconduct—and specifically foreign bribery—in the context of ODA projects. Grant contracts nevertheless require recipients to immediately notify the MFA of suspected or confirmed irregularities in the implementation of the grant activities. The MFA's broader reporting framework is described above (Increasing detection through other potential sources: the role of the MFA and Embassies) and no foreign bribery reports have been received through this framework, to date. MFA officials at the on-site visit considered that fraud—rather than foreign bribery—was the main issue arising in ODA projects. They explained that if suspected fraud is detected in the context of an ODA project, the MFA engages external forensic auditors (usually from one of the 'Big 4' firms) to investigate the allegations. The MFA provides the auditors with the parameters to investigate for fraud. It appears that specific red flags for foreign bribery are not systematically included in these parameters and the audit is case-specific. Based on the auditors' investigation, the MFA will decide whether to apply sanctions to the company in question (see below, Sanctions).

294. MFA officials receive substantial numbers of reports (suspicions) on fraud and corruption: between 2013 and 2015 there was an average of 25 reports per year, which increased to 68 reports in 2018 and 74 in 2019. Auditors and whistleblowers usually make the reports, which most often relate to procurement fraud and falsification of paychecks. In 2019, the MFA sanctioned companies in connection with ten cases of fraud in ODA projects. The MFA did not inform or consult law enforcement authorities of the allegations or sanctions in these cases, at any stage.

295. The RVO has a reporting procedure for cases of suspected fraud, including foreign bribery, which does not distinguish between reports received from abroad or about situations abroad. Both third parties and RVO staff can anonymously report to the fraud coordinator using the fraud reporting form on the RVO website.¹⁴⁸ Information about the OECD Anti-Bribery Convention is also available on the RVO website, including a telephone number that companies can use when they have questions. RVO officials indicated that if the agency received any indication that a company was misusing subsidy money or was involved in corrupt practices, it would contact FIOD or the FP. They noted the delicate process of, on the one hand,

¹⁴⁷ For example, [World Bank Listing of Ineligible Firms and Individuals](#).

¹⁴⁸ [Reporting form RVO](#) for possible fraud or breach of integrity.

working with companies to improve their business practices and in this context encouraging transparency about potential issues, whilst on the other hand having to report suspected fraud or corruption to law enforcement authorities as soon as they become aware of it. The RVO has made nine reports to the FP in the past seven years (one of which originated from a whistleblower) but none of these have involved bribery of foreign public officials, they also indicated receiving useful feedback on these reports. RVO officials receive mandatory FIOD foreign bribery trainings appear highly equipped to detect and report potential foreign bribery.

296. In relation to considering the risks of the environment of operation (section 10, 2016 ODA Recommendation) the FMO indicated that it conducts checks when onboarding a customer for its products, depending on the assessed risks (Know your Customer (KYC) risk assessment) posed by the customer, product and the geographical location involved. FMO verifies the ultimate beneficial ownership as well as the management of the company and if there are red flags, conducts enhanced due diligence. These checks are repeated either annually, every two years or every three years, depending on the assessed (KYC) risk of the customer. If the FMO is not satisfied following a due diligence process, it will not give clearance for the investment or can withdraw the loan.

297. FMO officials at the on-site visit indicated that when serious integrity cases occur, these are reported to Dutch law enforcement authorities (unusual transactions reported to FIU-NL). As part of its stakeholder engagement strategy, the FMO organises quarterly meetings with NGOs and other partners to discuss policy development and issues in FMO-financed projects. The FMO also has an Issue Management Team that analyses reputational, media and political risks (including daily media and political monitoring) and develops strategies to mitigate these risks. The FMO reports to the Ministry of Finance and the MFA and is also under an obligation to report unusual transactions to the FIU. FMO is a licensed bank, under the supervision of the Dutch Central Bank (DNB).

298. In addition to these frameworks for reporting to law enforcement authorities, the MFA noted that Dutch Parliament must be informed annually of all cases of corruption concerning government funds and of any decision to impose or withhold sanctions, together with the reasons. The House of Representatives is therefore informed of cases of corrupt practices in ODA projects in an Annex to ministerial annual reports. The Annex also provides data on alleged, proven, investigated and unsubstantiated cases involving corrupt practices. The number of allegations reported annually has steadily increased from 24 in 2017 to 38 in 2018. In 2019, the MFA received 74 allegations of fraud and/or corruption, of which 29 were proven, 37 investigations are ongoing and 8 were unsubstantiated. None of these cases involved bribery of foreign public officials and if they were referred to the Dutch law enforcement authorities for criminal investigation. The MFA provides additional information to the House of Representatives at other times in exceptional cases (i.e. cases that involve amounts of at least EUR 500 000 and/or are politically sensitive). In 2019, the MFA made two such exceptional reports to Parliament in relation to ODA contracts, neither of which involved suspicions of bribery of foreign public officials.

d) Sanctions

299. Recommendation 8 asks that ODA contracts provide for termination, suspension or reimbursement clauses when the information provided by applicants to ODA was false, or when the implementing partner subsequently engaged in corruption during the course of the contract. The legal basis for sanctions in an ODA context is the General Administrative Law Act (AWB) and the Ministry of Foreign Affairs Grants Decree. Further specific obligations are usually laid down in individual decisions awarding grants. The main sanctions that can be imposed before the definitive amount of the grant has been determined are: (1) reducing the definitive amount of the grant to a lower amount than was originally awarded, (2) reducing or withdrawing the grant (measures which derive directly from the AWB and apply automatically to any grant) and (3) preventive measures (in exceptional circumstances). Even after the definitive amount of the grant has been determined, the grant can be reduced or withdrawn retroactively by means of a sanction.

300. Section 4(35) of the AWB also provides for the possibility of taking measures before a grant is awarded. Applications may be rejected if there are well-founded reasons for concluding that: (1) some or all of the activities covered by the grant will not take place; (2) the grant recipient will not meet the grant conditions; (3) the applicant will not account properly for the funds provided.

