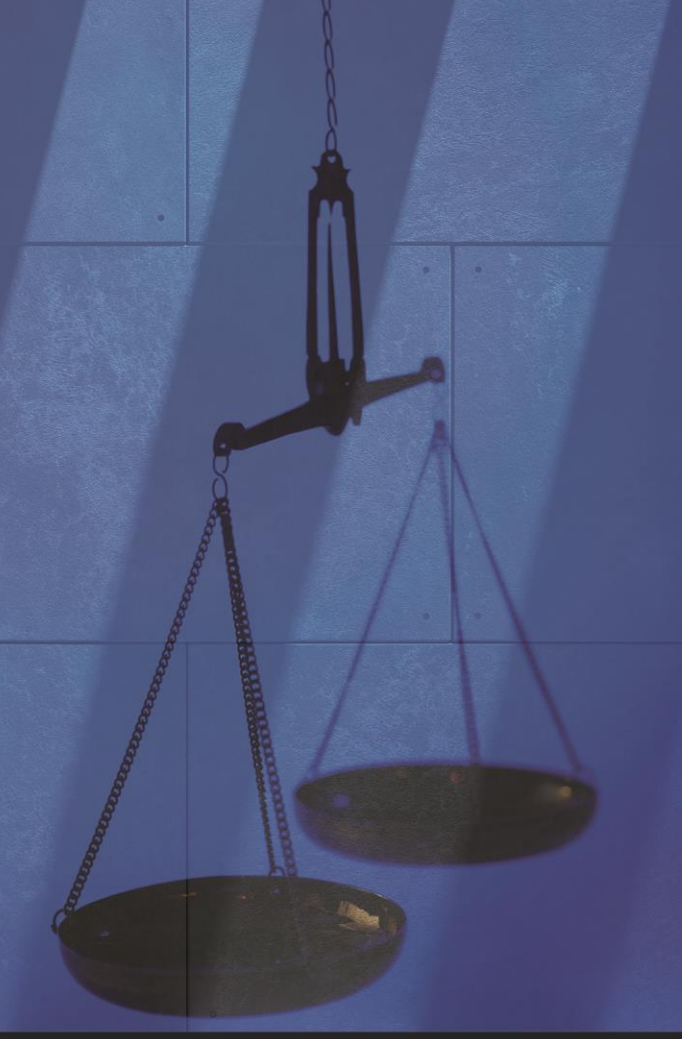
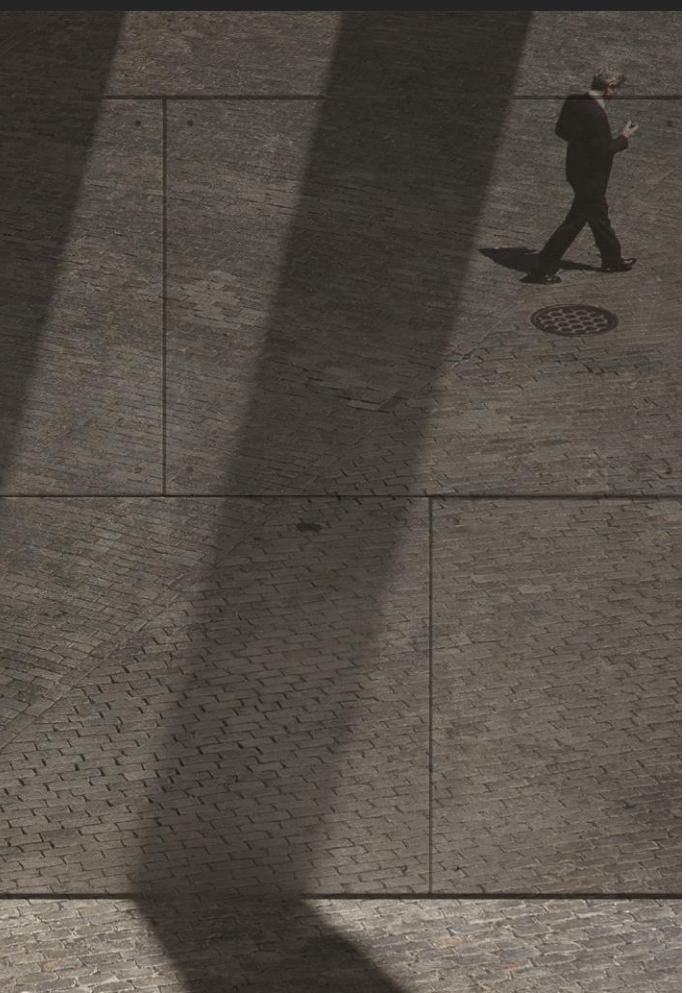


OECD



# Implementing the OECD Anti-Bribery Convention

## Phase 4 Two-Year Follow-Up Report: Netherlands

This report, submitted by the Netherlands, provides information on the progress made by the Netherlands in implementing the recommendations of its Phase 4 report. The OECD Working Group on Bribery's summary and conclusions to the report were adopted on 14 October 2022.

The Phase 4 report evaluated and made recommendations on the Netherlands' implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. The Phase 4 report was adopted by the OECD Working Group on Bribery on 16 October 2020.

