

NETHERLANDS

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal Issues

The Netherlands signed the Convention on December 17, 1997, and deposited the instrument of ratification on January 12, 2001. The Ratification Bill and Implementation Bill were enacted on December 13, 2000 and came into force on February 1, 2001. These Bills have been passed by Parliament in relation to the obligations under the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and three other treaties on the control of fraud and corruption¹.

The Dutch authorities explain that the entire Kingdom of the Netherlands, which includes Aruba and the Netherlands Antilles², is a signatory to the Convention. However, the Convention is ratified for the Kingdom of the Netherlands in Europe. In the notes on the Ratification Bill (discussed in more detail below), it is provided that “the governments of the Netherlands Antilles and Aruba shall consider whether the Convention shall also apply to their territories”, and that ratification has been extended to them to make “such co-application possible in due course”. The Dutch authorities confirm that Aruba and the Netherlands Antilles intend to implement the Convention in due course.

Convention as a Whole

(i) Obligations under the Convention

The Implementation Bill provides for several amendments to Dutch legislation in order to meet the obligations under the Convention and other international instruments³. The amendments relevant to the obligations under the Convention are contained in Article I and Article II of the Implementing Bill, and can be very briefly summarised as follows:

¹ The treaties other than the Convention are the following: 1. The Convention drawn up on the Basis of Article K.3 of the Treaty on European Union, Concerning the Protection of the European Communities' Financial Interests (Book of Treaties 1995, 289); 2. The Protocol drawn up on the Basis of Article K.3 of the Treaty on European Union, Accompanying the Convention on the Protection of the European Communities' Financial Interests (Book of Treaties 1996, 330); and 3. The Protocol drawn up on the Basis of Article K.3 of the Treaty on the European Union, Concerning the Interpretation, by way of Preliminary Rulings by the Court of Justice of the European Communities, of the Convention on the Protection of the Financial Interests of the European Communities (Book of Treaties 1997, 40).

² The Netherlands Antilles comprise two groupings of islands: Curacao and Bonaire are located off the coast of Venezuela; Saba, Sint Eustatius, and Sint Maarten (the Dutch two-fifths of the island of Saint Martin) are situated 800 km to the north.

³ The amendments relevant to the other international obligations include corresponding amendments to the passive bribery offences (see articles 362, 363 and 364 of the Penal Code) for the purpose of implementing the EU Corruption Protocol.

- A new article (article 178a) has been added to the Penal Code in order to extend the application of the active bribery offences, which previously only applied to domestic public servants, to “persons in the public service of a foreign state or an international law organisation”, “former public servants” and judges “of a foreign state or an international law organisation”.
- A new article (article 177a) has been added to the Penal Code in order to establish the offence of bribing a public servant in order to obtain an act or omission of him/her that is not in breach of his/her official duties. Article 177, which pertains to the bribery of a public servant, applies only where the purpose of the bribe was to obtain an act or omission in breach of official duties.
- The penalty of imprisonment and the fine that apply under article 177 of the Penal Code (i.e. where the bribe is intended to obtain an act or omission in breach of official duties) have been increased for imprisonment from 2 to 4 years and for the fine from category 4 to category 5.
- The offences have been expanded to cover the case where a person renders or offers a public servant a “service” (articles 177, 177a and 178 of the Penal Code).
- Article 51a of the Extradition Act is amended in order that the offences under articles 177 and 177a of the Penal Code are considered extraditable offences.

Existing provisions elsewhere in the Penal Code are relevant to other obligations under the Convention, such as complicity and the statute of limitations. Moreover, legislation, including the Code of Criminal Procedure, Financial Services Law and the Extradition Act, contain further provisions relevant to the implementation of the Convention.

(ii) Related Issues

The Dutch authorities provide that certain provisions in the Dutch Constitution are relevant to the relationship between domestic legislation and a treaty. However, these articles (article 93 and 94) relate to the immediate application of treaty provisions that are directly binding on all persons by virtue of their contents, such as the European Convention for the Protection of Human Rights. The obligations under the Convention are addressed to the Parties thereto, and thus the Constitution does not give it immediate effect. For this reason the Netherlands has transcribed the provisions of the Convention into legislation where necessary. The Dutch authorities explain that the Dutch courts would consult the provisions in the Convention in formulating their judgements with respect to, for instance, the application of the term “foreign public official”. However, pursuant to article 15(1) of the Constitution, “other than in cases laid down by or pursuant to an Act of Parliament, no one may be deprived of his liberty”. Thus there remains the question of how restrictively the courts interpret this provision, as it would appear to require that all the elements of an offence for which a term of imprisonment can be imposed be set out in legislation.

The Dutch authorities have provided two sets of explanatory notes on the various amendments to the Dutch legislation; one, which is attached to the copy of the Ratification Bill (notes on the Ratification Bill), and the other, which is attached to the copy of the Implementation Bill (notes on the Implementation Bill).⁴ These documents were drafted for the purpose of the parliamentary reading of the Bills, and are applied by the judiciary as one of the principal interpretations of the purpose and scope of the legislation.

⁴ These notes appear to have been prepared by the Minister of Justice, in the case of the Implementation Bill, and the Minister of Justice, Minister of Foreign Affairs and Minister of Economic Affairs, in the case of the Ratification Bill.

The Dutch authorities have also provided references to Supreme Court decisions in relation to various issues under the Convention. They explain that the Dutch legal tradition has been for decisions of the Supreme Court to be binding on the lower courts.

1.1 General Description of the Offence

(i) The Offences

Those offences that are relevant to the requirements under Article 1 of the Convention are reproduced below. The amendments that have been made pursuant to the Implementation Bill are indicated in bold.

Article 177 (Bribery of a public servant where there is a breach of duty.)

1. Punished by a prison sentence of not more than four years or a fine of the fifth category shall be:

- 1. a person who makes a gift or a promise to a public servant **or renders or offers him a service** with the intention of inducing him to do or not to do something in violation with the discharge of his duties.*
 - 2. a person who makes a gift or a promise to a public servant **or renders or offers him a service** as a result of or in reply to something he has done or not done in violation with the discharge of his duties.*
- 2. He may be deprived of the rights referred to in article 28, first paragraph, sub paragraphs 1, 2, and 4.*

Article 177a (Bribery of a public servant where there is no breach of duty.)

1. Punished by a prison sentence of not more than two years or a fine of the fourth category shall be:

- 1. a person who makes a gift or a promise to a public servant **or renders or offers him a service** with the intention of inducing him to do or not to do something in the discharge of his duties without violating these duties.*
 - 2. a person who makes a gift or a promise to a public servant **or renders or offers him a service** as a result of or in reply to something he has done or not done in the discharge of his current or former duties without violating these duties.*
- 2. He may be deprived of the rights referred to in article 28, first paragraph, sub paragraphs 1, 2, and 4.*

Article 178 (Bribery of a judge.)

- 1. A person, who makes a gift or a promise to **or renders or offers a service** to a judge, with the object of exercising influence on the decision in a case that is before him for judgement, is liable to a term of imprisonment of not more than six years or a fine of the fourth category.*

2. *Where the gift or promise is made with the object of obtaining a conviction in a criminal case, the offender is liable to a term of imprisonment of not more than nine years or a fine of the fifth category.*
3. *He may be deprived of the rights referred to in article 28, first paragraph, sub paragraphs 1, 2, and 4.*

Article 178a (Application of articles 177, 177a and 178.)

1. *Persons in the public service of a foreign state or an international institution will be considered as equivalent to the public servants referred to in articles 177 and 177a.*
2. *Former public servants are considered as equivalent to the public servants referred to in articles 177, first paragraph, subparagraph 2, and 177a, first paragraph, subparagraph 2.*
3. *A judge of a foreign state or an international institution is considered as equivalent to the judge referred to in article 178.*

(ii) General Defences

Exclusion of Criminal Liability under the Penal Code

The Penal Code provides several defences, including the usual exception to criminal liability for a person suffering from a “mental defect or mental disease” (article 39). The ones that are particularly relevant to the offences under articles 177, 177a and 178 of the Penal Code are discussed here.

Pursuant to article 40, a person is not criminally liable for committing an offence “as a result of a force he could not be expected to resist (*overmacht*)”. The Dutch authorities explain that this defence addresses the concept of *force majeure* (“acts of God”), of which there are two types: physical and psychological. The Dutch authorities do not foresee that these defences could be applied in practice to the offence of bribing a foreign public official.

Article 43.1 of the Penal Code provides a defence where an offence is committed pursuant to an “official order issued by a competent authority”. Pursuant to article 43.2, where the official order is issued without authority, criminal liability is not removed “unless the order was assumed by the subordinate in good faith to have been issued with authority and he complied with it in his capacity as subordinate”. The Dutch authorities confirm that in theory this defence could be applied to the offence of bribing a foreign public official where there is a “connection in public law between the perpetrator and the person giving the order”, but have not found any cases where this defence has been applied to bribery, and consider it highly unlikely or impossible to apply it thereto in practice. This defence is only triggered where the government can formally give the order in question, and in the Netherlands an order to bribe a foreign public official cannot be issued by the government.

Non-Codified General Excuses and Justifications

The Netherlands Supreme Court accepts the absence of blameworthiness (fault) as an excuse in cases where the perpetrator makes a mistake of fact or a mistake of law.⁵ The mistake must be reasonable,

⁵ *The Dutch Penal Code*, translated by Louse Rayar and Stafford Wadsworth, 1997, in *the American Series of Foreign Penal Codes: the Netherlands* (Rothman & Co., 1997). See p. 25 of introductory notes by Grat Van Den Heuvel and Hans Lensing.

which means that the excuse does not apply where the perpetrator should have known better.⁶ A “mistake of fact” refers to a mistaken assessment of an actual situation where the perpetrator should not have known better.⁷ The Dutch authorities explain that a briber could not argue that the person he/she bribed was a foreign public official because people are expected to inform themselves of the identity of persons with whom they do business.

In order to plead a “mistake of law” successfully, the perpetrator must believe that a punishable offence has not been committed. However, the duty to inform oneself of the current regulations applies, and only advice relied upon from a person or body with such a degree of authority that it is reasonable to have relied on his/her advice serves as an excuse.

The Dutch authorities state that these non-codified general excuses are not opposed to Commentaries 7 and 8 of the Convention, as the duty to inform oneself of the law does not enable one to “rely solely on information” gathered on site in the other country. Moreover, the person is expected to have informed himself/herself of whether the act in question is punishable according to Dutch law. The Dutch authorities add that with respect to the foreign bribery offence, the only case in which a mistake of law would apply would be where the perpetrator has been informed by a source with a sufficient degree of authority that the payment in question is required or permitted by the statutory regulations in force in the foreign public official’s country.

1.2 The Elements of the Offence

The review and analysis of the elements of the offences of bribing a foreign public servant is restricted in content to those offences that are covered by the Convention [i.e. articles 177.1(1), 177a.1(1), 178.1 and 178.2] . As articles 177.1(2) and 177a.1(2) address the making of a gift or promise, etc. in return for an act or omission that occurred in the past, they exceed the requirements of the Convention, and, thus, are not discussed in this review.

1.2.1 any person

Articles 177, 177a and 178 of the Penal Code apply to “a person”. Article 51.1 clarifies that criminal offences can be committed by “natural persons” and “juristic persons”.

1.2.2 intentionally

The Dutch authorities provide that the element of intention is implicit in the formulation of the offences. For instance, depending upon the translation, articles 177.1(1) and 177a.1(1) apply where a gift, etc. has been made “with the object of”, “with the intention of” or “for (a public servant) to act” or refrain from acting in the exercise of his/her function, in the breach of his/her official duties. Articles 178.1 and 178.2 also employ the terminology “with the object of”.