301. In practice, MFA officials at the on-site indicated that if the MFA receives information from an auditor, whistleblower or other source, about suspected misappropriation of ODA or non-ODA funds, it considers whether to suspend payments. If an applicant company cannot show that it has adequate policies in place, or has been sanctioned for corruption and has not subsequently implemented adequate policies, the MFA can decide to exclude a company from receiving the requested funding until it can demonstrate remedial efforts. This policy is based on the principle that improvement, rather than exclusion, should be the point of departure. In the past five years, three project applications were assessed as being 'susceptible to fraud', as well as not meeting other requirements for the project, and excluded before implementation.

Commentary

The lead examiners commend the Netherlands for implementing a robust and comprehensive framework to prevent, detect and sanction bribery of foreign public officials in the context of ODA projects. In particular, the Netherlands Enterprise Agency and Dutch Development Bank have implemented trainings and reporting mechanisms, resulting in effective reporting to law enforcement authorities and sanctions, where necessary. The lead examiners consider, however, that MFA officials overseeing ODA projects need further training on the indicators and reporting requirements for suspected foreign bribery and, more generally, corruption risks at large. In particular, they are concerned that the MFA's investigation process could result in potential cases of foreign bribery not being subject to criminal investigation and sanction. They therefore recommend that the MFA, within its existing risk management procedures, issue clear instructions on how to detect foreign bribery in ODA projects and on the concrete steps to be taken if suspicions of corruption should arise, including reporting the matter as appropriate to law enforcement authorities.

Conclusion: Positive achievements, recommendations and issues for follow-up

302. The Working Group congratulates the Netherlands on the progress it has made in recent years towards the implementation of the Convention and related instruments.

303. Regarding implementation of the Phase 3 recommendations, the Netherlands received 22 recommendations. In 2015, the Working Group concluded that the Netherlands had taken substantial steps to implement a number of recommendations, with 11 out of 22 recommendations fully implemented, 6 partially implemented and 5 not implemented. The Phase 3 recommendations that are only partially or not implemented are reflected below in the Phase 4 recommendations to the Netherlands.

Positive Achievements and Good Practices

304. Throughout this report a number of good practices and positive achievements by the Netherlands have been identified, which may prove effective in combating bribery of foreign public officials and enhancing enforcement.

305. The Netherlands has made substantial institutional changes to enhance its investigative and prosecutorial capability. Notably, the process of moving foreign bribery investigations to the remit of the FIOD and the creation of a specialised Anti-Corruption Centre has proven an innovative and effective approach. Since the transition of foreign bribery investigations to the FIOD in 2016 there has been an exponential increase in the number of foreign bribery investigations initiated, at a total of 19 out of the 24 currently ongoing. The process has been aided by the strong cooperation between the FIOD-ACC and the FP's own specialised team, which ensures prosecutors are involved in foreign bribery cases from their inception.

306. The Netherlands has been very proactive regarding detection, not only by having prosecutors within the FP specialising in detection but also by investing substantial resources in improving its detection sources. Of interest, and despite its perceived areas for improvement, is the enactment of the Whistleblower Authority Act. Also worth of notice is the increase in detection of foreign bribery cases by STR reports, reflecting an active FIU engaged in innovative awareness-raising and public-private partnership initiatives with the private sector. The Netherlands has also seen a positive increase in the number of cases detected by companies self-reporting in recent years. The recent revision of the Directive on Large Transactions removes the requirement for approval of proposed settlements by the Minister of Justice and Security and establishes an interim Review Committee pending further legal reforms to introduce judicial oversight.

307. Furthermore, the **KPMG case** in the Netherlands is a landmark case as it represents the first instance where a Party to the Convention has sanctioned an auditing firm for its part in concealing bribe

payments to foreign public officials. This case highlights the Netherlands' enforcement policy targeting gatekeepers for their role in transnational bribery schemes.

308. The Netherlands has been very successful in recovering proceeds of foreign bribery by imposing confiscation measures on legal persons in the context of non-trial resolutions. Not only are the amounts in question considerable, but the methods employed by the authorities in calculating the illegal proceeds demonstrate resourcefulness and innovation.

309. Finally, regarding international cooperation in foreign bribery cases, the Netherlands has put in place a strong and effective framework, which embraces informal cooperation and spontaneous exchange of information.

Recommendations of the Working Group

Recommendations regarding the detection of foreign bribery

1. Regarding **anti-money laundering measures** to enhance detection of foreign bribery, the Working Group recommends that the Netherlands' FIU and other relevant agencies increase awareness-raising efforts with the legal profession on AML reporting obligations and red flags for foreign bribery-based money laundering, given the essential role the legal profession plays in setting up corporate structures and the particular risk these structures pose in Dutch economic context [Convention Article 7, 2009 Recommendation III.i].
2. Regarding detection of foreign bribery by **whistleblowers**, the Working Group recommends that the Netherlands:
 - a. amends the Whistleblower Authority Act to transpose the EU Whistleblower Protection Directive, as a priority [2009 Recommendation IX (iii)] and implement, as appropriate, the recommendations of the various evaluations of the Whistleblower Authority, to ensure that public and private sector employees that report suspected acts of foreign bribery are protected from discriminatory and disciplinary action;
 - b. conduct training and awareness raising activities for the private sector and public agencies, specifically the Ministry of Foreign Affairs, on implementing the WAA's requirements for effective internal protected reporting mechanisms and its amendments, once enacted [2009 Recommendation IX iii)]; and
 - c. ensure clear guidance and training are provided to the Whistleblower Authority officials on procedures for detection and reporting of the foreign bribery offence to criminal law enforcement authorities [2009 Recommendation IX iii)].
3. Regarding detection of foreign bribery **self-reporting**, the Working Group recommends that the Netherlands' authorities establish a clear policy and guidelines explaining the procedure for making self-reports and the extent to which self-reporting will be considered in resolving and sanctioning foreign bribery cases [Article 3 of the Convention; 2009 Recommendation III.i].