# Table of contents

# The Netherlands Phase 4: Two-Year Written Follow-up Report – Summary and Conclusions

## Summary of findings[1]

1. In October 2022, the Netherlands submitted its Phase 4 written follow-up report to the OECD Working Group on Bribery (Working Group). The report outlined the Netherlands' efforts to implement the 25 recommendations and to address the follow-up issues identified during its Phase 4 evaluation in October 2020. In light of the information provided, the Working Group concludes that the Netherlands has fully implemented 8 recommendations, partially implemented 11 recommendations, and not implemented 6 recommendations.

2. The Working Group welcomes several efforts to address Phase 4 recommendations taken by the Netherlands. The Netherlands has taken significant steps to raise awareness of fighting foreign bribery including detection and reporting, especially among prosecutors, judges, and the Ministry of Foreign Affairs (MFA) staff. The increased investigative and prosecutorial capacities of the Dutch special municipalities Bonaire, St. Eustatius and Saba in the Caribbean ("BES Islands") is also a positive development. The training provided to the Whistleblowers Authority (WA) officials on procedures for detection and reporting of foreign bribery is commended, though the legislative reform on whistleblower protection has not yet been adopted.

3. However, the Working Group is concerned about the continued low level of foreign bribery enforcement in the Netherlands, especially in view of the size and specific risk profile of the Dutch economy. The Working Group is also concerned about the potential lack of resources in the Dutch Public Prosecution Service (PPS) and will continue to follow-up on this issue in light of proposed increases in funding announced by the government. Enforcement against natural persons also remains low with only two natural persons sanctioned for foreign bribery, one natural person sanctioned for related offences and a number of proceedings discontinued or dismissed, since the Convention entered into force. No natural persons have been sanctioned since Phase 4. In total, since the entry into force of the foreign bribery offence more than 20 years ago, the Netherlands has concluded foreign bribery investigations with sanctions by means of non-trial resolution in five cases and not a case has been concluded following a

[1] The evaluation team for this Phase 4 two-year written follow-up evaluation of the Netherlands was composed of lead examiners from **Estonia** (Estonia was represented by Mr. Tanel Kalmet Former Head of Division of the Penal Law and Procedure Division at the Ministry of Justice and Ms. Elina Elkind, Judge at the Harju County Court) and **Sweden** (Sweden was represented by Mr. Leif Görts, Chief Public Prosecutor at the National Public Prosecution Department and Mr. Walo von Greyerz, Director at the Division for Criminal Law in the Ministry of Justice) as well as members of the **OECD Anti-Corruption Division** (Paul Whittaker, Alejandra Tadeu and Louise Lecaros de Cossío, Legal Analysts). See Phase 4 Procedures, paras 54 et seq. on the role of Lead Examiners and the Secretariat in the context of two-year written follow-up reports.

criminal conviction at trial. Since Phase 4, the status of foreign bribery enforcement as reported by the Netherlands is the following:

- 24 cases are currently reported as ongoing investigations, including 23 foreign bribery investigations (compared with 22 at Phase 4) and 1 related offences investigation (none at Phase 4);
- Of the 22 foreign bribery investigations ongoing at the time of the Phase 4 report, five cases were discontinued without sanctions for foreign bribery, including one case against a legal person (*Shell* investigation) after an Italian criminal case for the same facts ended in an acquittal (*non bis in idem*);
- One ongoing Phase 4 investigation has been partially concluded by a non-trial resolution reached with one legal person for foreign bribery. Four other legal persons and four natural persons settled out of court for offences other than foreign bribery of public officials. However, part of the case is still under investigation;
- Six new foreign bribery investigations have been opened since Phase 4;
- Two cases are currently at prosecution stage, compared with one at Phase 4. The case of foreign bribery at prosecution stage at the time of the Phase 4 report is still under prosecution. Additionally, following the article 12 proceedings against a natural person, in the context of the settlement with a legal person in a Phase 4 case of money laundering predicated, inter alia, on foreign bribery, the court ordered the prosecution of one natural person (*ING Bank* case); and
- The Appeal Court in one Phase 4 case of money laundering predicated on foreign bribery (*KMPG* case) confirmed the inadmissibility of the proceedings against three natural persons.

4. A number of recommendations also remain unimplemented or partially implemented, with little to no development in some areas. As such, the framework for sanctions for natural persons remains unchanged since Phase 4, there are still no general guidelines for self-reporting procedures, and reforms concerning whistleblower protection and non-trial resolutions are currently still pending.

5. The Working Group's summary and conclusions with respect to specific Phase 4 recommendations are presented below. They should be read in conjunction with the report prepared by the Netherlands, annexed to the present document.

## Regarding detection of foreign bribery:

- *Recommendation 1 – Partially implemented:* Since Phase 4, the Ministry of Justice and Security (MJS) has initiated consultations with the relevant public institutions. These include the financial intelligence unit (FIU), the Anti-Corruption Centre of the Fiscal Intelligence and Investigation Service (FIOD/ACC), the PPS, the representatives of the legal profession (the Netherlands Bar and the Royal Dutch Association of Civil-law Notaries) and their supervisory authority, to consider awareness-raising efforts with the legal profession on AML reporting obligations and red flags for foreign bribery-based money laundering, as recommended by the Working Group. A document providing cases and guidance on this topic has been developed and will be incorporated to the regular training and courses offered to the legal profession from October 2022. Other awareness-raising activities are also planned.
- *Recommendation 2 (a) – Not implemented:* Since June 2021, the Bill implementing the EU Whistleblower Protection Directive has been under discussion before the Dutch House of Representatives. The Dutch House of Representatives, in consultations with the Minister of the Interior and Kingdom Relations, is also considering the recommendations requiring legislative amendments of the various evaluations of the Whistleblowers Authority Act (WAA) to ensure that public and private sector employees that report suspected acts of foreign bribery are protected from discriminatory and

disciplinary action. However, legislative reforms have not yet been adopted and the recommendations of the evaluations of the WAA not requiring legislative amendments are still in process of implementation.