The Dutch authorities explain that an offence is committed regardless if the action has an “effect”. It is the intention of the briber to induce an act or omission by the public official that gives an action a criminal nature. For example, the offence is completed where a message has been left on an official’s answering machine containing a promise, but the official has not heard it.

⁶ *Ibid.*

⁷ The Dutch authorities provide that a good example of a mistake of fact is the case where a motorist ignores the order to stop given by a police officer who was not recognisable as such standing at the side of the road, mistaking him/her for a hitchhiker.

Under Dutch law the requirement of intent does not contemplate the case where a person is wilfully blind to whether the act of offering, etc. money or any other advantage would induce an act or omission by the public official (i.e. the concept of *dolus eventualis*).

1.2.3 to offer, promise or give

Articles 177.1(1) and 177a.1(1) are based upon the formulation “makes a gift or a promise to a public servant or renders or offers him a service”.⁸ The latter part (i.e. “renders or offers him a service”) was added by way of amendment through the Implementation Bill. The formulation for article 178.1 is identical, except that the word “judge” has been substituted for “public servant”.⁹

The previous bribery offences applied only in relation to the making of “a gift or a promise”. In the notes on the Implementation Bill it is stated that the language “renders or offers him a service” was added through the Implementation Bill because practice had shown that the previous language “cannot, or at least, not automatically, be deemed to include the offer (or acceptance) of services”.¹⁰ The rationale for this amendment is discussed below (see 1.2.4 on “any undue pecuniary or other advantage”). However, for the purpose of the current discussion, it is necessary to address the issue of whether the language in the Dutch offences covers offers, promises and gifts of any undue pecuniary or other advantage. The new formulation is somewhat confusing, in that the term “offers” only appears in conjunction with “a service”, and the term promise does not appear in conjunction with this term. Clearly, the intent is to cover two categories of advantages, and the Dutch authorities confirm that offers, promises and gifts are covered in respect of both of them. They explain that under Dutch law, the term “promises” has a broad meaning, and is considered to contemplate the notion of offering. Additionally, in a judgement of the Supreme Court (NJ 1916, p. 300) it has been explicitly pronounced that offering falls under the making of a promise.

1.2.4 any undue pecuniary or other advantage

The language used in articles 177.1(1), 177a.1(1) and 178 to communicate the notion of what type of advantage is prohibited does not employ terminology similar in nature to the terminology in Article 1 of the Convention. Only the term “service” conveys the substance of the advantage that is prohibited, and as mentioned above, the legislators chose to add this term to the offences because practice had shown that the previous language (i.e. “makes a gift or a promise”) did not necessarily include the notion of services.¹¹ In the notes on the Implementation Bill, it is indicated that the term “service” would, for example, cover “participation in ‘freebie trips’ providing a holiday bungalow for a ‘soft price’ or offering a Supervisory Board position”.¹² The Dutch authorities add that the term “service”

⁸ One translation that has been provided uses the following language: “make or offer a promise or gift, or provide or offer a service”. However, the language in the official translation of the Penal Code, as well as another translation provided by the Dutch authorities uses the other language.

⁹ The Dutch authorities confirm that article 178.2 has been amended in exactly the same way as the other provisions in relation to offering, etc. but that the translation provided did not reflect this fact.

¹⁰ See page 10 of the notes on the Implementing Bill.

¹¹ Although, according to the notes on the Implementation Bill (page 9), the Supreme Court held in 1994 (*Netherlands Jurisprudence 1994, 673*) that this term applies not just to “money, goods or performance” but also to advantages “of a non-material nature, such as the provision of a decoration or the receipt of sexual favours”.

¹² See page 10 of the notes on the Implementation Bill.

was added for linguistic reasons and for the purpose of codifying the law, and that it does not affect the broad scope of the provision.

The Dutch authorities explain that the term “gift” is understood to mean “something that has value for the recipient”, and the term “promise” conveys the same notion but that it will be carried out in the future. Thus, the advantage does not have to consist of money, goods or services, but may be of a non-material nature.

In the notes on the Implementation Bill it is provided that “bagatelle (trivial) gifts” have not been expressly exempted from the coverage of the offences due to the drafting difficulties that would arise, and doubts that an express exception would create greater transparency.¹³ It is further stated that if necessary the Department of Public Prosecutions could “take self-steering action” by establishing guidelines in this regard.¹⁴

Small Facilitation Payments

The Dutch authorities state that although it is not the intention to provide an exclusion from the offence for facilitation payments, under certain circumstances it would be possible to consider not prosecuting a case involving a facilitation payment. They also state that it is the intention of the Department of the Public Prosecutions to issue guidelines for corruption cases, including facilitation payments. These will be drafted according to the standards in the Convention, and although it is not known with certainty how the guidelines will define small facilitation payments, the Dutch authorities expect that they will be described as small payments to low level public officials for the purpose of inducing them to do something that is not in contravention of their public duties, or words to that effect.

1.2.5 whether directly or through intermediaries

Articles 177, 177a and 178 do not expressly apply to bribes made through intermediaries. It was decided that an amendment to this effect was not required.¹⁵ The Dutch authorities state that the term “to make a gift or a promise to a public servant or renders or offers him a service” is intended to be interpreted in a broad, functional sense, and thus the case would be covered where an intermediary receives or transmits the payment or offer or the advantage is paid into an account accessible to the foreign public servant. This was the interpretation that was provided by the Minister of Justice to Parliament during the reading of the Bills, and it has also been accepted in a judgement of the Supreme Court [21 October 1918 (NJ 1918, p. 1128)].

1.2.6 to a foreign public official

Article 178a.1 of the Penal Code extends the meaning of “public servant” in articles 177 and 177a to “persons in the public service of a foreign state or an international institution”. Article 178a.3 extends the meaning of “judge” in article 178 to “a judge of a foreign state or an international institution”. Article 178a extends the application of these offences in the manner described by stating that the various types of foreign public officials referred to are “considered as equivalent” to the ones referred to in the offences themselves.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ See page 19 of the notes on the Ratification Bill.

(i) ***“Persons in the Public Service of a Foreign State”***

The term “persons in the public service of a foreign state” is not defined further in the Penal Code or elsewhere in the law. The Dutch authorities explain that the courts would make an independent judgement about whether a particular person meets this description by considering (1) the concept of a Dutch public official as defined in the Penal Code and the jurisprudence, and (2) the definition in the Convention. The definition of a public official under the law of the foreign public official’s country might also be taken into account in certain circumstances. They emphasise that the definition in the Convention would be the most important interpretative tool, and highlight that the notes drafted for the purpose of the Parliamentary reading of the implementing Bill state that the purpose of extending the relevant offences to the bribery of the aforementioned persons is to enable execution of the Convention.

The Dutch authorities provide that the term “public servant” is defined in article 84 of the Penal Code, pursuant to which it applies to “all persons elected to public office in elections duly called under the law” (84.1), “arbitrators” (84.2) and “all personnel of the armed forces” (84.3). In addition, it is stated in the notes on the Implementation Bill¹⁶ that the term “official” has been broadly interpreted in the jurisprudence¹⁷, and includes persons who are appointed to a public function by public authorities in order to perform part of the duties of the State or its bodies. The notes on the Implementation Bill clarify that “official” includes those who are elected as Members of Parliament and members of municipal councils.¹⁸ Furthermore, the Supreme Court has defined a “public servant” as “one who under the supervision and responsibility of the authorities has been appointed to a function of which the public character cannot be denied with a view to implementing tasks of the state and its organs”.

This explanation would appear to raise two issues. Firstly, since the definitions of domestic public servants are not directly applicable to foreign public servants, the definition of a foreign public official cannot be considered autonomous. Secondly, it is not clear whether in any case all the categories of public officials required to be covered by Article 1.4 of the Convention (other than any official or agent of a public international organisation, which is discussed below) are covered by the offence (e.g. judges and persons exercising a public function for a public enterprise). However, these factors must be balanced with the assurances of the Dutch authorities that the definition in the Convention would be given the most weight.

(ii) ***“Persons in the public service of an international institution”***

The term “persons in the public service of an international institution” differs in one significant aspect from the corresponding term in Article 1.4 of the Convention (i.e. “any official or agent of a public international organisation”) in that it applies to “persons in the public service” as opposed to “any official or agent”. The Dutch authorities indicate that agents of a public international organisation are covered by the formulation in the Penal Code, and reiterate that the definition in the Convention would be considered the most important interpretative tool.

¹⁶ See page 11 of the notes on the Implementation Bill.

¹⁷ Supreme Court, 30 January 1994, Ref. W 9149; Supreme Court, 1 January 1992, NJ 1993, 354; and Supreme Court, 4 February 1995, NJ 1995, 620.

¹⁸ See page 11 of the notes on the Implementation Bill.

(iii) “A judge of a foreign state or an international institution”

The term “judge of a foreign state or an international institution” appears to correspond in meaning to the term “any person holding a judicial office of a foreign country, whether appointed or elected” contained in Article 1.4 of the Convention. This part of the definition applies specifically to the offence under article 178a of the Penal Code of bribing a judge for the purpose of influencing his/her decision in a case before him/her for judgement, not the broader bribery offences under articles 177 and 177a.

In addition, if the definition under article 84.2 of a domestic “judge” were applied to foreign judges, they would encompass “arbitrators” as well as “those who have jurisdiction in matters of public administration”.

1.2.7 for that official or for a third party

Articles 177, 177a and 178 do not refer to third party beneficiaries. In the notes on the Ratification Bill it is stated that an amendment is not required in respect of this element of the offence.¹⁹ In relation to the passive bribery offence under article 363 of the Penal Code, it is provided that in principle the offence contemplates the case where a third party receives the advantage with the public servant’s knowledge.²⁰ This would tend to indicate that the corresponding active bribery offence would cover the case where the advantage is for a third party beneficiary. Moreover, the Dutch authorities confirm that an offence is committed where an agreement is reached between the briber and the foreign public servant to transmit the advantage directly to a third party, because in such a case the official is considered to have received something of value for the purpose of influencing him/her.

1.2.8 in order that the official act or refrain from acting in relation to the performance of official duties

The relevant offences cover bribes for the purpose of inducing the following acts and omissions, etc.:

1. *Pursuant to article 177.1(1), acts or omissions in breach of a public servant’s official duties.* Depending on the translation, this element is described as acts or omissions in the “exercise of his function, in breach of his official duties”, or acts or omissions “in violation with the discharge of duties”. The Dutch authorities confirm that this offence covers the situation where an official carries out a requested act (or omission) that is contrary to the regulations that apply to him/her. They state that this is in compliance with Commentary 3 (which states that an offence formulated in terms of a breach of duties meets the standard under the Convention if it is understood that every public official has a duty to exercise judgement or discretion impartially and this is an “autonomous” definition not requiring proof of the law of the particular official’s country) when considered together with the offence under article 177a.1(1), which does not require a breach of duties.
2. *Pursuant to article 177a.1(1), acts or omissions in the discharge of a public servant’s duties, without breaching his/her official duties.* This element is described in one translation as acts or omissions “in the exercise of his function, but not in breach of his official duties”. In another translation it is described as acts or omissions “in the discharge of his duties without violating these duties”.

¹⁹ See page 19 of the notes on the Ratification Bill.