Recommendations regarding enforcement of the foreign bribery and related offences

4. Regarding **small facilitation payments**, the Working Group recommends that the Netherlands, in the context of the recent amendment of the Directive on Foreign Corruption, conduct more targeted efforts, including training and awareness raising activities to encourage law enforcement officials, companies and professionals of the auditing and accounting profession to prevent, detect and report the use of facilitation payments [Convention Article 1; 2009 Recommendation III.ii and VI.i and ii]

5. Regarding **investigation and prosecution of foreign bribery**, the Working Group recommends that the Netherlands:

- a. take urgent measures, as appropriate within its criminal justice system, to address delays caused by processes for assessing legal privilege claims in foreign bribery investigations [Convention Article 5, 2009 Recommendation Annex I B];
- b. conduct training and awareness raising for prosecutors and judges on the standards of the Anti-Bribery Convention, including the definition of foreign public official and liability for bribes paid through intermediaries and to third party beneficiaries [Convention, Article 1; 2009 Recommendation, III. ii) et V] ;
- c. ensure that the BES islands have appropriate resources, training, expertise and capacity to investigate and prosecute foreign bribery and related offences [Convention, Article 5 and Annex I D];
- d. conduct systemic training among Dutch officials posted abroad on the MFA's protected reporting framework, the standards set out in the Convention, including Article 5, and the confidential nature of criminal investigations [Convention, Article 5 and Annex I D].

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

- a. publish, as necessary and in compliance with the relevant rules, the essential elements of resolutions in all foreign bribery cases [Convention Arts 3 and 5; 2009 Recommendation III(i)];
- b. introduce, as planned, appropriate oversight of proposed non-trial resolutions in foreign bribery cases [Convention, Article 5 and Annex I D];
- c. provide guidance on procedures for self-reporting and the level of cooperation expected from defendants [Convention Articles 3 and 4 and Annex I D];
- d. clarify if and under which conditions non-trial resolutions are available to natural persons in foreign bribery cases, including under the Directive on Large Transactions;
- e. provide further guidance and training on factors to be taken into account when determining penalties in non-trial resolutions, and imposing and enforcing additional measures such as compliance monitors and remedial compliance actions. [Convention Article 3(1), Article 5; 2009 Recommendation III(ii)].

7. Regarding **sanctions**, the Working Group recommends that the Netherlands increase the maximum fines available for natural persons for foreign bribery or take other measures to ensure that the sanctions imposed in practice meet the standards set out under Article 3 of the Convention that criminal penalties be sufficiently effective, proportionate and dissuasive [Convention Article 3(1)];

8. Regarding **international cooperation**, the Working Group recommends that the Netherlands:

- a. to the fullest extent possible within its legal system, ensure that a broad range of MLA can be provided to Parties to the Convention that apply civil or administrative (and not criminal) liability to legal persons for foreign bribery and take necessary measures to ensure that information covered by data protection can be disclosed to the fullest extent possible [Convention Article 9.1].
- b. amend the Protocol on International Cooperation to reflect the role of the FIOD in international cooperation and to ensure that the opening of an investigation in the requested country does not constitute the sole ground for refusing to issue an MLA request [Convention, Article 9; 2009 Recommendation XIII.]
- c. take necessary measures to ensure that the database for requests for international cooperation records information on the existence and status of extradition requests, by category of crime including bribery, to monitor whether any Dutch nationals not extradited for foreign bribery offences are prosecuted, as appropriate. [Convention, Articles 9 and 10].

Recommendations regarding liability of, and engagement with, legal persons

9. Regarding **liability of legal persons**, the Working Group recommends that the Netherlands issue guidance for companies on effective anti-bribery compliance programmes, and disseminate more targeted information for SMEs on implementing anti-bribery compliance measures to effectively prevent and detect foreign bribery [2009 Recommendation C i) and ii)].

Recommendations regarding other measures affecting implementation of the Convention:

10. Regarding **tax measures** to combat foreign bribery, the Working Group recommends that the Netherlands ensure a consistent approach to tax treatment of confiscated amounts in foreign bribery cases [2009 Recommendation, VIII.i; 2009 Tax Recommendation];

11. Regarding **public procurement**, the Working Group recommends that the Netherlands;

- a. take steps to promote the use of the Certificate of Conduct (VOG/GVA) by contracting institutions on both natural and legal persons to verify that tenderers have not been convicted of foreign bribery in the Netherlands [Convention, Article 3(4); 2009 Recommendation XI.i]; and
- b. conduct training and awareness raising activities with procurement agencies on the debarment framework with respect to foreign bribery convictions, including in relation to the database of convictions and Certificates of Conduct (VOG/GVA). [Convention, Article 3(4); 2009 Recommendation XI.i]

12. Regarding **export credits**, the Working Group recommends that, in the context of the evaluation of its new anti-bribery policy planned for end-2020, Atradius DSB undertake a comprehensive review of its policies to identify how they could better be applied in practice to enable identification of foreign bribery red flags and provide regular training to its staff [Convention, Article 3(4); 2009 Recommendation XI.i; 2006 Export Credit Recommendation].

13. Regarding **Official Development Assistance**, the Working Group recommends that the MFA, within its existing risk management procedures, issue clear instructions on how to detect foreign bribery in ODA projects and on the concrete steps to be taken if suspicions corruption should arise, including reporting the matter as appropriate to law enforcement authorities [2016 Recommendation for Development Cooperation Actors 7.iii.].

Follow-up by the Working Group

14. The Working Group will follow up on the issues below as case law, practice, and legislation develops:

- a. The interpretation of the offence in practice to ensure that:
 - i. The offer of a bribe is criminalised and enforced [Convention Article 1];
 - ii. That the definition of 'foreign public official' is autonomous, sufficiently broad to cover employees of public enterprises and consistent with Article 1 of the Anti-Bribery Convention [Convention Article 1 and Commentary 3]
- b. Whether the increase in resources increases the FIU Netherlands' ability to process UTRs and provide feedback on their overall quality to the private sector, as it relates to the detection of foreign bribery [Convention Article 7; 2009 Recommendation III.i];
- c. The implementation of the Source Protection in Criminal Matters Act, as it relates to ensuring protection of sources who report foreign bribery [2009 Recommendation IX (iii)];