- *Recommendation 2 (b) – Partially implemented:* The Netherlands has made significant efforts to raise awareness of effective internal protected reporting mechanisms based on the EU Whistleblower Directive and upcoming legislative reforms. Notably, the Ministry of the Interior and Kingdom Relations and the WA have been proactive disseminating material and information. The MFA has also conducted training and awareness raising activities among its staff. These efforts are very positive. However, as mentioned above (recommendation 2(a)), the WAA has yet to be amended. The Working Group encourages the Netherlands to continue developing awareness activities and training once the WAA has been amended.
- *Recommendation 2 (c) – Fully implemented:* A public prosecutor of the National Public Prosecutor's Office for Serious Fraud, Environmental Crime and Asset Confiscation (FP) has been assigned as a permanent contact point for the WA and ensures co-ordination between the WA and the FP. Additionally, in March 2022, WA staff has been trained by the PPS on procedures for detection and reporting of the foreign bribery offence to criminal law enforcement authorities. Courses on anti-corruption which include this topic are also frequently available to WA employees: two commercial courses have already been conducted in July 2021 and June 2022, and a course has been conducted in November 2021 by the Training and Study Centre for the Judiciary (SSR) (the next one is scheduled for November 2022). The Working Group welcomes these developments and encourages the Netherlands to repeat the training and ensure that clear guidance is also available to new staff.
- *Recommendation 3 – Not implemented:* There are currently no clear and transparent publicly available guidelines that explain the extent to which self-reporting will be considered in resolving and sanctioning foreign bribery cases. The MJS commissioned an independent study on the use of self-reporting by companies. This study, after its conclusion in late 2022, will inform the discussion on the drafting of possible guidelines for self-reporting procedures for economic crimes, including foreign bribery.

## Regarding enforcement of the foreign bribery and related offences:

- *Recommendation 4 – Partially implemented:* Whilst the Netherlands has made good progress in raising awareness of the change in policy regarding small facilitation payments, some steps are still to be completed. This includes the Royal Dutch Association of Accountants (NBA) amendment of its guidance 1137 'Corruption, work of the accountant' and the 'knowledge document' produced by FIOD for the banks.
- *Recommendation 5 (a) – Not implemented:* The Netherlands is actively seeking measures to address the significant delays to criminal investigations caused by the inadequacy of the current processes for assessing legal privilege claims entailing confidentiality of parts of large datasets. Legal privilege is being discussed in the broader context of the planned reforms to the Dutch Criminal Procedure Code (DCPC), which are expected to be in force in 2026. It is currently unknown how the future framework will be supported by information technology to reduce the necessary time and resources to search through large datasets. As a result of recent case law, the PPS and FIOD have drawn up a temporary working method for digital data that is ordered/demanded from service providers. Meanwhile, the PPS is working on a new general working method for assessing the legal privilege of documents and data that will be laid down in new public guidelines, following consultation with the Netherlands Bar. The MJS also commissioned a study that was published in May 2021 into the bottlenecks in criminal cases due to legal privilege claims. This study recommended an increase in the knowledge of investigators on the topic of legal privilege claims, which is now the object of a number of courses offered by the SSR to judges and prosecutors. However, the Netherlands recognises that the current measures are insufficient to address the problem.