²⁰ *Ibid.*

3. Pursuant to article 178.1, influence over a judge with respect to a decision in a case that is before him/her for judgement and pursuant to article 178.2, influence over a judge for the purpose of obtaining a conviction in a criminal case. The Dutch authorities confirm that where a judge is bribed in relation to other aspects of his/her duties (e.g. the disbarring of attorneys, prosecutorial or investigatory powers), either article 177.1(1) or article 177a would apply depending on whether a breach of official duties is involved. In addition, they clarify that article 178 addresses omissions on the part of judges (e.g. a decision not to convict) despite the lack of express language in this regard.

Moreover, all four categories of acts/omissions are limited by the scope of the duties of the public servant or judge as the case may be. In the case of the breach of duties and no breach of duties related offences, the public servant must be exercising his/her function. The same limitation is implicit in the offences in relation to judges, due to the nature of the acts covered. The Convention requires that the bribery of foreign public officials address acts or omissions “in relation to the performance of official duties”, which is defined under Article 1.4.c as including “any use of the public official’s position, whether or not within the official’s authorised competence”. The Dutch authorities confirm that the purpose of the terms used in the offences in this regard is to make it clear that the offences capture advantages for the purpose of inducing an act or omission in the bribed person’s capacity as an official as opposed to some other capacity (e.g. chairman of a football club).

1.2.9/1.2.10 in order to obtain or retain business or other improper advantage/in the conduct of international business

The Dutch offences are not limited in application to bribes for the purpose of obtaining or retaining business or other improper advantage in the conduct of international business. Thus in this respect the Dutch legislation exceeds the standard under the Convention.

1.3 Complicity

Article 1.2 of the Convention requires Parties to establish as a criminal offence the “complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official”.

The Penal Code contains two provisions relevant to the issue of complicity; article 47.1(2), which addresses the solicitation of the commission of a crime, and article 48, which designates the persons liable as accessories to a serious offence. Pursuant to article 47.1(2) a person who by means of gifts, promises, abuse of authority, use of violence, etc. provides the opportunity, means or information to commit an offence, intentionally solicits the commission of a crime and is liable as a principal. The Dutch authorities provide that this offence captures the notion of incitement.

Article 48 of the Penal Code states that the following persons are liable as accessories to a serious offence:

1. Those who intentionally assist during the commission of the offence.
2. Those who intentionally provide the opportunity, means or information necessary to commit the offence.

Pursuant to article 49.1, an accessory is liable to the maximum penalty prescribed for the serious offence reduced by one-third. Serious offences are contained in Book II of the Penal Code, in which all the relevant bribery offences are set out. The Dutch authorities indicate that “participation” is only

punishable where the offence in question is completed or at least a punishable attempt has taken place; however it is not required that the person who commits the principal offence is prosecuted or liable to prosecution.

These provisions would appear to cover incitement, aiding and abetting and authorisation, as required by Article 1.2 of the Convention.

1.4 Attempt and Conspiracy

Article 1.2 of the Convention further requires Parties to criminalise the attempt and conspiracy to bribe a foreign public official to the same extent as they are criminalised with respect to their own domestic officials.

(i) Attempt

Pursuant to article 45.1 of the Penal Code, a punishable attempt occurs “where the perpetrator manifests his intention by initiating the serious offence”. Article 45.2 prescribes a reduction in the maximum principal penalty by one-third in the case of an attempt. Article 46b states that an attempt (or preparation) to commit a serious offence does not occur where the offence has not been completed due to circumstances dependent on the perpetrator’s will.

The Dutch authorities provide as an example of the application of the provision on attempts to the offences of bribing a foreign public servant, etc. the case where an attempt is made without success to put something into the public servant’s hand.

(ii) Conspiracy

Neither conspiracy to bribe a Dutch public official nor a foreign public official is criminalised under Dutch law. However, pursuant to article 140.1 of the Penal Code, participation in an organisation “that has as its object the commission of serious offences” is punishable by a maximum term of imprisonment of 6 years or a category 5 fine.

2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS

Article 2 of the Convention requires each Party to “take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official”.

2.1 Criminal Responsibility

The criminal liability of legal persons is established by article 51 of the Penal Code, which the Dutch authorities confirm applies to articles 177, 177a and 178 on foreign bribery.

(i) Standard of Liability

Article 51.2, which establishes the criminal liability of legal persons as well as those who have ordered the commission of the criminal offence and those in control of the unlawful behaviour, states as follows:

Where a criminal offence is committed by a juristic person, criminal proceedings may be instituted and such penalties and measures as are prescribed by law, where applicable may be imposed:

- (1) *against the juristic person; or*
 - (2) *against those who have ordered the commission of the criminal offence, and against those in control of such unlawful behaviour; or*
 - (3) *against the persons mentioned under (1) and (2) jointly.*
- (underlining has been added for emphasis)

The use of the word “may” in article 51.2 appears to inject discretion at two stages: the institution of criminal proceedings and the application of penalties. Moreover, article 51.2 provides a choice between proceeding against and imposing penalties on either the legal person itself, those who have ordered the commission of the criminal offence and those in control of such unlawful behaviour, or both jointly. A certain degree of discretion would also appear to be involved in making such a choice. However, the Dutch authorities indicate that article 51.2 contemplates the same level of prosecutorial discretion that is available where natural persons are involved.

The Dutch authorities provide that pursuant to article 51.2(2), it is not required that the actual persons in charge or the persons issuing the assignment be formal members of the board, directors or owners of the legal person; someone legally subordinate to the board can be in *de facto* control. They explain that a “person in charge” is criminally liable where his/her “intentions (are) directed towards the prohibited actions”, where he/she “consciously accepts the considerable possibility that the prohibited acts will take place” or he/she fails to take steps to “prevent the prohibited acts that he/she was competent and reasonably obliged to take”. According to the Dutch authorities, there are no hard and fast criteria for determining whether a person is in *de facto* control. The Supreme Court held that a person is considered to be acting as a manager where he/she holds authority or possesses considerable influence over others in the organisation, a part of the organisation or in relation to a certain activity of the organisation (HR 16 June 1981, NJ 1982, 586).

The Dutch authorities explain that the person issuing the assignment is criminally liable where he/she explicitly orders the commission of the criminal act. Moreover, the Supreme Court has ruled in one case that a suggestion by a manager to a subordinate to perpetrate the act was sufficient to trigger liability.

For the “person in charge” or the “person issuing the assignment” to be criminally liable, the legal person must have committed a criminal offence.

With respect to the liability of the legal person pursuant to article 51.2(1), the Dutch authorities explain that the execution of a criminal offence by a natural person that can be imputed to the legal person is usually required. The jurisprudence requires that the legal person (through the manager or principal) accepts the prohibited acts or omissions of the natural person, accepts the chance that the forbidden conduct will occur, or that it accepted similar conduct in the past. Precise identification of the natural person(s) who actually provided the offer, etc. to the foreign public official is not required where it is clear that the conduct was perpetrated for the benefit of the legal entity and the legal entity tolerated or accepted such conduct. The Dutch authorities confirm that the person who actually perpetrates the bribe does not have to be someone with managerial responsibility, and cites a case pertaining to a death by negligence in a hospital in support thereof [Supreme Court (NJ 1988, 981)].

The Dutch authorities indicate that the same rules and regulations regarding seizure and confiscation and enforcement in relation to natural persons are applicable in relation to legal persons.

The Dutch authorities confirm that the criminal responsibility of the legal person or any of the persons covered by article 51.2 does not exclude the liability of a natural person(s) not covered by article 51.2.

(ii) Legal Entities

Article 51.3 states that for the purpose of criminal liability of juristic persons under article 51.2, the “following are deemed to be equivalent to juristic persons”:

- A ship owning firm (*rederij*).
- Unincorporated associations, such as an unincorporated company (*vennootschap zonder rechtspersoonlijkheid*).
- A partnership (*maatschap*).
- Special funds.

The formulation of this provision would seem to indicate that the list of entities clarifies the types of entities, in addition to incorporated entities, that are criminally responsible pursuant to article 51.2.

The Dutch authorities state that the concept of a legal person is primarily interpreted as a civil law term, and provide the relevant sections of the Civil Code on the entities that are considered to possess legal personality. In summary, these include the following:

- The State, provinces, municipalities, water control corporations, all bodies, which pursuant to the Constitution, are empowered to issue regulations, and other bodies “charged with part of the duties of government” pursuant to the law. (Section 1)
- Religious associations and their independent sub-bodies and bodies in which they are united. (Section 2)
- Associations, cooperatives, mutual insurance societies, companies limited by shares, private companies with limited liability and foundations. (Section 3)

The Dutch authorities confirm that state-controlled and state-owned companies are covered. They further explain that with respect to the entities referred to in the Civil Code provisions having regulation-making powers, in particular the State, and other bodies “charged with part of the duties of government”, such entities are not criminally liable for offences “committed within the context of the execution of State duties”, although the case law on this issue is undergoing a “dynamic transition”.

The Dutch authorities indicate that any formal deficiencies in the definition of legal persons do not imply that a particular type of entity is not covered by article 51.2 of the Penal Code. Thus it would appear that the concept of legal person is broadly interpreted under Dutch jurisprudence.

3. ARTICLE 3. SANCTIONS

The Convention requires Parties to institute “effective, proportionate and dissuasive criminal penalties” comparable to those applicable to the Party’s own domestic officials. Where a Party’s domestic law does not subject legal persons to criminal responsibility, the Convention requires the Party to ensure that they are “subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions”. The Convention mandates that for a natural person, criminal penalties include the “deprivation of liberty” sufficient to enable mutual legal assistance and extradition. The Convention also requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of a “comparable effect” are applicable. Additionally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

3.1/3.2 Criminal Penalties for Bribery of a Domestic and Foreign Public Official

3.1.1/3.2.1 Natural Persons/Legal Persons

(i) Generally

The penalties are identical for foreign and domestic bribery and can be summarised as follows:

Pursuant to article 177.1(1) of the Penal Code (i.e. the purpose of the bribe is to obtain a breach of duties), the penalties are:

(a) *Natural persons*: prison sentence of not more than 4 years or a category 5 fine (100,000 guilders)²¹. Deprivation of the rights referred to in article 28.1(1), (2) and (4) is also available.

(b) *Legal persons*: The fine is the same as for natural persons, except that pursuant to article 23.7 it may be increased in certain circumstances (discussed below) to not more than the amount of the next category (1 million guilders).

Pursuant to article 177a.1(1) of the Penal Code (i.e. the purpose of the bribe is not to obtain a breach of duties), the penalties are:

(a) *Natural persons*: prison sentence of not more than 2 years or a category 4 fine (25,000 guilders). Deprivation of the rights referred to in article 28.1(1), (2) and (4) is also available.

(b) *Legal persons*: In certain circumstances the fine may be increased to not more than the amount of the next category (100,000 guilders).

Pursuant to article 178.1 of the Penal Code (i.e. the purpose of the bribe is to influence a judge's decision concerning a case before him/her):

(a) *Natural Persons*: prison sentence of not more than 6 years or a category 4 fine (25, 000 guilders). Deprivation of the rights referred to in article 28.1(1), (2) and (4) is also available.

(b) *Legal Persons*: In certain circumstances the fine may be increased to not more than the amount of the next category (100,000 guilders).

Pursuant to article 178.2 of the Penal Code (i.e. the purpose of the bribe is to obtain a conviction in a criminal case):

(a) *Natural Persons*: prison sentence of not more than 9 years or a category 5 fine (100,000 guilders). Deprivation of the rights referred to in article 28.1(1), (2) and (4) is also available.