- d. The application of the foreign bribery offence in practice to ensure it is interpreted in conformity with the Convention [Articles 1 and 4 (a)];
- e. The adequacy of human and financial resources to investigate and prosecute foreign bribery [Convention Article 5; 2009 Anti-Bribery Recommendation Annex I.D];
- f. The use of 'self-investigations' in foreign bribery cases [Convention Article 5; 2009 Anti-Bribery Recommendation Annex I.D];
- g. The ability of the Minister of Justice and Security to request information from the OM in specific cases, and the exercise of these powers in foreign bribery cases [Convention Article 5];
- h. The implementation of the UBO register in the Netherlands, including in the BES Islands, to ensure that it records adequate, accurate and current beneficial ownership information on companies incorporated in their jurisdictions, and provides sufficient access by law enforcement authorities in foreign bribery cases [Convention Articles 5 and 7 and Annex I D];
- i. That natural persons involved in foreign bribery schemes are held liable [Convention Arts. 3 and 5, 2009 Recommendation Annex I.D];
- j. Relevant case law developments to ensure that:
 - i. Parent companies can be held liable for the acts of foreign subsidiaries; and
 - ii. Jurisdiction can be exercised over mailbox companies for the purposes of prosecuting foreign bribery [Article 4(1) of the Convention];
- k. The application of the dual criminality requirement for exercising extraterritorial jurisdiction, to ensure that it does not provide an impediment in foreign bribery cases; [Convention Article 1, 2009 Recommendation, III (ii), V, VI and Annex I A].
- l. The re-assessment of tax returns to ensure non-deductibility as foreign bribery case law developments [2009 Recommendation III.iii and VIII.i, Tax Recommendation II].
- m. The use of the Ministry of Justice and Security's database of convictions among public agencies to enhance due diligence and the application of exclusion rules [2009 Recommendation XI.(i)].

Annex A. Phase 3 Recommendations to the Netherlands and assessment of implementation by the Working Group on Bribery in 2015

Recommendations of the Working Group in Phase 3		Written follow-up March 2015
Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery		
1.	Regarding the <u>offence of bribing a foreign public official</u> , the Working Group recommends that the Netherlands:	
	a) Keep the Working Group on Bribery informed of developments concerning the adoption of amendments to the foreign bribery offence in the Dutch Criminal Code [Convention, Article 1];	Fully Implemented
	b) Periodically review its policy and approach on small facilitation payments, and continue to encourage Dutch companies to prohibit or discourage their use and in all cases, accurately record them in companies' accounts [Convention, Article 1; 2009 Recommendation III. (ii) and VI.(i) and (ii)];	Partially Implemented
	c) Continue to encourage Aruba and Sint Maarten to adopt a foreign bribery offence and assist them in their efforts to do so, in line with the rules governing its relationship [Convention, Article 1].	Fully Implemented
2.	Regarding the <u>criminal liability of legal persons</u> , the Working Group recommends that the Netherlands:	
	a) Take all possible measures to ensure that mailbox companies are considered legal entities under the Dutch Criminal Code and that cases of foreign bribery involving mailbox companies can be effectively investigated, prosecuted and sanctioned [Convention, Article 2; 2009 Recommendation V];	Partially Implemented
	b) Draw the attention of prosecutors to the importance of applying effectively the criminal liability of legal persons in foreign bribery cases, including for acts by intermediaries and related legal persons [Convention, Article 2; 2009 Recommendation V];	Fully Implemented
	c) Continue to maintain detailed yearly statistics on the number of prosecutions of legal persons [Convention, Article 2; 2009 Recommendation V];	Fully Implemented
	d) Develop guidance on the application of probationary periods in foreign bribery cases [Convention, Article 2; 2009 Recommendation V].	Not Implemented
3.	Regarding the <u>investigation and prosecution of foreign bribery</u> , the Working Group recommends that the Netherlands:	
	a) Proactively gather information from diverse sources at the pre-investigative stage to increase the sources of allegations and to enhance investigations [Convention, Article 5; 2009 Recommendation V];	Partially Implemented

Recommendations of the Working Group in Phase 3		Written follow-up March 2015
	b) Proactively investigate cases of foreign bribery involving legal persons, including mailbox companies [Convention, Article 5; 2009 Recommendation V];	<i>Partially Implemented</i>
	c) Exercise its jurisdiction in foreign bribery cases concerning Dutch natural or legal persons, and, where relevant, consult with other jurisdictions to determine the most appropriate jurisdiction for prosecution or consider undertaking concurrent or joint investigations [Convention, Articles 4 and 5; 2009 Recommendation V, XIII.(i) and (iii)];	<i>Fully Implemented</i>
	d) Proceed with the adoption and implementation of the revised Instruction on the Investigation and Prosecution of Foreign Corruption to ensure in no uncertain terms that it cannot be interpreted contrary to Article 5 of the Convention [Convention, Article 5; 2009 Recommendation, Annex I(D)];	<i>Fully Implemented</i>
	e) Provide adequate resources to Dutch law enforcement authorities to effectively examine, investigate and prosecute all suspicions of foreign bribery [Convention, Article 5; 2009 Recommendation V and Annex I(D)].	<i>Fully Implemented</i>
4.	Regarding <u>sanctions</u> in cases of transnational bribery, the Working Group recommends that the Netherlands:	
	a) Promptly proceed with the adoption of the proposed amendments to the Criminal Code which would significantly increase the level of sanctions [Convention, Article 3];	<i>Fully Implemented</i>
	b) Consider introducing the possibility of additional sanctions against legal persons, such as suspension from public procurement or other publicly-funded contracts [Convention, Article 3; Commentary 24].	<i>Not Implemented</i>
Recommendations for ensuring effective prevention and detection of foreign bribery		
5.	Regarding <u>money laundering</u> , the Working Group recommends that the Netherlands raise awareness and provide training to the FIU, law enforcement officials and reporting entities on foreign bribery as a predicate offence to money laundering. Such awareness-raising could also include the sharing of typologies on money laundering related to foreign bribery [Convention, Article 7; 2009 Recommendation III.(i)].	<i>Fully Implemented</i>
6.	Regarding <u>accounting and auditing requirements</u> , the Working Group recommends that the Netherlands:	
	a) Ensure that the foreign bribery offence and the accounting and auditing requirements of the Convention are covered in training programmes and related guidelines for the accounting and auditing professions, in order to facilitate their more active role in detecting foreign bribery [Convention, Article 8; 2009 Recommendation III.(i)];	<i>Not Implemented</i>
	b) Promptly proceed with the adoption of the proposed amendments to the Criminal Code which would significantly increase the level of financial sanctions on legal persons for the false accounting offence [Convention, Article 8; 2009 Recommendation X.A.(iii)].	<i>Fully Implemented</i>
7.	With respect to <u>tax-related measures</u> , the Working Group recommends the Netherlands encourage law enforcement authorities to promptly share information on foreign bribery enforcement actions with the tax administration to verify whether bribes were impermissibly deducted [2009 Recommendation VIII.(i); 2009 Tax Recommendation I.(i)].	<i>Fully Implemented</i>