- *Recommendation 5 (b) – Fully implemented:* The Netherlands has been proactive in distributing knowledge materials on the Convention and the Phase 4 report to its law enforcement officials. The SSR has several trainings on offer for judges and prosecutors that are organised on an annual or biannual basis covering the legal framework for foreign bribery, including bribery committed through intermediaries and for the benefit of third parties. Additionally, in 2021 the Netherlands carried out a series of training initiatives on corruption offences, including a course for judges and prosecutors focused on foreign bribery and the definition of public officials.
- *Recommendation 5 (c) – Fully implemented:* The Netherlands has decided to allocate additional funds to increase the investigative capacity of the BES Islands. This includes the permanent placement of two *Rijksrecherche* detectives and two investigators with financial expertise from the FIOD. Additional funds will also be made available starting from 2023 to add the equivalent of two full-time employees to the staff of the BES Islands' prosecutor's office. Additionally, training conducted by the SSR is available to BES Islands' prosecutors.
- *Recommendation 5 (d) – Fully implemented:* The Netherlands appears to have developed a solid programme of training to MFA employees on integrity issues and the available reporting channels. Integrity trainings are offered annually and, in 2021, the MFA developed a new programme focusing on integrity rules and desired behaviour that will be offered several times a year. The issue of corruption and reporting channels was also one of the topics of the "Economic Week" that gathered the heads of the economic departments of Dutch embassies. Other initiatives include an integrity training carried out in 2022 for Dutch Ambassadors and Consuls that was attended by 140 foreign representations and the MFA's participation in the yearly "Integrity Week", that draws focus on the Governments' code of conduct and reporting channels.
- *Recommendation 6 (a) – Not implemented:* The information provided by the Netherlands on the inclusion of specific provisions about the publication of press releases and statements of facts of non-trial resolutions in the Directive on Large Transactions (transactions where the penalty imposed is more than EUR 200,000 or the total transaction value is EUR 1,000,000 or more) was already assessed by the Working Group in the Phase 4 report. Recent case law shows that press releases in the context of the Directive are being published with more extensive information on the terms of the transaction. However, the issue raised by the Phase 4 report relates to the publication of information on non-trial resolutions that do not fall under the scope of the Directive. The Phase 4 report noted in particular that the only non-trial resolution in a foreign bribery case that was not concluded in the framework of the Directive was not made public, demonstrating that the essential elements of non-trial resolutions are not being published in all foreign bribery cases. There is currently still no framework for the publication of elements of foreign bribery cases concluded by non-trial resolutions falling outside of the scope of the Directive.
- *Recommendation 6 (b) – Partially implemented:* The legislative reforms to introduce a system of judicial oversight for non-trial resolutions are currently still pending. No timeline was provided on the enactment of these reforms. In the meantime, the Netherlands successfully implemented a transitory oversight regime involving the approval of an independent Review Committee abolishing the previous intervention of the Minister of Justice and Security in the approval procedure. According to the Netherlands, the Committee has reviewed all non-trial resolutions that qualify as large transactions offered by the PPS since the new Directive on Large Transactions entered into force. The Committee's reports are published together with the statement of facts, increasing the overall transparency of the procedure for non-trial resolutions.
- *Recommendation 6 (c) – Not implemented:* As stated above regarding recommendation 3, the Netherlands does not currently have general guidelines for self-reporting procedures. This is also the case for the non-trial resolution framework. The Directive on the Investigation and Prosecution of Foreign Corruption provides that self-reporting and cooperation are relevant considerations in

assessing the type of resolution to be offered and the Directive on Large Transactions dictates that self-reporting will be taken into consideration in determining the amount of the fine. The Working Group welcomes developments in recent case law whereby discounts are being applied in practice for foreign bribery cases resolved through non-trial resolutions, and the details of the extent to which self-reporting and cooperation influenced the quantum of the settlement are being publicly disclosed. However, formal guidance on sentencing discounts is still lacking for both prosecutors and defendants. This is illustrated by the recent case law, where prosecutors had to rely on the experience of similar resolutions concluded in foreign jurisdictions to apply the discount percentages.

- *Recommendation 6 (d) – Partially implemented:* According to the Netherlands, the general policy rule is to prosecute natural persons. However, the only foreign bribery case concluded with sanctions against natural persons to date was concluded through a non-trial resolution under article 74 of the Dutch Criminal Code. The Directive on Large Transactions clarifies that it applies to natural persons only in exceptional circumstances where the prosecutors predict that a court would not impose a penalty other than a fine, such as imprisonment or community service (and granted that the threshold for the Directive is met). However, the Directive does not provide information on how prosecutors assess the potential penalties that would be imposed by a court. According to the Netherlands, the upcoming reforms to the non-trial resolutions framework will reflect the provisions of the Directive. These reforms are yet to be enacted.
- *Recommendation 6 (e) – Partially implemented:* The Phase 4 report noted a lack of transparency in the way law enforcement calculated fines imposed in the context of non-trial resolutions. The SSR provides training to prosecutors on the determination of penalties in general (not specifically focused on transactions) and on negotiating a non-trial resolution. However, the PPS does not have internal guidelines on methods for calculating the amount of a fine in foreign bribery cases. Regarding the issue of imposing and enforcing compliance monitors and remedial compliance measures, the Netherlands states that these will be addressed in the draft bill to amend the DCPC and in the context of the upcoming new regulations on non-trial resolutions.
- *Recommendation 7 – Not implemented:* There has been no change since Phase 4 except for the indexation of the maximum level of the fine. The Netherlands states they do not intend to implement the recommendation as the overall framework for sanctions currently in place is sufficient. This includes the fact that a prison sentence (or community service and other penalties or measures) and a fine can be imposed together and that fines can cumulate without a limit.
- *Recommendation 8 (a) – Partially implemented and converted to follow-up:* While there has been no legislative change since Phase 4, the Netherlands has provided further information on its legal framework and internal procedures for considering MLA requests from Parties to the Convention that apply non-criminal liability to legal persons. The Netherlands clarified that MLA requests in these circumstances can only be executed based on a treaty or bilateral arrangement, and where the facts constitute foreign bribery under Dutch legislation. The Working Group will follow up on whether MLA is provided in practice in non-criminal proceedings against legal persons for foreign bribery. On the matter of the execution of MLAs requesting sensitive information, the Netherlands satisfactorily clarified that this can be disclosed, if justified, and subject to judicial authorisation.
- *Recommendation 8 (b) – Partially implemented:* The Netherlands reports that a new version of the Protocol on International Co-operation will be adopted in 2022 and will include the role of the FIOD, as required by the recommendation. However, this has yet to happen. The Working Group also recommended that the Netherlands ensure that the opening of an investigation in the requested country does not constitute the sole ground for refusing to issue an MLA request. In response to this, and after internal consultations among relevant institutions, the Netherlands confirms that this factor "cannot be the sole reason to refuse MLA-request". The Netherlands explains that the list of factors under the Protocol is not an exhaustive list and does not constitute a list of grounds for refusal but

factors to be considered. The Working Group welcomes the Netherlands' explanation and encourages it to continue to ensure that, in practice, this factor does not constitute the sole ground for refusing to issue an MLA request.