(b) *Legal Persons*: In certain circumstances the fine may be increased to not more than the amount of the next category (1 million guilders).

In the notes on the Implementing Bill, it is explained that the penalties for an offence under article 177 have been increased for imprisonment from a maximum of 2 to 4 years and for the fine from category 4 to category 5 in order to eliminate the sharp distinction between the penalties for active and passive bribery where a breach of duties is involved.²² However, to a certain extent the distinction has been maintained in relation to the offences not involving a breach of duty as the fine under article 177a is a category 4 fine, in contrast to the fine under the corresponding passive offence (article 362), which is a category 5 fine.

The Dutch authorities confirm that interim detention and the associated forms of coercion are only available for offences for which a term of imprisonment of 4 years or more is available, or no fixed

²¹ On 8 February 2001, 100 Dutch Guilders were valued at 42 US Dollars and Euro 45.

²² See page 15 of the notes on the Implementation Bill.

address in the Netherlands can be determined for the accused. They state that, however, during the initial stages of an investigation the public prosecutor would normally base his/her suspicions on both articles 177 and 177a, and thus the lower sentence for an offence under article 177a would not present practical difficulties in this regard.

The following rights can be withdrawn pursuant to article 28.1(1), (2) and (4):

The right to hold public office or specific offices. [28.1(1)]

The right to serve in the armed forces. [28.1(2)]

The right to serve as an advisor before the courts or an official administrator. [28.1(4)]

The penalties for similar offences are quite similar in severity to those applicable to the foreign bribery offences. For instance, the penalty for theft is a term of imprisonment of not more than 4 years or a category 4 fine, the penalty for embezzlement ranges from 3 years of imprisonment and a category 5 fine to 5 years of imprisonment and a category 5 fine. The penalty for false representation in order to obtain an unlawful gain is a maximum of 3 years of imprisonment or a category 5 fine.

The Dutch authorities confirm that a fine and a penalty of imprisonment can be applied cumulatively. They also indicate that in the Netherlands, judges are not bound by guidelines or directives in determining the appropriate penalty.

(ii) Issues Specific to Liability of Legal Persons

With respect to the maximum limit of the fines identified above for legal persons, these reflect article 23.7 of the Penal Code, which permits the imposition of a fine up to the maximum limit of the next highest category “where the category defined for the offence does not allow appropriate punishment”. The Dutch authorities explain that the English translation of article 23.7 incorrectly creates the appearance that there is a presumption that the lower level of fine (i.e. the category of fine for natural persons) applies to a legal person, and that in fact the presumption is that the higher category of fine applies.

Article 74a of the Penal Code provides the opportunity to “avoid criminal proceedings” where an accused offers to pay the maximum fine for the criminal offence and comply with other conditions that may be set in accordance with article 74.2 (e.g. the surrender of seized objects)²³. Where an accused offers to pay the fine in a case where article 74a applies, the Public Prosecutor “may not refuse to set the conditions specified in article 74”. This provision applies in the case of a criminal offence “for which no principal penalty other than a fine is prescribed”. However, the Dutch authorities clarify that a legal person could not invoke this provision in respect of an offence under article 177, 177a or 178 because imprisonment is available thereunder in respect of natural persons.

3.3 Penalties and Mutual Legal Assistance

The Dutch authorities state that the term of imprisonment for an offence is only relevant to the provision of mutual legal assistance where a country requests the seizure of documents, which can only be provided where extradition would be available for the offence in question. Pursuant to section 5(1)(a) of the Extradition Act, the availability of extradition is restricted to offences for which a

²³ Article 74.1 is discussed below under 5.1 on “Enforcement”.

penalty of imprisonment of “1 year or more may be imposed under the law of both the requesting state and the Netherlands”.²⁴

3.4 Penalties and Extradition

Please see the discussion above (3.3 on “Penalties and Extradition”) with respect to the requirement for a penalty of imprisonment of 1 year or more under section 5(1)(a) of the Extradition Act.

3.6 Seizure and Confiscation of the Bribe and its Proceeds

(i) Pre-trial Seizure

Articles 94 and 94a of the Code of Criminal Procedure govern pre-trial seizure, which, according to the Dutch authorities, is discretionary under both provisions.

Pursuant to article 94.1, seizure of “property” may be ordered for the purpose of providing evidence or to demonstrate illegally obtained advantage as referred to in article 36e of the Penal Code. Pursuant to article 94.2, seizure of “property” may be ordered for the purpose of ensuring the availability of property at the time of trial for which “forfeiture” may be ordered.

The discretionary power to seize “property” is also available under article 94a.1 for the purpose of safeguarding the “right of recovery” of a fine upon conviction where there is a suspicion of an “indictable offence” for which a category 5 fine may be imposed. In addition, the discretionary power to seize “property” exists pursuant to article 94a.2 for the purpose of safeguarding the “right of recovery in respect of an order to pay a sum of money to the state by way of deprivation of illegally obtained advantage”, which may be imposed upon conviction.²⁵ The power to seize under article 94a.2 applies where there is a suspicion of an “indictable offence” for which a category 5 fine may be imposed. It is presumed that the term “indictable offence” corresponds to “serious offence”, which describes all the foreign bribery offences under the Penal Code. The Dutch authorities confirm that by restricting these discretionary forms of seizure to offences for which a category 5 fine is applicable, such seizure is not available for offences under article 177a (no breach duty) or article 178.1 (bribery of a judge for purpose of influencing the decision in a case before him/her for judgement). However, they emphasise that despite this limitation, seizure would be available for these offences pursuant to article 94.1 for the purpose of providing evidence of illegally obtained advantage and pursuant to article 94.2 for the purpose of ensuring the availability thereof for the purpose of forfeiture.

For the purpose of seizure under articles 94 and 94a, “property” is defined as “all objects and all property rights”.²⁶ The Dutch authorities clarify that objects include all corporate effects, movables or property of any nature, including an amount of money, and property rights include claims and securities as well as intellectual property rights that provide a corporate benefit. They also clarify that the bribe as well as the proceeds is covered in the notion of objects.

²⁴ A discussion on the dual criminality aspect of this requirement is contained below under 9.2 on “Dual Criminality”.

²⁵ Seizure pursuant to article 94a.2 is also available where there has been a conviction, presumably because confiscation for the purpose of depriving a person of “unlawfully obtained gains” requires, pursuant to article 36e.1, a separate judicial decision.

²⁶ Article 94a.3

(ii) Confiscation and Forfeiture

Confiscation of “Objects”

The Penal Code provides for “forfeiture” as well as “confiscation”. Forfeiture constitutes a penalty that may be imposed upon conviction for any criminal offence (article 33), whereas confiscation is a measure for seizing objects the uncontrolled possession of which constitutes a violation of the law or public interest (article 36b). The Dutch authorities clarify that confiscation under article 36b is of minor importance in relation to the offence of bribing a foreign public official as possession of the proceeds of the bribe “cannot constitute such a violation”. For this reason, this review focuses on the availability of “forfeiture” as a punishment.

Forfeiture of the Bribe

Forfeiture upon conviction pursuant to article 33 is discretionary²⁷, and pursuant to article 33a it is available in respect of certain “objects” including objects used to commit or prepare the offence [article 33a.1(c)]. It is not available, however, in relation to objects derived from the offence. Thus it would appear that, with respect to active bribery, forfeiture of an object is available in respect of the bribe but not the proceeds of bribing. Article 33a.2 provides for the forfeiture of the objects listed in article 33a.1 when they are in the possession of a person other than the convicted person where either the third person knew of or might reasonably have suspected their illegal purpose or origin, or it has not been possible to ascertain to whom they belong. Contrary to Article 3.3 of the Convention, it does not appear that there is any requirement that where the bribe is not subject to forfeiture (e.g. because it is in the possession of a *bona fide* third party) that “monetary sanctions of comparable effect are applicable”.

Deprivation of Unlawfully Obtained Gains

Article 36e.1 of the Penal Code provides the discretionary power²⁸ to order, by “separate judicial decision”, the payment of a sum of money in order to deprive a person convicted of a criminal offence of “unlawfully obtained gains”. The Dutch authorities explain that the purpose of section 36e is to restore the “lawful financial state of affairs” rather than result in an additional punishment.²⁹

Such an order is only available on application by the Public Prosecutor’s Office upon conviction in relation to any criminal offence. Where there has been no conviction, it is only available for an offence for which a category 5 fine applies. Thus, as in the case of the corresponding provision on pre-trial seizure (article 96a.2 of the Code of Criminal Procedure) where there is no conviction it is not available for offences under article 177a (no breach of duty) or article 178.1 (bribery of a judge for purpose of influencing the decision in a case before him/her for judgement).

It therefore appears that although the proceeds of bribery per se are not subject to forfeiture, the court has the discretion to order the payment of a sum of money in order to restore the briber to his/her pre-bribery financial state. Moreover, the Dutch authorities state that in practice forfeiture of the bribe and the related measure concerning the payment of an amount equivalent to the unlawfully obtained gains are normally applied.

²⁷ The power is discretionary due to the language “may be imposed”.

²⁸ The power is discretionary due to the language: “may be imposed”.

²⁹ In calculating the payment to be ordered, court-awarded claims are deducted and obligations imposed by prior decisions to make such payments are taken into account. [articles 36e.6 and 36e.7]

3.8 Additional Civil or Administrative Sanctions

The Dutch authorities provide that pursuant to the Civil Code, legal persons may be dissolved in certain circumstances on application by the Public Prosecutor's Office. They state that such a remedy would be available, for instance, where activities of a legal person are in conflict with the public order, and confirm that it is conceivable that a legal person that has bribed a foreign public official would fit this case.

Additionally, an injured party can institute an action for civil damages on the ground that an unlawful act has been committed by the legal person during or before the criminal prosecution regarding the act in question. The Dutch authorities consider that it "is not at all unlikely" that an action of this type could succeed with respect to the bribery of a foreign public official with the object of obtaining a competitive advantage in international business.

4. ARTICLE 4. JURISDICTION

4.1 Territorial Jurisdiction

Article 4.1 of the Convention requires each Party to "take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory". Commentary 25 on the Convention clarifies that "an extensive physical connection to the bribery act" is not required.

Article 2 of the Penal Code establishes territorial jurisdiction as follows:

The criminal law of the Netherlands is applicable to any person who commits a criminal offence within the Netherlands.

Article 3 clarifies that a criminal offence committed on board a Dutch vessel or aircraft outside of the Netherlands would be covered by Dutch criminal law.

The Dutch authorities explain that territorial jurisdiction applies pursuant to article 2 where an offence takes place in its entirety or in part in the Netherlands. Although there are no provisions in the Penal Code for determining the location of an offence, they explain that the following four points of reference follow from the case law and the academic literature:

1. The location of the physical actions. This principle is particularly useful where the result is not an element of the offence.
2. The place where the instrument has its effect (e.g. poison or a gun).
3. The place where the offence was completed by "occurrence or constitutive consequence".
4. The tenet of ubiquity, on the basis of all of the above criteria.

The Dutch authorities confirm that in light of a number of recent decisions of the Supreme Court³⁰, territorial jurisdiction is established where an offence is committed in the Netherlands as well as abroad, and that, for instance, a telephone call, fax or e-mail emanating from the Netherlands would provide a sufficient nexus.

³⁰ The most recent of which is: 13 April 1999 (NJ 1999, 538).

4.2 Nationality Jurisdiction

Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, “take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official”. Commentary 26 on the Convention clarifies that where a Party’s principles include the requirements of dual criminality, it “should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute”.