Recommendations of the Working Group in Phase 3		Written follow-up March 2015
8.	Regarding <u>awareness-raising</u> , the Working Group recommends that the Netherlands: (i) continue its foreign bribery awareness-raising efforts within the public and private sectors including, where relevant, in cooperation with business associations; (ii) continue to encourage companies, especially SMEs, to develop internal controls, ethics and compliance systems to prevent and detect foreign bribery, including by promoting the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance [2009 Recommendation III.(i), X.C.(i) and (ii); Annex II, Good Practice Guidance on Internal Controls, Ethics and Compliance].	<i>Partially Implemented</i>
9.	With respect to the <u>reporting of foreign bribery</u> , the Working Group recommends that the Netherlands:	
	a) Ensure that public servants report all suspicions of foreign bribery, including by private persons and companies, irrespective of whether it constitutes a violation of the rules in the public servants' field of activity, and that they are made aware of this duty [2009 Recommendation IX.(ii)];	<i>Partially Implemented</i>
	b) Put in place appropriate measures to protect from discriminatory or disciplinary action public and private sector employees who report suspected acts of foreign bribery in good faith and on reasonable grounds to competent authorities [2009 Recommendation IX.(iii)].	<i>Not Implemented</i>
10.	Regarding <u>public advantages</u> , the Working Group recommends that the Netherlands promote the use of the Ministry of Security and Justice's database of convictions more widely among public agencies to enhance due diligence and the application of exclusion rules, where appropriate [2009 Recommendation XI.(i)].	<i>Not Implemented</i>
Phase 3 Issues for follow up by the Working Group		Written follow-up March 2015
11.	The Working Group will <u>follow-up</u> the issues below as case law and practice develops:	
	15. The results of the analysis carried out by the Netherlands on the reasons for the decline in prosecutions of legal persons [Convention, Article 2];	<i>Issue resolved</i>
	16. The use of out-of-court settlements in foreign bribery cases [Convention, Article 5];	<i>Follow-up in Phase 4</i>
	17. The application in practice of sanctions and confiscation measures in on-going and future foreign bribery investigations [Convention, Article 3];	<i>Follow-up in Phase 4</i>
	18. That the Netherlands takes any measures necessary to assure either that it can extradite its nationals for foreign bribery or that it can prosecute its nationals for foreign bribery. If the Netherlands declines a request to extradite a person for foreign bribery solely on the grounds that the person is its national, it shall submit the case to its competent authorities for the purpose of prosecution [Convention, Article 10.3].	<i>Follow-up in Phase 4</i>

Annex B. List of participants in the on-site visit

Government ministries and agencies

- Ministry of Foreign Affairs
- Ministry of Justice and Security
- Ministry of Interior and Kingdom Relations (BZK)
- Ministry of Finance
- Netherlands Enterprise Agency (RVO)
- Atradius DSB (Export Credits Agency)
- PIANOo (Procurement Agency)
- Dutch Development Bank (FMO)
- Dutch National Bank (DNB)
- Dutch Whistleblowers Authority (Huis voor Klokkeluiders)

Law enforcement and the Judiciary

- National Head Office of the Public Prosecution Service (PAG)
- Public Prosecutor's Office (OM)
- OM's National Office for Serious Fraud, Environmental Crime and Asset Confiscation (*Functioneel Parket*)
- FIOD
- Dutch National Police Internal Investigations Department (Rijksrecherche)
- FIU Nederland
- Tax and Customs Administration (*Belastingdienst*)
- Amsterdam Court of Appeals

Private enterprises

- SBM Offshore
- Akzo Nobel
- NS
- Heineken
- Friesland Campina
- Booking.com
- CRODA Gouda (via call)

- Van den Berg Hardhout
- Dekkers Zevenhuizen BV
- Verstegen
- Rabobank
- ING
- ABN AMRO
- Ernst & Young
- KPMG
- Allen & Overy

Business organisations and auditing associations

- Confederation of Netherlands Industry and Employers
- International Chamber of Commerce Netherlands
- MVO Nederland
- Federation of Dutch Food Industry
- FME – Dutch Employers' organisation in the technology industry
- Royal Netherlands Institute of Chartered Accountants

Legal profession and compliance experts

- NautaDutilh
- De Brauw Blackstone Westbroek
- Lumen Lawyers
- Norton Rose Fulbright LLP
- Pels Rijcken & Droogleever Fortuijn
- Recht en Raat
- ECMC
- The Compliance Monitor

Civil society and journalists

- Transparency International Nederland
- Follow the Money
- Open State Foundation

Annex C. Legislative extracts

Dutch Criminal Code

Article 23 - Sanctions

Categories of fines for natural and legal persons

(1) He who has been sentenced to a fine pays the determined amount to the state within the period set by Our Minister of Security and Justice.

(2) The amount of the fine is at least € 3.

(3) The maximum fine that may be imposed for a criminal offense is the amount of the category determined for that offense.

(4) There are six categories:

the first category, € 335 [Red: As of 1 January 2020: € 435.];

the second category, € 3 350 [Red: As of 1 January 2020: € 4,350.];

the third category, € 6,700 [Red: As of 1 January 2020: € 8,700.];

the fourth category, € 16 750 [Red: As of 1 January 2020: € 21,750.];

the fifth category, € 67,000 [Red: As of January 1, 2020: € 87,000.];

the sixth category, € 670,000 [Red: As of January 1, 2020: € 870,000.].

(5) For a violation or a crime, on which no fine has been imposed, a fine can be imposed up to the amount of the first or third category respectively.

(6) For an offense or a crime, on which a fine has been imposed, but for which no category of fines has been determined, a fine may be imposed up to the amount of the first or third category respectively, if this amount is higher than the amount of the fine imposed on the offense concerned.