- *Recommendation 8 (c) – Partially implemented:* To date, there is no database in the Netherlands to record information on the existence and status of extradition requests, by category of crime, including bribery. However, the Working Group welcomes the development of the system DIAS that, when operational as of October 2022, will address this concern.

## Regarding liability of, and engagement with, legal persons:

- *Recommendation 9 – Fully implemented:* The MFA has revised the brochure '*Fair business, without corruption*' together with various stakeholders. The target group of this document consists of Dutch SMEs that are or want to become internationally active and in countries prone to corruption. The brochure was published in October 2022.

## Regarding other measures affecting implementation of the Convention:

- *Recommendation 10 – Partially implemented:* In Phase 4, prosecutors coordinated with Tax and Customs Administration (TCA) agents on a case-by-case basis, but without clear guidelines, to determine the specific tax implications in non-trial resolutions. The Working Group was concerned that the approach to tax treatment of confiscation could result in inconsistencies between non-trial resolutions and trial cases, in particular, in light of the settlement agreement in the *ING case*. Since then, TCA agents are now required to be involved in an early stage of negotiations to guarantee a consistent approach among cases. Additionally, the Netherlands reports that the relevant parties, i.e. FIOD, PPS, and TCA, are ensuring that tax rules are known, and the Anti-Corruption Steering and Assessment Team will monitor the consistent approach. These developments are positive, however guidelines are yet to be developed.
- *Recommendation 11 (a) – Fully implemented:* In the Netherlands, the Certificate of Conduct VOG/GVA can be used to attest non-conviction for foreign bribery in public contracts, but contracting institutions are not obliged to refer to it. PIANOo, the Netherlands' procurement agency, regularly promotes the use of the Certificate of Conduct VOG/GVA on its website. Additionally, it incorporated the Certificate of Conduct in a session during its 2021 annual PIANOo congress held for contracting institutions' staff and in several courses it delivered.
- *Recommendation 11 (b) – Fully implemented:* PIANOo has been proactive in conducting training and awareness raising activities among contracting authorities on the debarment framework with respect to foreign bribery convictions. The activities have also included the Certificate of Conduct VOG/GVA. The Working Group commends these efforts and encourages the Netherlands to continue raising awareness and training contracting authorities on the topic.
- *Recommendation 12 – Partially implemented:* The evaluation of the Netherlands' export credit agency's (Atradius DSB) policies has been completed and was sent to the Dutch Parliament, together with the government's reaction to the evaluation. The evaluation's main conclusion is that the anti-bribery policy has been strengthened since 2018, but further improvement of its efficiency and effectiveness is still required. In anticipation of the evaluation, an anti-bribery task force has been set up to deal with the implementation of the recommendations following from the evaluation. The Working Group welcomes these efforts but encourages the Netherlands to ensure that it considers how the policies could better be applied in practice to enable identification of foreign bribery red flags as required by the recommendation.

- *Recommendation 13 – Fully implemented:* The Working Group welcomes that the MFA has assigned risk managers to support risk assessments in ODA projects and undertaken Community of Practices. There is a focus on all relevant risks in regard to the activity, including those related to bribery, corruption and other forms of fraud. In addition, the Netherlands advises that a 2021 audit of the MFA was completed that concluded the MFA acts proactively in dealing with allegations of misuse. The audit includes a focus on fraud and corruption in the broadest sense, which also included irregularities such as bribery. In August 2022, the Netherlands issued instructions on fraud prevention and compliance. In addition, where evidence of criminal conduct is detected, the matter must be reported internally to the MFA Integrity Department. This department is then obliged to report the matter to the PPS.

## Dissemination of the Phase 4 report[2]

6. The Netherlands indicates that the Phase 4 report was sent to the Dutch Parliament with an enclosed letter on 9 November 2020. Both the report and the letter were published on the government's official website. The Phase 4 report was published on the PPS' knowledge website on corruption and was sent directly to all dedicated anti-corruption officers and relevant staff of the FP's Anti-Corruption Team.

## Conclusions of the Working Group on Bribery

7. Based on these findings, the Working Group concludes that of the Netherlands' 25 recommendations 8 have been fully implemented (recommendations 2.c); 5.b); 5.c); 5.d); 9; 11.a); 11.b); and 13); 11 have been partially implemented (recommendations 1; 2.b); 4; 6.b); 6.d); 6.e); 8.a); 8.b); 8.c); 10; and 12); and 6 have not been implemented (recommendations 2.a); 3; 5.a); 6.a); 6.c); and 7). The Working Group invites the Netherlands to report back in writing within one year (i.e. by October 2023) on outstanding recommendations 2.a) and b); 3; 5.a); and 6.a) – e), as well as on the status of foreign bribery enforcement. The Working Group will continue to monitor follow-up issues (except 14.b)) as case law and practice develop. The Netherlands will also report to the Working Group on its foreign bribery enforcement actions in the context of its annual update.

[2] The Phase 4 procedures, para. 50, provide that "the evaluated country should make best efforts to publicise and disseminate the report and translated documents, for example, by making a public announcement, organising a press event, and translating the full report into the national language. In particular, the evaluated country should share the report and translated documents with relevant stakeholders, particularly those involved in the evaluation".