Pursuant to article 5.1 of the Penal Code, the Netherlands has jurisdiction over criminal offences committed outside the Netherlands by Dutch citizens³¹ in the following 2 cases:

1. In respect of any of the serious offences defined under certain articles of the Penal Code. The articles of the Penal Code relevant to the offence of bribing a foreign public official (i.e. articles 177, 177a and 178) are not mentioned here. [article 5.1(1)]
2. In respect of an offence that is considered a serious offence under the criminal law of the Netherlands and is also considered a criminal offence under the laws of the country where the offence was committed. [article 5.1(2)]

It would therefore always be the case that dual criminality would have to be met in order for nationality jurisdiction to be established over an offence under article 177, 177a or 178. The Dutch authorities confirm that the requirement of dual criminality is not strictly interpreted, and that it would be considered to be met where the offence is punishable in both countries, regardless of the formulation of the offence in the other country. They further confirm that nationality jurisdiction “could possibly not be” established over a Dutch national who bribes a foreign public official abroad in a country other than the country for which he/she exercises a public function if only the bribery of a domestic public official is criminalised in that country (and the conduct is not covered by another crime).

There is no case law indicating whether nationality jurisdiction can be established over legal persons. However, it is the view of the Dutch authorities that a legal person can have nationality, and that a legal person incorporated under Dutch law would have Dutch nationality. In addition, the academic literature indicates that a legal person can be subject to nationality jurisdiction pursuant to article 5 of the Penal Code.

Article 5.2 confirms that nationality jurisdiction applies where the accused person acquires Dutch nationality after having committed the offence.

4.3 Consultation Procedures

Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution.

Pursuant to articles 552t to 552w of the Code of Criminal Procedure, the transfer of criminal proceedings to another country is possible with or without a treaty for “serious offences”.³² The

³¹ For the purpose of establishing nationality jurisdiction, whether a person has Dutch citizenship is determined according to the Dutch Nationality Act. Thus it would appear that a Dutch permanent resident would not be considered a citizen for this purpose.

³² The process for transferring proceedings to another state is initiated by a submission by the public prosecutor of a “motivated application” to the Minister of Justice. If he/she accepts the request of the

general principle in either case is that the transfer must be in the interest of the administration of justice. As a rule, a transfer of proceedings may take place with respect to any serious offence where the suspected perpetrator is a foreigner who is not a Dutch resident.

Moreover, where a treaty does not exist between the Netherlands and the requesting state, a transfer is only possible where the requesting state and the Netherlands have jurisdiction under their domestic laws.

4.4 Review of Current Basis for Jurisdiction

Article 4.4 of the Convention requires each Party to review whether its current basis for jurisdiction is effective in the fight against bribery of foreign public officials, and if it is not, to take remedial steps.

It is the view of the Dutch authorities that the Netherlands has sufficient jurisdictional powers to enable adequate action against the bribery of foreign public officials, considering that the territorial and nationality principles have been broadly interpreted.

5 ARTICLE 5. ENFORCEMENT

Article 5 of the Convention states that the investigation and prosecution of the bribery of a foreign public official shall be “subject to the applicable rules and principles of each Party”. It also requires that each Party ensure that the investigation and prosecution of the bribery of a foreign public official “shall not be influenced by consideration of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved”.

5.1 Rules and Principles Regarding Investigations and Prosecutions

(i) Investigation

The police generally initiate a preliminary investigation in response to an indication that a felony has been committed. The police may apply coercive measures³³, including arrest and interrogation, upon forming a reasonable suspicion, based on the facts and circumstances, that a person may have committed an offence. Where the police have performed the investigation, they prepare a report, under oath, which is turned over to the prosecutor’s office.³⁴ The Dutch authorities indicate that a case is transferred to these authorities when sufficient evidence has been obtained to justify a decision to prosecute.

public prosecutor, it is then formally submitted to the authorities of the requested state. A corresponding process applies where the Netherlands is requested by another state to take over proceedings.

³³ Investigative procedures such as the search of premises are performed in accordance with the Code of Criminal Procedure.

³⁴ Aronowitz, Alexis, ‘The Netherlands’, *The World Factbook of Criminal Justice Systems* (U.S. Department of Justice; Bureau of Justice Statistics, 1993). This document was taken from: <http://www.ojp.usdoj.gov/bjs/pub/ascii/wfbcjnet.txt>

Public prosecutors are considered to be State officials belonging to the judiciary and are under the ultimate authority of the Minister of Justice.³⁵ They have the overriding responsibility for detecting offences, and are empowered to instruct the police on the execution of criminal investigations. Moreover, the authority to apply the majority of coercive measures is by law the prerogative of the public prosecutor. The most intrusive coercive measures, such as wiretapping, are under the prerogative of the examining magistrate.

Pursuant to article 12 of the Code of Criminal Procedure, injured parties (i.e. victims) are entitled to file a complaint with the Court of Appeal where a decision has been taken to not prosecute or discontinue the prosecution of a felony.

(ii) Prosecution

Article 167 of the Code of Criminal Procedure delegates the exclusive right of prosecution to the Public Prosecutor's Office. The Dutch authorities explain that the purpose of this delegation of power "is to prevent criminal proceedings from becoming dependent on political considerations". They state that although article 167 of the Code of Criminal Procedure "allows" the Public Prosecution to not prosecute on "public interest" grounds, they could not find any jurisprudence indicating that such decisions are influenced by any of the prohibited grounds under Article 5 of the Convention³⁶, and that in fact, the jurisprudence indicates quite the contrary.

The Dutch authorities state that prosecutions are conducted according to the principle of expediency or advisability (*opportuiniteitsbeginsel*)³⁷. The Public Prosecutor's Office has broad discretionary powers to dismiss cases. This includes the power to settle cases outside court by use of a "conditional waiver" or "transaction".³⁸ A "conditional waiver" is given when the prosecutor believes that an alternative to a criminal trial is preferable under the circumstances.³⁹ Such a waiver could, for instance, be conditional on alcohol or drug treatment, community service, or restitution to the victim.⁴⁰ The Dutch authorities confirm that this measure is not provided for under the law, but that it has been accepted in practice for a long time. The state further that it is applied only in the rare case where the measures under article 74 (discussed immediately below) are considered too restrictive.

"Transaction", is governed by article 74 of the Penal Code, and essentially involves the payment of a sum of money⁴¹ by the defendant to avoid criminal proceedings. It can also involve the renunciation of title to or surrender of objects that have been seized and are subject to forfeiture and confiscation, or payment of their assessed value.⁴² Moreover, it can involve the payment of the estimated gains

³⁵ *Report on the Netherlands*, United Nations High Commission for Human Rights (26/02/96). This document was taken from: http://www.asem.org/Documents/UN_Docs/ASEM_Countries/Netherlands.htm

³⁶ i.e. Considerations of national economic interest, the potential effect upon relation with another state or the identity of the persons involved.

³⁷ This is also referred to as the "principle of opportunity" in the academic literature. (e.g. See article by Aronowitz, *Supra*, 34.)

³⁸ Aronowitz, *Supra*, 34.

³⁹ Aronowitz, *Supra*, 34.

⁴⁰ Aronowitz, *Supra*, 34.

⁴¹ Pursuant to article 74.2.a of the Penal Code, not less than 5 guilders and not more than the maximum of the statutory fine.

⁴² See article 74.2.b, c and d.

acquired from the criminal offence⁴³, as well as compensation for any damage caused.⁴⁴ Pursuant to article 74.1, it is available in relation to “serious offences” excluding those for which the penalty of imprisonment is more than 6 years. The right to prosecute lapses once the conditions set in a particular case have been met. The Dutch authorities indicate that guidelines on the exercise of the prosecutorial discretion to settle a case under article 74 have been drafted for a wide range of felonies, although up to now no guidelines have been drafted respecting bribery. They explain that when such guidelines are prepared, they will focus on the determination of whether certain “minor” forms of corruption qualify for out-of-court settlements, and in particular, whether the legal process will be served by a public trial.

To counterbalance this broad discretionary power, two methods for obtaining a reversal of the prosecutor’s decision are available: individual appeal (complaint) and ministerial instruction. The Dutch authorities state that under article 12 of the Code of Criminal Procedure, every “interested party”(including a victim⁴⁵) is entitled to appeal to a court the decision of a prosecutor to not prosecute, in which case the prosecutor is required to provide the reasons for his/her decision. Furthermore, the Dutch authorities indicate that the Public Prosecutor’s Office has drafted internal guidelines for prosecuting a number of offences, and intends to draft guidelines for prosecuting cases involving corruption. According to the Dutch authorities, prosecutorial guidelines reduce the risk of a lack of uniformity in the application of prosecutorial discretion in different parts of the country.

It appears that the Minister of Justice has the ultimate authority over the Public Prosecutor’s Office, as pursuant to article 127 of the Law on Organisation of the Judiciary, he/she has the authority to issue general and specific instructions concerning the tasks and competence of public prosecutors. The Dutch authorities state that in practice, the Minister of Justice makes limited use of this power.

Pursuant to article 51 of the Code of Criminal Procedure, an injured party who has suffered direct damage due to a felony may claim damages as a part of the penal process. Direct damage is suffered where a person has been injured by the violation of a legal provision that protects his/her interests. The Dutch authorities state that since the offence of bribing a foreign public official is designed to combat unfair competition, a competitor who has been injured by bribery could make such a claim by joining the proceedings as an injured party. Moreover, pursuant to article 36f of the Penal Code, the judge in a criminal matter may *ex officio* order damages incurred by a victim to be paid to the State for his/her benefit.

5.2 Considerations such as National Economic Interest

The Dutch authorities confirm that the factors listed in Article 5 of the Convention shall not influence the investigation and/or prosecution of the offence of bribing a foreign public official. (See discussion under 5.1 above about “public interest”)

6. ARTICLE 6. STATUTE OF LIMITATIONS

Article 6 of the Convention requires that any statute of limitations with respect to the bribery of a foreign public official provide for “an adequate period of time for the investigation and prosecution” of the offence.

⁴³ See article 74.2.d.

⁴⁴ See article 74.2.e.

⁴⁵ A victim may file a complaint with the Court of Appeal regarding a decision of the public prosecutor to not prosecute (Aronowitz, *Supra*, 34).

Article 70 of the Penal Code contains the rules prescribing the statute of limitations. The provisions that are relevant to the offences under articles 177, 177a and 178 provide that the “right to prosecute lapses” as follows:

1. After 6 years for serious offences punishable by a fine, detention or imprisonment of not more than 3 years. [article 70(2)]
2. After 12 years for serious offences punishable by a term of imprisonment of more than 3 years. [article 70(3)]

Thus the statute of limitations for offences committed under article 177 (breach of duty) and 178 (bribes to judges) is 12 years, and for offences committed under article 177a (no breach of duty) it is 6 years.

Pursuant to article 71.1, the period of limitation begins to run on the day following the day on which the act in question was committed. Pursuant to article 72.1 “any act of prosecution terminates” the running of the period, provided that the person prosecuted is aware thereof or notice thereof has been served on him/her. Under article 72.2, when a period of limitation terminates, a new one commences. Moreover, article 73 states that suspension of a prosecution for the purpose of resolving a preliminary issue “tolls” (suspends temporarily) the limitations period.

7. ARTICLE 7. MONEY LAUNDERING

Article 7 of the Convention requires that where a Party has made bribery of a domestic public official a predicate offence for the application of money laundering legislation, it must do so on the same terms for bribery of a foreign public official, regardless of where the bribery occurred.