(7) When a legal person is convicted, if the category of the fine determined for the fact does not allow for appropriate punishment, a fine may be imposed up to the amount of the next higher category. If a fine of the sixth category can be imposed for the fact and that fine category does not allow appropriate punishment, a fine may be imposed up to a maximum of ten percent of the annual turnover of the legal person in the financial year prior to the decision or sentence.

(8) The previous paragraph applies *mutatis mutandis* when convicting a company without legal personality, partnership, shipping company or target capital.

(9) The amounts referred to in the fourth paragraph are adjusted every two years, with effect from 1 January of a year, by order in council to the development of the consumer price index since the previous adjustment of these amounts. In this adjustment, the amount of money in the first category is rounded down to a multiple of € 5 and, assuming the amount of money in this first category and subject to the relationship between the amounts of the fine categories, the amounts of the second to and determined with the sixth fine category.

Article 51 – Liability of legal persons

(1) Criminal offenses can be committed by natural and legal persons.

(2) If a criminal offense is committed by a legal person, criminal proceedings may be instituted and the penalties and measures provided for by law, if they are eligible, may be pronounced:

1 °.against that legal person, or

2 °.against those who ordered the offense, as well as those who gave actual direction to the prohibited conduct, or

3 °.against the aforementioned under 1 ° and 2 ° together.

(3) For the purposes of the previous paragraphs, the legal entity is equated with: the company without legal personality, the partnership, the shipping company and the target capital.

Article 74 – Non-trial resolutions (*transactie*)

Conditions for avoiding prosecution

(1) Before the start of the hearing, the public prosecutor may impose one or more conditions to prevent prosecution for crimes, with the exception of those that are legally imprisoned for more than six years and for offense. By complying with those conditions, the right to criminal action lapses.

(2) The following conditions can be imposed:

- a. payment to the State of a sum of money, to be determined at a minimum of € 3 and a maximum of the maximum of the fine that can be imposed for the offense;
- b. distance from objects seized and susceptible to forfeiture or withdrawal from traffic;
- c. extradition, or settlement of the estimated value, of items subject to forfeiture;
- d. payment of a monetary amount or transfer of seized objects to the full or partial confiscation of the illegally obtained advantage susceptible to confiscation under [Article 36e](#);
- e. full or partial compensation for damage caused by the offense;
- f. performing unpaid work or following a learning project for a maximum of one hundred and twenty hours.

(3) In the event of a crime, the public prosecutor immediately informs the directly interested party known to him of the date on which he has set those conditions.

(4) [Article 6: 1: 1 of the Code of Criminal Procedure](#) applies mutatis mutandis to the conditions laid down pursuant to the first paragraph.

(5) On the condition referred to in the second paragraph, under f, the provisions of or pursuant to [Articles 22b, 22c, first paragraph](#), and [Articles 6: 1: 9, 6: 3: 1, second paragraph](#), and [6: 3: 6 of the Code of Criminal Procedure](#) with regard to community service orders, correspondingly applicable. When performing unpaid work or the learning project, the identity of the convicted person is determined in the manner referred to in [Article 27a, first paragraph, first sentence, and second paragraph, of the Code of Criminal Procedure](#). The unpaid labour or learning project will be completed within nine months of approval of the condition.

(6) By or pursuant to an Order in Council, regulations are given regarding the fulfilment of the condition referred to in the second paragraph, under a. These regulations shall in any case relate to the place and method of payment of the sum of money, the period within which that payment must have been made and the justification of the amounts of money received. Rules may be laid down by or pursuant to an order in council with regard to the fulfilment of the other conditions referred to in the second paragraph.

Annex D. Directive on large transactions (official translation)

Nature	:	Directive pursuant to section 130, subsection 6 of the Judiciary (Organisation) Act
From	:	Board of Procurators General
To	:	Heads of the Public Prosecution Service (OM) units
Registration number	:	2020A005
Date of entry into force	:	04-09-2020
Publication in Government Gazette	:	Stcrt-2020-46166
Replacing	:	Directive on Large and Special Transactions
Relevant OM administrative rules	:	Directive on Confiscation (2016A009) Directive on Providing Information about Investigations and Prosecutions (2020A004)
Legislative provisions:		Articles 33, 74 and 74a, Criminal Code and section 36, Economic Offences Act (WED)
Annexes	:	-

SUMMARY

This Directive sets out the framework for offering large transactions. The term ‘large transactions’ has now been defined more specifically and covers all transactions involving the payment to the State of a sum including a fine component of at least €200,000 and transactions with a total value of at least €1,000,000. The directive specifies the basic principles and procedural rules for offering transactions of this nature. The independent Large Transactions Review Committee is required to play an advisory role. If the Public Prosecution Service decides to offer a large transaction, it should, in principle, issue a press release. The directive contains general rules about the information to be included in a press release.

1. INTRODUCTION

Criminal cases can be disposed of in different ways. If the public prosecutor believes the case can be

proved, he may issue a writ of summons to the suspect so that the case may be adjudicated by a court, he may issue a penalty rather than taking the case to court or he may decide not to prosecute, conditionally or otherwise. In addition, the public prosecutor may opt to offer the suspect a transaction so as to avoid prosecution by fulfilling one or more conditions. An exhaustive list of the conditions can be found in article 74 of the Criminal Code and section 36 of the Economic Offences Act (*Wet op de economische delicten*).

This directive concerns large transactions, in other words transactions where the condition in article 74, paragraph 2 (a) of the Criminal Code (payment to the state of a sum of money) involves a sum of at least €200,000 and transactions with a total value of at least €1,000,000 (including confiscation of proceeds of crime, the value of any property liable to be declared forfeit which the offender relinquishes, and compensation). Large transactions are generally applied only in relation to legal persons, partly because a fine is often the only penalty that can be imposed on a legal person. In addition, disposal of the case in this way may influence the legal person's corporate culture, thus preventing further infringements of the rules. A transaction offers the offender, the injured parties and society as a whole clarity about the disposal of a case more swiftly than prosecution proceedings. A large transaction can thus ultimately have a greater impact than prosecution.