# Annex. Phase 4 Evaluation of the Netherlands: Two-Year Written Follow-up Report by the Netherlands

**Instructions**

This document seeks to obtain information on the progress each participating country has made in implementing the recommendations of its Phase 4 evaluation report. Countries are asked to answer all recommendations as completely as possible. Further details concerning the written follow-up process is in the Phase 4 Evaluation Procedure (paragraphs 51-59 and Annex 8) as updated in December 2019.

Please submit completed answers to the Secretariat on or before **29 July 2022**.

| | |
|---|---|
| **Name of country:** | **THE NETHERLANDS** |
| **Date of approval of Phase 4 evaluation report:** | **16 October 2020** |
| **Date of information:** | **29 July 2022** |

## PART I: RECOMMENDATIONS FOR ACTION

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

### Recommendations regarding detection of foreign bribery

The Netherlands notes that a list of abbreviations, terms and acronyms is attached to this template as **Annex A**.

| **Text of recommendation 1:** |
|---|

1. Regarding **anti-money laundering measures** to enhance detection of foreign bribery, the Working Group recommends that the Netherlands' FIU and other relevant agencies increase awareness-raising efforts with the legal profession on AML reporting obligations and red flags for foreign bribery-based money laundering, given the essential role the legal profession plays in setting up corporate structures and the particular risk these structures pose in Dutch economic context [Convention Article 7, 2009 Recommendation III.i].

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

The lead examiners welcomed the increase in detection of foreign bribery through Suspicious Transaction Reports (STRs) since Phase 4 and were encouraged by the potential of the Anti-Money Laundering (AML) system to play an even greater role in detection. The lead examiners stated that the Financial Intelligence Unit of the Netherlands (FIU-NL) had undertaken innovative awareness-raising initiatives, but recommended that FIU-NL, given the essential role of the legal profession in setting up corporate structures and the particular risk these structures could pose in the Dutch economic context, should increase its awareness-raising efforts with the legal profession on AML-reporting obligations and specific exceptions for lawyers, as well as red flags for foreign bribery based money laundering.

The Ministry of Justice and Security initiated conversations with FIU-NL, the Anti-Corruption Centre of the Fiscal Intelligence and Investigation Service (FIOD/ACC), the Dutch Public Prosecution Service (PPS), the representatives of the legal profession (the Netherlands Bar Association and the Royal Dutch Association of Civil-law Notaries) and their supervisory authority to consider how awareness of reporting obligations for unusual transactions related to foreign bribery can be further increased. Specifically, legal professions are being considered, as such professions may play a role in setting up complex business structures. The measure currently being considered to comply with the recommendation is to create guidance regarding the AML-reporting obligations in connection with red flags for foreign bribery-based money laundering and to make this guidance part of the regular training and courses for the legal profession. Moreover, the involved parties are considering to develop a flyer or leaflet with illustrative cases to provide to the legal profession via newsletters, websites, et cetera. Finally, parties intend to raise awareness by strengthening the feedback-loop, more specifically through publication of concrete cases among the legal profession.

Furthermore, not specific to foreign-bribery, but regarding AML-reporting obligations of the legal profession in general, there are several initiatives. One example of such initiatives is the '*Overleg Weerbaar Notariaat*' (Resilient Notary; OWN). In this 'OWN' several authorities (Financial Supervision Office (*Bureau Financieel Toezicht; BFT*), Tax and Customs Administration (TCA), PPS, FIU-NL, Police and the Fiscal Intelligence and Investigation Service (*Fiscale Inlichtingen- en Opsporingsdienst*; FIOD)) consult with the notary (Royal Dutch Association of Civil-law Notaries) to help them to fulfil their gatekeeper role. The emphasis is on (building) relationships and trust. The strategic objective of the OWN is to create a public-private collaboration platform, aimed at an even more resilient notarial profession, to promote and professionalise cooperation between the notarial profession (represented by the Royal Dutch Association of Civil-law Notaries) on the one hand and relevant public and private parties on the other, in order to structurally support the notarial profession in effectively (continuing to) fulfil its gatekeeper role and in *de facto* helping to identify and prevent fraud and subversive crime.

**If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 2(a):**

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

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

**Action taken as of the date of the follow-up report to implement this recommendation:**
On 4 February 2022, the Minister of the Interior and Kingdom Relations informed Dutch Parliament that they wanted to examine together how the bill to implement the EU Whistleblower Directive can be supplemented with the results of the evaluation of the Whistleblower Authority Act (WAA). On 21 April 2022, the Minister of the Interior and Kingdom Relations discussed the evaluation of the WAA and the amendment of the WAA with the parliamentary commission of the Dutch House of Representatives. The Dutch House of Representatives attaches great importance to incorporate the evaluation of the current WAA in the legislative proposal. There are also wishes in the Dutch Parliament regarding optional provisions of the EU Whistleblower Directive. To achieve this, Dutch Parliament issued a memorandum with various proposals in April 2022. In response to these proposals, the Minister of the Interior and Kingdom Relations sent a (second) letter of amendment to the Dutch House of Representatives on 29 June 2022 with the aim to implement the Directive as soon as possible.[3]