(i) Money Laundering Offence

The Dutch authorities refer to articles 416 and 417bis, which establish offences of handling stolen property, in respect of the obligation under Article 7 of the Convention. In summary, article 416 applies where the person handling property knows that it was obtained by means of a serious offence, and article 417bis applies where the person handling property “should reasonably have suspected” that it was obtained by means of a serious offence. Both of these offences cover obtaining, having at one’s disposal or transferring such property for the purpose of “pecuniary gain” (articles 416.1.b and 417bis.1.b) as well as in the absence of such a purpose (articles 416.1.a and 417bis.1.a). The offences apply in relation to “property” or “a right *in personam* or *in rem*.” The penalty for an offence under article 416.1 is a maximum term of imprisonment of 4 years or a category 5 fine (i.e. 100,000 guilders), and the penalty under article 417bis.1 is a maximum term of imprisonment of 1 year or a category 5 fine (i.e. 100,000 guilders).

Articles 416.2 and 417bis.2 clarify that the respective punishments also apply where a person “intentionally derives advantage from the proceeds of any property obtained by means of a serious offence” (article 416.2) or “derives advantage from the proceeds of any property where he should reasonably suspect the property to have been obtained by means of a serious offence” (article 417bis.2). The Dutch authorities confirm that articles 416.1 and 417bis.1 address the “acceptance of a share of stolen money” whereas articles 416.2 and 417bis.2 address the “acceptance of goods bought with stolen money”. They state that conversely in respect of the theft of “goods”, articles 416.1 and 417bis.1 address the acceptance of the goods whereas articles 416.2 and 417bis.2 address the “sharing in the proceeds from the sale of the goods”.

According to the Dutch authorities, articles 416.1 and 417bis.1 as well as 416.2 and 417bis.2 apply to all tangible items, including money. They state further that money must, however represent the direct

proceeds of the felony. It is the opinion of the Dutch government, that the bribe and the proceeds of bribing a foreign public official are both covered under these provisions in respect of the active bribery of a foreign public official.

The Dutch authorities provide that in order to establish criminal liability for the offences of handling stolen property under article 416 or 417, the court must establish that a felony from which the property was acquired has been committed, although there is no requirement that the perpetrator of the underlying offence is criminally liable for that offence or that prosecution thereof is possible. It is irrelevant whether the “underlying” offence has been committed within the jurisdiction of Dutch criminal law. Moreover, pursuant to articles 416 and 417, the perpetrator of the offence of handling stolen property need only have knowledge or should reasonably have suspected that the property was obtained by a punishable offence; thus knowledge or suspicion of the specific felony is not required. The Dutch authorities confirm that these provisions do not apply to the handling of property by the perpetrator of the predicate offence.

The Dutch authorities indicate that there have been initiatives underway to establish a separate money laundering offence, and that a motion to amend the Penal Code in this connection is due to be debated shortly in the Second Chamber of the Dutch Parliament. It is anticipated that if Parliament adopts the motion, the amendments will be enacted by the end of 2001. The offence will also apply to the perpetrator of the predicate offence (sometimes described as “self-laundering”).

The Dutch authorities are of the view that articles 416 and 417 are sufficient to deal with money laundering activities until the new provisions are in place. They add that the amendments have been drafted in order to meet the requirement of international uniformity, as many countries currently have separate money laundering offences.

(ii) Reporting Requirements for Financial Institutions

Pursuant to article 8 of the Act Respecting the Notification of Unusual Transactions (Financial Services Law), which came into force in February 1994, “anyone who provides financial services on a professional or commercial basis” is required to disclose an “unusual transaction” carried out by a client to the “Disclosure Office”. The Disclosure Office (*Meldpunt*) is an autonomous department within the Department of Justice, which determines independently whether the conditions for notifying the police have been met (e.g. whether the information is sufficient to give rise to probable cause).⁴⁶ It investigates a report of an unusual transaction to determine whether it qualifies as “suspicious”, in which case the transaction is referred to the police and judicial authorities. The Dutch authorities explain that the Disclosure Office has independent access to many information networks, including police files, and that under certain circumstances it has the authority to question the financial institutions.

The police cannot rely on information about unusual transactions, without having obtained the information from the Disclosure Office. In addition, they may not act on their own initiative to obtain information from the Disclosure Office. However, they may provide information to the public prosecutor about a transaction along with the request that it be examined by the Disclosure Office along with any information available to the Disclosure Office to determine whether it qualifies as a suspicious transaction.

⁴⁶ M. Groenhuijsen, F. Molenaar, ‘Bank Confidentiality and Governmental Control of Exchange Operations and of their Unlawful Effects—Netherlands’, P. Bernasconi (ed.) *Money Laundering and Banking Secrecy*, 177-206 (1996 *Kluwer Law International*), pp. 192-193.

A transaction is regarded “unusual” if “indicators” (*indicatoren*) that are specified in a ministerial decree (i.e. Minister of Finance), are present.⁴⁷ The list of indicators is published and reviewed at 6-month intervals, in order to ensure a flexible system for keeping up with the latest money laundering techniques.⁴⁸

The Dutch authorities explain that the purpose of the Disclosure Office is to stimulate the detection of suspicious transactions. In addition, it acts as a “buffer” between the financial institutions and the police to ensure that the police only receive information about suspicious transactions (i.e. where there is a “substantive reason for believing that a felony has been committed”).

8. ARTICLE 8. ACCOUNTING

Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibits the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for persuasive, proportionate and dissuasive penalties in relation to such omissions and falsifications.

8.1/8.2 Accounting Requirements/Companies Subject to Requirements

The Dutch authorities provide that the general regulations concerning accounting requirements are contained in articles 361, 362, et seq. of Book 2 of the Civil Code, and include the following:

- The obligation to draw up annual accounts containing a balance sheet, profit and loss account and notes on the accounts.
- The obligation to draw up the profit and loss account in such a manner as to allow a reasonable judgement with regard to the pattern of income and expenditure of the company.
- The obligation to not adopt and approve the annual accounts before an independent accountant has issued a statement regarding the credibility of the annual account.

Most of the regulations in the Civil Code regarding accounting are based on EU Directives (i.e. 4th Directive 78/660/EC and 7th Directive 83/349/EC). Additionally, further accounting standards are contained in the Guidelines for Annual Reporting, issued by the Council for Annual Reporting (CAR)⁴⁹. Although these guidelines do not have the force of law, Dutch courts take into consideration whether they have been respected. The Dutch authorities indicate that multinationals generally follow the International Accounting Standards (IAS).

Disclosure and publication requirements vary depending on the nature and size of a company. For instance, small⁵⁰ and medium⁵¹ companies are exempted or are not required to provide full disclosure

⁴⁷ *Ibid*, p. 188.

⁴⁸ *Ibid*, p. 204.

⁴⁹ CAR is a private organisation consisting of business, trade union and banking representatives as well as accountants and auditors.

⁵⁰ The Dutch authorities provide that a company qualifies as “small” if it meets two of the following criteria: 1. The total value of assets does not exceed NLG 6 million; 2. Turnover does not exceed NLG 12 million; and 3. The average number of employees is less than 50.

⁵¹ A company qualifies as “medium” if it meets two of the following criteria: 1. The total value of assets does not exceed NLG 24 million; 2. The turnover is between NLG 12 and 48 million; 3 The average number of employees is between 50 and 250.

in respect of certain publication requirements (e.g. balance sheet, profit and loss account and management report).⁵²

The Dutch authorities explain that the requirements contained in articles 361, et seq. apply to “almost all legal forms of Dutch companies” [i.e. private limited liability companies (*besloten vennootschap*), public limited liability companies (*naamloze vennootschap*), unincorporated companies (*vennootschap onder firma*), etc., as well as any association (*vereniging*) or foundation (*stichting*), co-operative associations and limited partnerships].

Article 225.1 of the Penal Code prohibits the false preparation or falsification of a document “that is to serve as evidence of any fact, with the object of using it as genuine and unfalsified or of having it used as such by others”. Pursuant to article 225.2, it is an offence for a person to intentionally use a false or falsified document, or intentionally deliver or have it at his/her disposal where he/she knows or should reasonably suspect that it will be used in such a manner. The Dutch authorities state that these provisions cover the fraudulent preparation or fraudulent use of documents with the intent to conceal the fact that a foreign public official has been or will be bribed. In addition, they state that article 225 covers the preparation, etc. of documents where the whole document or a part thereof is falsely prepared, and they confirm that a falsification may involve a change or addition to or an omission from a document.

8.1.1/8.2.1 Auditing Requirements/Companies Subject to Requirements

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

The Dutch authorities state that two accounting organisations (Royal NIVRA and NovAA) have issued regulations for their respective members concerning the obligation on auditors to report suspected fraud or any crime, including the offence of bribing a foreign public official. Pursuant thereto, auditors are required to report possible fraud to management or the supervisory body where it is suspected that management is involved. If the fraud is not addressed following having made the report, the auditor is required to withdraw from his/her engagement with the company, and report this to a special police unit (CRI). The report to the police must be filed with the accounts reviewed, and thus is publicly available.

8.3 Penalties

The Dutch authorities provide that an economic offence under article 1.4 of the Economic Offences Act may be considered to have been committed where in violation of article 361, et seq. of Book 2 of the Civil Code, the annual accounts fail to “provide the required insight”. The penalty for an offence under article 1.4 includes a category 5 fine (i.e. 100,000 guilders), complete or partial closure of the company or placement of the company under an administrative order.

The penalty for the offence of false preparation or falsification of a document, etc, under article 225 of the Penal Code (see discussion under 8.1/8.2) is a maximum term of imprisonment of 6 years or a category 5 fine (i.e. 100,000 guilders).⁵³

⁵² See: HLB Netherlands, “Doing Business in the Netherlands”. This document was taken from: <http://www.hlbi.com/html/dbi/netherlands/dbinether.htm>

Furthermore, the Dutch authorities draw attention to article 336 of the Penal Code, which prohibits a trader, director, managing partner or member of the Supervisory Board of a juristic person or a commercial partnership from intentionally disclosing “a false statement, balance sheet, profit and loss account, statement of income and expenditure or false explanations pertaining to such documents” or intentionally allowing such disclosure to take place. The penalty for this offence is a maximum term of imprisonment of 1 year or a category 5 fine (i.e. 100,000 guilders).⁵⁴

With respect to auditors, the Dutch authorities provide that in addition to the penalties applicable for the relevant crimes (e.g. fraud, embezzlement), they are liable to penalties for a violation of the Disciplinary Rules on Performance and Behaviour issued by the applicable accounting organisations. These penalties are ordered by disciplinary courts that are composed of independent lawyers and members of the profession. Penalties range from a written reprimand to expulsion from the Registry of Accountants. The decisions of these courts are publicly available.

9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE

Article 9.1 of the Convention mandates that each Party cooperate with each other to the fullest extent possible in providing “prompt and effective legal assistance” with respect to the criminal investigation and proceedings, and non-criminal proceedings against a legal person that are within the scope of the Convention.

In addition to the requirements of Article 9.1 of the Convention, there are two further requirements with respect to criminal matters. Under Article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which assistance is sought is within the scope of the Convention. And pursuant to Article 9.3, a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance

9.1.1 Criminal Matters

(i) Treaty Requirements

The Dutch authorities state that where Dutch law requires the existence of a treaty as a condition for providing mutual legal assistance, Article 9 of the Convention shall form the basis to approve such a request. Pursuant to the Code of Criminal Procedure, the cases for which a request for MLA must be based on a treaty include the following:

1. Requests for information in the possession of the tax department. (article 552m.3)
2. Where a request for MLA concerns an investigation into an offence of a political nature or an offence connected therewith. (article 552m.1)

⁵³ Since pursuant to article 23.7 a legal person may be subject to a fine “of not more than the amount of the next highest category where the category defined for the offence does not allow appropriate punishment”, the fine in this case could be as high as 1 million guilders.