For some time, there has been a desire in political circles to make it compulsory by law for large transactions to be reviewed by the courts before they are offered to an offender. Until this is regulated by statute, the rules contained in this directive apply, which require a proposed large transaction to be reviewed by an independent committee.

The independent Large Transactions Review Committee was established and its three members were appointed by the Board of Procurators General (note including reference to Board's decision).

2. GENERAL PRINCIPLES

In line with the discretionary principle, the Public Prosecution Service always opts for the most appropriate method of disposing of a case. The decision to offer a large transaction to avoid prosecution must be tailored to each individual case. In addition to the criteria that apply to all transactions, a number of factors are relevant to the question of whether an offending natural or legal person is eligible for a transaction and if so in what amount. These factors are carefully assessed in every case where a transaction is under consideration. In cases that have caused public disquiet, a transaction should not be offered unless there is a very good reason. In such circumstances, the proposed transaction is submitted to the Board of Procurators General as a sensitive case.

The factors taken into consideration in the decision to offer a transaction, large or otherwise, include the offender's conduct during the proceedings, whether the offender acknowledges the facts, whether the offender has paid compensation to the victims and/or their surviving dependants, the measures taken by

the offender to prevent repetition of unlawful conduct, and the role played by the offender in bringing the offences in question to light.

Under article 74b of the Criminal Code, the right to prosecute may revive even after the conditions set in accordance with article 74 of the Criminal Code have been met, namely in the event that an order is made by the court of appeal to institute or continue prosecution after a complaint has been lodged under article 12 of the Code of Criminal Procedure. Any such complaint must be lodged within three months of the date on which the interested party has become aware of the application of article 74 of the Criminal Code (article 12k of the Code of Criminal Procedure). Following an order to institute or continue prosecution, the transaction agreement is annulled and the sums involved in the transaction are repaid.

3. LARGE TRANSACTIONS

This Directive defines a transaction as large:

- a. if the sum set pursuant to article 74, paragraph 2 (a) of the Criminal Code (payment to the state of a sum of money) exceeds €200,000, unless:
 - in the case of a criminal offence where, according to its statutory definition, the sole principal penalty carried by the offence is a fine, the offender has offered – in accordance with the provisions of article 74a of the Criminal Code – to pay the maximum fine and to comply with all other conditions imposed pursuant to article 74, paragraph 2 of the Criminal Code,,
 - the penalty involves a fine or multiple fines deriving directly from sentencing guidelines adopted by the Board of Procurators General;
- b. if the total amount involved in the transaction is at least €1,000,000, including:
 - the value of monies or seized property paid or handed over to the state by the offender by way of deprivation of illegally obtained advantage,
 - the amount of damage for which compensation is payable,
 - the value of seized monies or property liable to be declared forfeit which are relinquished by the offender,
 - the value of monies or property which have not been seized and which are liable to be declared forfeit, which the offender submits or the estimated value of which is paid to the state.

Consequently, transactions of over €1,000,000 without a fine component as referred to in article 74, paragraph 2 (a) of the Criminal Code are also regarded in this directive as large.

4. BASIS FOR OFFERING A LARGE TRANSACTION

First of all, the criteria that apply to all transactions also apply to decisions to offer a large transaction.

- A transaction can be applied only in respect of minor offences and serious offences carrying a maximum sentence of imprisonment of six years (cf. article 74 of the Criminal Code).

- A transaction can be applied only if there is sufficient evidence available and sufficient policy grounds to warrant committal for trial.
- In choosing whether or not to prosecute, the Public Prosecution Service should make an autonomous assessment of the case on the basis of the rules of criminal procedure.
- This assessment should explicitly take into account the interests of those involved, particularly those of the victims and injured parties.
- A transaction may be offered only where it would be reasonable to expect that the case, if brought to trial, would be disposed of by the imposition of no more than a financial sanction.
- It is essential that the offender accept the offer voluntarily. An offender can always refuse a transaction and choose to allow the case to go to trial.

In addition, a specific condition for an offer of a large transaction as referred to in section 3 of this directive is that the offender must acknowledge the acts that form the grounds for the transaction. After all, without an acknowledgement of such acts there can be no realisation that changes must be made within the offending legal person to ensure that the same errors are not made again in the future. It should be emphasised that this required acknowledgement does not imply an admission of guilt in relation to a criminal offence; acceptance of the criminal law provisions (the legal definitions of the offences in question) deemed applicable by the public prosecutor is not required.

The following factors may also play a role in determining whether or not a large transaction is one of the disposal options:

- measures that the offender has taken or promises to take to ensure future compliance and avoid further infringements;
- the offender's role in bringing the offences to light;
- international coordination of investigations and joint disposal;
- payment of compensation (or willingness to pay compensation) for any damage.

Reoffending militates against offering a large transaction.

The following factors are among those taken into account in determining the amount of the penalty:

- the offender's ability to pay, as referred to in article 24 of the Criminal Code;
- whether or not there has been self-reporting;
- the extent to which the offender has cooperated with the investigation;
- whether a settlement has been reached with victims;¹⁴⁹
- judicial sentences and transactions imposed in similar cases;

¹⁴⁹ The above factors and criteria alone mean that a large transaction will not often come into play. In the case of legal persons, the deciding factor will be that a court, in all probability, would also impose a fine and that – because of the compliance measures that an offending legal person must take – more can be achieved by a transaction than by prosecution.

- penalties imposed by foreign authorities.

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In the case of legal persons, natural persons may of course also be named as offenders. Penalties other than a fine may be imposed on natural persons, both by the Public Prosecution Service and by a court judgment. The basic principle is still that those who ordered the commission of the offence and those who had de facto control, as referred to in article 51 of the Criminal Code, are also prosecuted where possible. The case of each offender will be assessed on its own merits with a view to the decision whether or not to prosecute. The seriousness of the offences and the circumstances, including personal circumstances, will be taken into account.

As regards compliance with the transaction agreement, external supervisory bodies may be called upon to assist. These include regional environmental enforcement agencies, De Nederlandsche Bank and the Data Protection Authority (Autoriteit Persoonsgegevens). Specific internal supervisory measures may also be agreed with offenders, such as the appointment of a compliance monitor. A legal person can also be instructed to report regularly to its supervisory board.