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

**Text of recommendation 2(b):**

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

b. conduct training and awareness raising activities for the private sector and public agencies, specifically the Ministry of Foreign Affairs, on implementing the WAA's requirements for effective internal protected reporting mechanisms and its amendments, once enacted [2009 Recommendation IX iii)]; and

**Action taken as of the date of the follow-up report to implement this recommendation:**
Overall, the lead examiners were encouraged by the enactment of the WAA in the Netherlands, but mentioned some challenges faced by the Whistleblower Authority (WA) in its infancy, both in terms of

[3] 2e nota van wijziging wetsvoorstel implementatie EU-klokkenluidersrichtlijn | Kamerstuk | Rijksoverheid.nl (Dutch).

legal and institutional arrangements and with respect to human and financial recourses. The lead examiners mentioned that recent cases of retaliation against public and private sector whistleblowers in foreign bribery cases raised serious concerns and made various recommendations on the subject. The Netherlands has taken several steps to follow up on these recommendations.

The Ministry of the Interior and Kingdom Relations has set up a website in Dutch (www.wetbeschermingklokkenluiders.nl) to provide employers with information about the upcoming legislative amendments and the stricter requirements for internal reporting procedures as a result of the implementation of the EU Whistleblower Directive. The website explains, among other things, what new requirements apply to the internal reporting procedures of various employers. The Ministry of the Interior and Kingdom Relations also sends out a newsletter to employers in the private and public sector every one to two months with information about the EU Whistleblower Directive and the upcoming legislative changes.[4] The newsletter also contains interviews with employers or scientists about organising a safe working and reporting climate.

In September 2022, the Ministry of the Interior and Kingdom Relations will start a campaign for a safe working and reporting climate. The Ministry of the Interior and Kingdom Relations is setting up a network of employers to allow for an exchange of experiences and knowledge. Other parties are also involved in this network, such as science and trade unions. Together with the network, the Ministry of the Interior and Kingdom Relations wants to consider what behavioural change is necessary and desirable among employers and how best to respond to this. The campaign also includes the provision of (online) seminars on how employers can ensure a safe work environment and how to design internal reporting procedures effectively. After the amendment of the law as a result of the EU Whistleblower Directive, a baseline measurement (*nulmeting*) will take place periodically. Additionally, an investigation of the existence, application and effectiveness of internal reporting regulations at employers will be held. The results of this investigation will be reviewed to determine which actions relating to employers have to be undertaken.

The WA itself also conducts awareness raising activities. The WA provides information on its website (www.huisvoorklokkenluiders.nl)[5] for both the public and private sector. Additionally, the WA gives advice, answers questions and provides information. For example, the website contains a brochure about adjusting reporting procedures in accordance with the EU Whistleblower Directive, an overview of frequently asked questions with corresponding answers (FAQ) and an overview of what will change for employers and employees with the amended WAA.[6]

The Ministry of Foreign Affairs (MFA) has a Code of Conduct for Integrity,[7] which contains the Annex 'Bribery of foreign public officials' (**Annex B**). This Annex was last updated in December 2019. In the Annex, MFA officials are reminded that if they have a reasonable suspicion that a Dutch citizen or a

[4] Nieuwsbrief Wet bescherming klokkenluiders | Actueel | Wet bescherming klokkenluiders (Dutch).

[5] For an English version of the website, please see: English | Huisvoorklokkenluiders.

[6] We note that with the implementation of the EU Whistleblower Directive, the name of the WAA will be changed to the Whistleblower Protection Act. For ease of reference, we only use the term WAA in this template.

[7] https://www.government.nl/documents/publications/2018/08/08/bz-code-of-conduct-on-integrity (English)https://www.rijksoverheid.nl/documenten/publicaties/2018/06/08/gedragscode-integriteit-bz.

company established in the Netherlands is bribing a foreign official, they are obliged to report this (via their supervisor or directly) to the MFA Integrity Reporting Centre. The Annex explains, among other things, which facts are important, what the PPS pays attention to, under what circumstances the information must be passed on and where people can go.

The MFA has a system of internal and external confidential advisors. In the MFA-offices in The Hague there are three central confidential advisers at the moment, but recently three additional confidential advisers have been selected. They are currently awaiting formal appointment. One of the advisers is an *external* confidential adviser. Furthermore, almost all larger embassies (normally more than eight employees) have one or more local confidential advisers. This means that there are more than 100 confidential advisers. Employees are regularly informed of the possibility and procedure to report possible integrity violations at the contact point. For example: in May 2022 about 30 new ambassadors participated in a training course which included a presentation about integrity and the reporting mechanism.

Regularly, reference is made to the available reporting mechanisms and safety nets on the internal communication portal of the MFA. Reference is also made to the integrity portal, an online website containing information on these reporting mechanisms and safety nets. All employees of MFA have access to this portal. For example, on 17 December 2021 (via communication portal) and 14 February 2022 (via communication portal), all employees have been informed about the WAA.

The protocol for internal integrity investigations was updated in 2021. It offers all colleagues within the MFA management guidelines on how to act in the event of suspected integrity violations and provides clarity to anyone involved in an investigation. It also addresses abuses in accordance with the WAA. This protocol can be found on the integrity portal of the MFA.

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

**Text of recommendation 2(c):**

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

c. ensure clear guidance and training are provided to the Whistleblower Authority officials on procedures for detection and reporting of the foreign bribery offence to criminal law enforcement authorities [2009 Recommendation IX iii)].