⁵⁴ *Ibid.*

It also appears that a treaty requirement may exist where financial information is requested (e.g. from the “Disclosure Office”). This is implicit in the comment of the FATF, in the Summary of its Second Round Mutual Evaluation of the Netherlands, that the ability of the Netherlands to provide assistance “would be further strengthened if the requirement of a treaty were removed”.⁵⁵ Moreover, the Bureau for International Narcotics and Law (U.S. Department of State) states in the International Narcotics Control Strategy Report, 1998, that the Dutch Ministry of Foreign Affairs has taken the position that the “Disclosure Office” “cannot legally exchange information with its FIU counterparts without first negotiating treaties with the various foreign governments”.⁵⁶ However, the Dutch authorities explain that the Disclosure Office has the “discretion” to exchange information with its financial intelligence counterparts in other countries without a treaty. The Dutch authorities add that information can only be obtained from the Disclosure Office where it has also been reported to the police and judicial authorities in the Netherlands in connection with a suspicious transaction.

The Dutch authorities provide that the Netherlands is a party to several multilateral mutual assistance treaties, including the European Treaty regarding Mutual Legal Aid in Criminal Cases entered into in Strasbourg on the 20th of April 1959, and bilateral treaties⁵⁷ (e.g. with the US). Where a treaty is applicable, it generally governs the process for obtaining MLA, and with respect to the substantive issues, articles 552h to 552s of the Code of Criminal Procedure apply.

Pursuant to article 552K.1 of the Code of Criminal Procedure, “every effort shall be made to comply with a request based on a treaty”. Where a request is not based on a treaty or the applicable treaty does not make compliance compulsory, pursuant to article 552K.2, the request shall be met where it is “reasonable” and “unless such compliance would be unlawful or contrary to instructions from the Minister of Justice”. The Dutch authorities confirm that an application for MLA pursuant to the Convention would be treated as an application pursuant to a treaty to which article 552K.1 would apply.

(ii) Requirements under the Code of Criminal Procedure

The circumstances under which a request for MLA “shall not be complied with” include the following: 1. The purpose of the investigation is to punish, etc. a suspect due to his/her nationality, race or religion, etc. [article 552L.1(a)]⁵⁸; 2. Compliance would involve assisting in proceedings that would violate the protection against double jeopardy [article 552L.1(b)]; and 3. The suspect is being prosecuted in the Netherlands in respect of the same offence(s). [article 552L.1(c)]

Additionally, pursuant to article 552m, the cases for which a request may only be granted with the authorisation of the Minister of Justice include the following:

⁵⁵ See page 3 of the FATF Summary Report, available at http://www.oecd.org/fatf/Ctry-orgpages/ctry-nl-00_en.htm

⁵⁶ See page 16 of the International Narcotics Control Strategy Report (released February 1999) at http://www.state.gov/www/global/narcotics_law/1998_narc_report/

⁵⁷ The Netherlands is a party to bilateral treaties concerning the provision of mutual legal assistance with countries including the following: U.S., U.K and Northern Ireland, Australia and Canada.

⁵⁸ Where there are grounds to believe that a request fits within this description, it shall be submitted to the Minister of Justice (552L.2).

1. Offences of a “political nature” or offences “connected therewith”⁵⁹. The Dutch authorities confirm that such an offence refers to a crime against national security or against heads and representatives of friendly states and felonies that interfere with the exercise of constitutional government. They confirm that this qualification has no relevance to the offence of bribing a foreign public official.
2. Requests for information from the tax department.⁶⁰

It appears that in all other cases, it is the public prosecutor who receives the request and decides on the action to be taken in response to a request.⁶¹

(iii) Types of MLA Available

Pursuant to article 552h.2 of the Penal Code, the following “shall be deemed to be requests for legal assistance”:

- Requests to carry out or assist in investigations.
- Request to supply documents, files or evidence, or provide information.
- Requests to serve documents on or issue documents to third parties.

Furthermore, article 552i.2 of the Penal Code indicates that coercive measures are also available. Technically speaking, seizure of documents is only available where an offence is extraditable (see discussion under 3.3 “Penalties and Mutual Legal Assistance”), and pursuant to section 51(a)(1) of the Penal Code, extradition is not available with respect to article 178 on the bribery of judges. The Dutch authorities state that, however, this does not present an obstacle to providing the seizure of documents in relation to an offence under article 178, because such an offence is also covered under articles 177 and 177a. Additionally, where a specific treaty is in force between the Netherlands and the requesting country, this coercive measure may be requested by referring to article 178.

9.1.2 Non-Criminal Matters

The Dutch authorities provide that mutual legal assistance can be provided to Parties requesting assistance in relation to non-criminal proceedings against a legal person (e.g. article 49 of the Schengen Agreement and the future EU legal assistance treaty).

9.2 Dual Criminality

The Dutch authorities explain that where the seizure of documents is requested, dual criminality is required for the provision of MLA. They state that this requirement does not create an obstacle to the implementation of the Convention. Since this requirement of dual criminality is derived from the law on extradition, it is discussed below in relation to extradition (see 10.5 on “Dual Criminality”).

9.3 Bank Secrecy

The Dutch authorities state that Dutch law does not include any provisions that enable MLA to be denied on the ground of bank secrecy.

⁵⁹ The Minister may only authorise the granting of such a request where it is based on a treaty and after consultation with the Minister for Foreign Affairs (552m.1). Article 552m.2 provides an exception to this requirement where a request is made in relation to terrorist activities.

⁶⁰ The Minister may only authorise the granting of such a request where it is based on a treaty and after consultation with the Minister of Finance.

⁶¹ See articles 552I and 552j.

Information regarding a “suspicious” transaction can be requested by a Party from the police or the judicial authorities to which the Disclosure Office has already made a report thereof [see discussion above under heading (ii) of “Article 7. Money Laundering”]. Additionally, the Disclosure Office may independently exchange information with its financial unit counterparts in other countries provided that they have comparable responsibilities and that the information is not disclosed to the investigative authorities in the other country without the permission of the Dutch Disclosure Office. Permission shall only be given where the Dutch Disclosure Office has proceeded to transmit the information to the police or judicial authorities in the Netherlands. In all cases, only information about “suspicious” transactions is available.

The Dutch authorities provide that another avenue for obtaining MLA in the form of financial information is to obtain a warrant for the release of documents pursuant to article 552o.1(a) of the Code of Criminal Procedure.

10. ARTICLE 10. EXTRADITION

10.1/10.2 Extradition for Bribery of a Foreign Public Official/Legal Basis for Extradition

Article 10.1 of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them. Article 10.2 states that where a Party that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has no such treaty, it “may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official”.

In the notes on the Ratification Bill, it is stated that since Dutch law requires an extradition treaty in order to be able to extradite, it was necessary to amend section 51a of the Extradition Act (through Article II of the Implementation Bill) in order that the Convention is considered a “relevant treaty”. Section 51a(2) of the Extradition Act lists the treaties pursuant to which extradition can be provided under section 51a(1). This provision has been amended in order that extradition may be granted for “the offences that are criminalised pursuant to articles 177 and 177a of the Criminal Code, in as far as they are covered by the definition contained in Article 1.1 and 1.2 of the Convention”. Thus extradition is not available with respect to article 178 on the bribery of judges; however the Dutch authorities are of the opinion that articles 177 and 177a provide sufficient latitude to meet the obligations under the Convention in this respect. Additionally, where a specific extradition treaty is in force between the Netherlands and the requesting country extradition is available for an offence under article 178.

Section 51a(3) of the Extradition Act states further that where extradition is available under section 51a [i.e. it is available pursuant to a “relevant treaty” listed under section 51a(2)], and “no other extradition treaty applies”⁶², it shall be effected subject to the provisions of the European Convention on Extradition of 13 December 1957.

Pursuant to section 5 of the Extradition Act, extradition may be granted only for the following purposes:

⁶² The Netherlands is a party to bilateral extradition treaties with Argentina, Australia, Canada, Mexico and the U.S. In addition, it has arrangements with 23 other OECD countries pursuant to the European Extradition Treaty.

- Criminal investigations instituted by the authorities in the requesting state because of a suspicion regarding an offence for which a term of imprisonment of 1 year or more may be imposed under the law of the requesting state and the Netherlands (dual criminality).⁶³ [section 5(1)(a)]
- Enforcing a term of imprisonment of 4 months or more⁶⁴ regarding an offence referred to under section 5(1)(a).⁶⁵ [section 5(1)(b)]

The grounds under which extradition shall not be granted pursuant to the Extradition Act include the following: 1. The punishment has been barred by a lapse of time under Dutch law [section 9(1)(e)]; 2. The Minister of Justice believes there are good grounds for believing that the person in question would be prosecuted, etc. on account of his/her religious or political convictions, etc. [section 10(1)]; and 3. The offence has a “political nature” or is “connected therewith” [section 11(1)] {See discussion regarding offences of a political nature above under heading (ii) of 9.1.1 “Criminal Matters”}.

The Dutch authorities explain that requests for extradition involve two stages of decision-making: the court and the Minister of Justice. The court of primary process or the Supreme Court decides at first instance on whether to provide extradition. It is only empowered to refuse extradition when there are compelling reasons to do so. Where the court refuses extradition, the Minister of Justice is obligated to also refuse the request. However, where the court decides to grant the request, the Minister has the discretion to refuse the application. A decision of the Minister of Justice to refuse extradition cannot be appealed, whereas the civil courts can provide interim relief where he/she grants extradition.

10.3/10.4 Extradition of Nationals

Pursuant to section 4(2) of the Extradition Act, a Dutch national may be extradited where he/she is requested for a criminal investigation and the Minister of Justice is satisfied that there is an adequate guarantee that if a non-suspended custodial sentence is ordered, he/she will be allowed to serve the sentence in the Netherlands. The other conditions for extradition discussed above (see 10.1/10.2) also apply to the determination of whether to extradite a Dutch national.

The Dutch authorities confirm that where extradition is refused on the ground of nationality, the case shall be submitted to the competent authorities for the purpose of prosecution in accordance with Article 10.3 of the Convention.

10.5 Dual Criminality

Dual criminality is required under section 5(1)(a) and (b) of the Extradition Act (see discussion above under 10.1/10.2). The Dutch authorities confirm that in accordance with Article 10.4 of the Convention, it shall be deemed to met if the offence for which extradition is sought is within the scope of Article 1 of the Convention in so far as it is criminalised pursuant to article 177 or 177a of the Penal Code.

⁶³ Pursuant to section 6 of the Extradition Act, the minimum period of 1 year does not apply in respect of extradition to Belgium or Luxembourg.

⁶⁴ Pursuant to section 6 of the Extradition Act, the minimum period of 4 months does not apply in respect of extradition to Belgium or Luxembourg.

⁶⁵ Pursuant to section 5(3) of the Extradition Act, where the custodial sentence was given *in absentia*, extradition shall only be permitted if the person in question has had or will still be given an adequate opportunity to defend himself/herself.

11. ARTICLE 11. RESPONSIBLE AUTHORITIES

Article 11 of the Convention requires Parties to notify the Secretary-General of the OECD of the authority or authorities acting as a channel of communication for the making of and receiving of requests for consultation, mutual legal assistance and extradition.