5. PROCEDURE

a. *Approval by the chief public prosecutor*

Every time a public prosecutor considers disposing of a criminal case by offering a large transaction, he must submit this plan to the head of the public prosecutor's office where he works. The proposal is then put before the Board of Procurators General for its approval.

b. *Advisory opinion of the Large Transactions Review Committee*

The Board then seeks the advice of the Large Transactions Review Committee. The reasoned transaction proposal, an account of the facts, including the applicable criminal law provisions, and a draft press release are enclosed with the request for an advisory opinion. On the basis of these documents, and having heard the head of the relevant public prosecutor's office or his representative and the offender or his/its representative(s) and their lawyer, the Review Committee assesses whether, in view of all the circumstances of the case and having regard to the principles outlined in this directive, the proposal is an appropriate form of disposal which the Public Prosecution Service can reasonably decide to adopt. The review is thus a test of reasonableness.

The Review Committee issues its advisory opinion to the Board of Procurators General.

c. *Decision by the Board of Procurators General*

If the Review Committee's advisory opinion is positive, the Board of Procurators General takes it into account when deciding whether to offer the transaction proposal to the offender. If the Review Committee's advisory opinion is negative, the case is handed over to the chief public prosecutor for a new decision on whether or not to prosecute.

6. PUBLIC ACCOUNTABILITY AND TRANSPARENCY

If a decision is taken to offer a large settlement, the Public Prosecution Service will in principle make this known by means of a press release. In this way the Public Prosecution Service renders public account for the way in which the case was dealt with and disposed of. A press release also compensates for the absence of publicity that would otherwise accompany a trial and a judgment delivered in public. The press release, which includes the amount involved in the settlement, will have a general deterrent effect. It also includes an account of the facts of the case, detailing the acts and events which led to the criminal proceedings, the investigation's findings, the acts that provided grounds for the settlement, the suspicions based on the applicable criminal law provisions and the role played by the offender.

A list of large settlements is published at <http://www.om.nl>. The number of large settlements in a given year is included in the Public Prosecution Service's annual report for that year.

Where this section deviates from the Directive on Providing Information about Investigations and Prosecutions, the latter Directive does not apply.

TRANSITIONAL PROVISIONS

The administrative rules in this directive will have immediate effect from the date of their entry into force.

However, this directive does not apply to transactions which, at the time when this directive enters into force, have already been submitted for approval to the Minister of Justice and Security pursuant to the Directive on Large and Special Transactions (2008A021).

Annex E. List of abbreviations, terms and acronyms

AFM	Dutch Authority for Financial Markets
AIRS	Department of International Affairs and Legal Assistance in Criminal Matters of the Ministry of Justice and Security
AML	Anti-Money Laundering
AMLC	FIOD's Anti-Money Laundering Centre
AWB	General Administrative Law Act
AWR	General State Taxes Act (<i>Algemene Wet inzake Rijksbelastingen</i>)
BES	Bonaire, St. Eustatius and Saba
BOOM	Criminal Assets and Deprivation Bureau of the Public Prosecution Office (<i>Bureau Ontnemingswetgeving Openbaar Ministerie</i>)
DCC	Dutch Criminal Code (<i>Wetboek van Strafrecht</i>)
DCPC	Dutch Criminal Procedure Code
DNB	Dutch Central Bank (<i>De Nederlandsche Bank</i>)
ECA	Export Credit Agency
EU	European Union
EUR	Euro
FDI	Foreign Direct Investment
FIOD	Fiscal Intelligence and Investigation Service (<i>Fiscale Inlichtingen en Opsporingsdienst</i>)
FIOD-ACC	FIOD's Anti-Corruption Centre
FIU	Financial Intelligence Unit
FMO	Dutch Development Bank

FP	Office for Serious Fraud, Environmental Crime and Asset Confiscation, Public Prosecution Service (<i>Functioneel Parket</i>)
FP-IRC	FP's International Legal Assistance Centre
GDP	Gross Domestic Product
GVA	Certificate of Conduct for legal persons (<i>Gedragsverklaring Aanbesteden</i>)
IESBA	International Ethics Standards Board for Accountants
IRC	National level International Legal Assistance Centre
ISA	Clarified International Standards on Auditing
JIT	Joint Investigation Team
MFA	Ministry of Foreign Affairs
MJS	Ministry of Justice and Security
MLA	Mutual Legal Assistance
MLAP	Money Laundering Action Plan
NBA	Royal Dutch Professional Association of Accountants (<i>Koninklijke Nederlandse Beroepsorganisatie van Accountants</i>)
NCPC	National Coordinating Prosecutor for Corruption
NFIA	Netherlands Foreign Investment Agency
NV NOCLAR	Rules governing Non-Compliance with Laws and Regulations for the accountancy profession
NRA	National Risk Assessment
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
OM	Public Prosecution Service (<i>Openbaar Ministerie</i>)
ORIA	Organisational Risk and Integrity Assessment conducted by the MFA in ODA contracts worth more than EUR 1 million
RBC	Responsible Business Conduct
RVO	Netherlands Enterprise Agency (<i>Rijksdienst voor Ondernemend Nederland</i>)
SME	Small and Medium Enterprise

SOE	State Owned Enterprise
SPE	Special Purpose Entity
STR	Suspicious Transaction Report
TCA	Tax and Customs Administration (<i>Belastingdienst</i>)
TCSP	Trust or Company Service Provider
TIOC	FP's Information and Operational Coordination Team
UBO	Ultimate Beneficial Owner
UN	United Nations
US	United States
US DOJ	United States Department of Justice
USD	US Dollar
UTR	Unusual Transaction Report
VGBA	Code of Conduct and Professional Practice for Accountants Regulation
VOG	Certificate of Conduct for natural persons (<i>Verklaring Omtrent Gedrag</i>)
WAA	Whistleblower Authority Act (<i>Wet Huis voor Klokkeluiders</i>)
WGB	Working Group on Bribery in International Business Transactions
Wwft	Dutch Anti-Money Laundering and Counter Terrorism Financing Act (<i>Wet ter voorkoming van witwassen en financieren van terrorisme</i>)

www.oecd.org/corruption/anti-bribery