The Secretary-General has been notified that the Minister of Justice is the person responsible for the matters listed in Article 11.

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

TAX DEDUCTIBILITY

(i) *Non-tax deductibility of bribes*

Provisions in three pieces of legislation regulate the non-tax deductibility of bribes. With respect to entrepreneurs and employees, it is regulated by the Law on Income Tax of 1964⁶⁶, which was replaced by the Law of Income Tax 2001, as of 1 January 2001. The Dutch authorities indicate that the new text “remains similar” in this regard. In addition, similar provisions are contained in the Law on Wage Tax of 1964, with respect to employees⁶⁷, and the Law on Corporate Tax 1969, with respect to enterprises⁶⁸.

The Dutch authorities provide the following excerpts from the text regarding entrepreneurs in the Law on Income Tax⁶⁹ to illustrate how all these provisions operate (the provisions in the other relevant legislation are practically identical):

1. *In determining the operating profits, expenses related to the following items are not deductible:*
 - d. *crimes for which the taxpayer irrevocably has been convicted by a Dutch criminal court, including crimes taken into consideration when determining punishment and crimes that Prosecution renounces to prosecute;*
 - e. *crimes with respect to which the taxpayer has met the conditions to prevent criminal prosecution in the Netherlands;*
4. *As far as the expenses relating to a crime have been deducted in one or more of the five years previous to the year in which the conviction mentioned in paragraph 1, sub d, has turned irrevocable or the conditions referred to in paragraph 1, sub e, have been met, an amount the size of those expenses will be included in the operating profits of the latter year.*
5. *As to the application of paragraph 1, sub d en sub e, he who on behalf of the taxpayer has commissioned the crime or actually been in charge of the crime will be put on a par with the taxpayer.*

Thus, expenses related to a bribe under article 177, 177a or 178 of the Penal Code would only be non-deductible where there has been a conviction or a settlement by payment of a fine, etc. with the prosecutor to avoid criminal prosecution. Moreover, such a deduction is only prohibited retroactively for up to 5 years following the submission of the expense.

⁶⁶ See article 8a, para. 1, sub c and d, juncto article 8a, para. 5 regarding entrepreneurs; and article 36, para. 1, sub m and n, juncto para. 13 regarding employees.

⁶⁷ See article 15b, para. 1, sub o and p regarding employees.

⁶⁸ See article 8, para. 1 regarding enterprises.

⁶⁹ See article 3.14, para. 1, sub d and sub e, para. 4 and para. 5.

The Dutch authorities explain that the non-deductibility of bribes has been restricted to bribes in relation to which there has been a conviction or an out-of-court settlement because the present system is based upon the notion that it is within the exclusive authority of the criminal courts to determine whether a criminal offence has been committed. They add that the prosecutorial authorities are generally better equipped to obtain evidence of bribery, especially when the bribery has taken place abroad, and that it is easier to obtain mutual legal assistance in criminal matters than in respect of information concerning taxes.

The Dutch authorities explain that the 5-year period for disallowing deductions is customary for an additional assessment under tax law, and that the taxpayer is only obliged to keep tax related data for 7 years. They add that the criminal law provides the possibility of confiscation. In any case, in light of the significantly longer statute of limitations for offences under article 177, 177a and 178 (i.e. 12 years for an offence under article 177 or 178, and 6 years for an offence under article 177a) it appears feasible that certain bribes in relation to which a conviction, etc. is obtained, will in fact be permanently deductible.

(ii) Recent Initiatives

Questions regarding the current tax regime in relation to bribe payments have been raised by Members of Parliament. In response, the State Secretary of Finance informed Parliament in November 2000 of his decision to amend the fiscal law. The Tax Legislation Directorate is currently preparing amendments that will enable the tax authorities to disallow an expense where there is a suspicion that it represents a bribe payment to a foreign public official. This means that a conviction by a criminal court will no longer be a prerequisite for disallowing such a deduction. Instead, a deduction will not be permitted where the tax authority is reasonably convinced that the payment represents a bribe payment. It does, however, appear that the 5-year limitation period for disallowing the tax deductibility of bribes will continue to operate.

(iii) Exchange of Information

The Dutch authorities state that pursuant to article 6.3.3 of an instruction for tax administration, all tax inspectors are obligated to report suspected criminal acts, including the bribery of a civil servant, to the head of the Fiscal Information and Investigation Services, which is obliged to report in turn to the prosecutorial authorities.

Additionally, the Dutch authorities explain that the Netherlands tax administration is “able and willing” to exchange information about bribe payments on the basis of multilateral and bilateral treaties.⁷⁰

⁷⁰ The Dutch authorities indicate that the Netherlands has agreements with France and Belgium providing for the intensification of exchange of information, both spontaneous and on request, on fees, commissions, brokers’ fees and other forms of remuneration paid to natural and legal persons.

EVALUATION OF THE NETHERLANDS

General Remarks

The Working Group commends the Dutch authorities for the thoroughness of their written responses at the preliminary stages of the examination and for having provided excellent translations of all the relevant legislation. The Group appreciates the high level of co-operation of the Dutch authorities throughout the examination process.

The Working Group considers that on the basis of the available documentation and explanations given by the Dutch authorities that the Dutch implementing legislation conforms to the standards under the Convention. The Netherlands implemented the Convention by extending the offences under the Penal Code of bribing a domestic public servant and bribing a domestic judge to the bribery of “persons in the public service of a foreign state or an international institution” and “a judge of a foreign state or an international institution” respectively. The implementing legislation also creates a new offence of bribing persons in the public service, etc. where the intent is not to induce a breach of duty, and increases the penalties for bribery where a breach of duty is involved. The Netherlands explains that it has ratified the Convention relatively late due to the desire to produce an omnibus Bill that implements several anti-corruption related international instruments, rather than to take a piecemeal approach to implementing its international obligations in this regard.

The Convention has been signed for the Kingdom of the Netherlands, which includes the part of the Kingdom in Europe, Aruba and the Netherlands Antilles. The instrument of ratification has only been deposited for the part of the Kingdom in Europe, but it remains open to the Kingdom to ratify for Aruba and the Netherlands Antilles when they have passed implementing legislation. These parts of the Kingdom have expressed the intention to implement the Convention. The Working Group encourages the early ratification and implementation of the Convention by the Netherlands Antilles and Aruba.

I. Specific Issues

1. Small Facilitation Payments

The Dutch authorities indicate that prosecutorial discretion could be exercised in order that in certain circumstances it would be possible to not prosecute a case involving a small facilitation payment. It is the intention of the Department of Public Prosecutors to publish guidelines in the near future for corruption cases, including the issue of small facilitation payments. These will be drafted according to the standards in the Convention, and although it is not known with certainty how the guidelines will define small facilitation payments, it is expected that they will be described as small payments to low level public officials for the purpose of inducing them to do something that is not in contravention of their public duties, or words to that effect.

The Working Group recommends that it would be advisable to monitor in Phase 2 the application of prosecutorial discretion in this regard, including the application of the future guidelines.

2. Definition of Foreign Public Official

The Dutch Penal Code does not provide a detailed definition of the term used in the foreign bribery offences to refer to a foreign public official (i.e. a “person in the public service of a foreign state or an international institution”). The Dutch authorities explain that the courts would make an independent judgement about whether a particular person meets this description by considering (1) the concept of a

Dutch public official as defined in the Penal Code and the jurisprudence, which they state is very broad, and (2) the definition in the Convention. The definition of a public official under the law of the foreign public official's country might also be taken into account in certain circumstances. However, they emphasise that the definition in the Convention would be the most important interpretative tool, and highlight that the notes drafted for the purpose of the Parliamentary reading of the implementing Bill state that the purpose of extending the relevant offences to the bribery of the aforementioned persons is to enable execution of the Convention.

On the basis of the explanations provided by the Dutch authorities, this approach appears to be in line with the Convention. This issue could be revisited in Phase 2.

3. Third Parties

The relevant offences under the Penal Code (articles 177, 177a and 178) do not refer to bribes for a third party. The Dutch authorities state that the case is covered where the advantage is for a third party beneficiary, including the case where an agreement is reached between the briber and the foreign public official to transmit the advantage directly to a third party, because in such a case the official is considered to have received something of value for the purpose of influencing him/her. In addition, they point out that the notes drafted for the purpose of the Parliamentary reading of the Bill support this interpretation.

The Working Group recommends that this issue is followed-up in Phase 2.

4. Level of Monetary Sanctions for Legal Persons

The Working Group discussed whether the level of fines for legal persons is sufficiently effective, proportionate and dissuasive. Pursuant to the Penal Code, the maximum fine for legal persons is 1 million guilders (Euro 450,000) for the aggravated (breach of duty) offence, which is also the maximum fine available for any offence. The maximum fine for the lesser (no breach of duty) offence is 100,000 guilders (Euro 45,000).

The Dutch authorities state that the level of fines should be considered together with other measures that could be applied upon conviction. They state that in practice forfeiture and the related measure concerning the payment of an amount equivalent to the unlawfully obtained gains are normally applied. They also highlight the availability of the sanction of imprisonment for the person in *de facto* control of the legal person who, for instance, issued the assignment or failed to prohibit the bribery act.

The Working Group recommends that the level of fines be monitored in Phase 2, including the scope of application of the two categories of fines.

5. Nationality Jurisdiction

According to the Dutch authorities the requirement of dual criminality for the establishment of nationality jurisdiction could possibly not be met where a Dutch national bribes a foreign public official abroad in a country other than the country for which the official exercises a public function if only the bribery of a domestic public official is criminalised in that country (and the conduct is not covered by another crime). The Dutch authorities believe however that it would be extremely unlikely for a bribery transaction to occur in these circumstances.

The Working Group recommends that, in view of the requirement under Article 4.4 of the Convention to review the effectiveness of jurisdiction, this issue should be reviewed on a horizontal basis in Phase 2.

II. Tax Deductibility

The relevant tax laws do not expressly deny the tax deductibility of bribes to foreign public officials. Instead they deny the tax deductibility of expenses related to “crimes” where there has been a conviction by a Dutch court or a settlement by payment of a fine, etc. with the Dutch prosecutor to avoid criminal prosecution. Further, even where there has been a conviction, a deduction is prohibited retroactively under these statutes for only up to 5 years following the submission of an expense. Thus, in light of the significantly longer statute of limitations for offences under article 177, 177a and 178 (i.e. 12 years for an offence under article 177 or 178, and 6 years for an offence under article 177a) it appears feasible that certain bribes in relation to which a conviction, etc. is obtained, will in fact be permanently deductible. However, pursuant to a tax directive there is an obligation on tax inspectors to report suspected crimes, including the bribery of a civil servant, to the head of the Fiscal Information and Investigation Services, who is obliged to report in turn to the prosecutorial authorities.

On 9 February 2001, the Council of Ministers approved the intention of the State Secretary of Finance to prepare a Bill amending the fiscal treatment of bribes. Pursuant to this Bill, tax officials would be able to refuse the deduction of certain expenses where they are reasonably convinced based on adequate indicators that the expenses consist of paid bribes (in the Netherlands or abroad), thus removing the requirement of a conviction. The Government intends to “make haste” with this process, and the Dutch authorities believe that it is possible that the Bill could be passed by the end of the year.

The Working Group considers that the current situation is not in conformity with the spirit of the 1996 Recommendation on tax deductibility and is not in line with the present situation of the other Parties to the Recommendation. It welcomes the legislative initiative, and urges the Netherlands to make the necessary amendment as soon as possible.