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

The WA maintains regular contact with the International Chamber of Commerce (Netherlands), which is also committed to preventing (foreign) corruption and bribery. Through this contact, the WA is kept alert and informed of any new developments in this area. Furthermore, in view of knowledge sharing and raising awareness, employees of the advice and investigation department of the WA were pleased to follow a training course offered by the PPS at the beginning of 2022. The National Coordinating Corruption Prosecutor and a dedicated corruption public prosecutor then provided training on recognition of corruption and how to report corruption. There was special attention paid to the

recognition of foreign bribery, the relevant legal context and the importance of combating corruption. It has also been agreed that should the WA encounter (possible) cases of corruption, it will continue to use its existing channels and contacts with the PPS, as laid down in general terms in the cooperation protocol.[8]

As a result of the trainings and the protocol, it is expected that the WA will refer more quickly to the appropriate authorities, insofar as required. In the future, (new) employees of the WA can also participate in an anti-corruption course organised by the Training and Study Centre for the Judiciary (*Studiecentrum Rechtspleging*; SSR).[9] Furthermore, corruption courses for a broader audience are of course also available to employees of the WA, such as the corruption course of *Bijzonder Strafrecht.nl* (6 July 2021 and June 2022)[10] which, among other things, addresses whistleblowers.

A public prosecutor of the Office for Serious Fraud, Environmental Crime and Asset Confiscation, Public Prosecution Service (*Functioneel Parket*; FP) is account holder for the WA and this officer acts as a permanent point of contact for the WA. The feedback provided during both the training and the coordination between the WA and the accountholder of the FP has shown that this method of cooperation meets the wishes and needs of the WA. In addition, several employees of the investigation department of the WA have criminal law and criminological knowledge and experience. This helps in the recognition of criminal offences and in the cooperation with criminal justice authorities. There appears to be no need for further training on recognising corruption.

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

**Text of recommendation 3:**

3. Regarding detection of foreign bribery self-reporting, the Working Group recommends that the Netherlands' authorities establish a clear policy and guidelines explaining the procedure for making self-reports and the extent to which self-reporting will be considered in resolving and sanctioning foreign bribery cases [Article 3 of the Convention; 2009 Recommendation III.i.].

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

The lead examiners welcomed the use of self-reporting as a source of detection of foreign bribery cases in the Netherlands, but mentioned that self-reporting has only resulted in the detection of a small number of cases. The lead examiners said that there appears to be a general reluctance to make self-reports due to uncertainty about the consequences thereof and the lack of an overarching legal framework and therefore recommended to establish clear policy and guidelines on this topic and encouraged the PPS to provide guidance on the procedure(s) for self-reporting.

[8] Afstemmingsprotocol Openbaar Ministerie - Huis voor Klokkenluiders | Publicatie | Huisvoorklokkenluiders (Dutch).
[9] https://ssr.nl/ssr-excellent-training-for-a-just-society/ (English).
[10] https://www.bijzonderstrafrechtacademie.nl/corruptie-in-binnen-buitenland (Dutch).

The current policy of the PPS is that, if a suspect reports that foreign bribery has been committed by them or within their company/organisation and discloses this to the PPS, the PPS will consider this self-report transparently in the (method of) resolution and possible punishment (Directive on the Investigation and Prosecution of Foreign Corruption, Article 2.1 Factors taking into account in determining the prosecution decision.)[11]

In addition: while Article 2.1 of the Directive relates to the conduct of the PPS in all resolutions in foreign bribery cases (both trial and non-trial resolutions), the PPS has a publically available Directive for high non-trial resolutions, which covers foreign bribery and other offences.[12] This Directive on Large Transactions stipulates that in determining the amount of the fine, it is taken into account whether or not there has been self-reporting and to what extent the suspect has cooperated with the investigation.

The application of these policies in actual (foreign) bribery cases is shown by the *Nelson*-case. Regarding self-reporting and cooperation with the investigation, the following considerations from the press release and statements of facts for this case are of relevance: [13]

- In calculating the amount of the fine, the PPS assessed whether, and if so to what extent, the suspect cooperated in the criminal investigation. The extent of cooperation is assessed according to a variety of aspects, including the scope, quantity, quality and timing of the cooperation in the given circumstances. One important relevant aspect is whether the defence cooperated proactively or reactively. Also relevant is the extent to which the FIOD and the PPS are able to use the documents and information provided to verify information.
- A 25% discount was applied to the fine for the facts that were reported to the PPS by the companies themselves.
- An additional 25% discount was applied to the fine in respect of all companies which cooperated fully in the investigation into all the investigated offences.

In the *Nelson*-case, the PPS sought affiliation with the discount percentages applied in the United States (Foreign Corrupt Practices Act Corporate Enforcement Policy) and the United Kingdom in comparable cases. Depending on the extent of cooperation and self-reporting in a given case, a lower discount percentage could be given, if these elements were deemed lacking. In other words, the amount of a fine depends on all the facts and circumstances of the case in question.

In addition to the press release, an interview with the public prosecutors involved in the *Nelson*-case has been published in order to reach a wider audience. In the interview, the public prosecutors explain (in accessible language) why (the use of) self-reporting is important and how the process works. For example, in the interview it is explained that applying penalty discounts for self-reporting is not much different from the usual process of determining sanctions in a court decision or in a PPS penalty order.

[11] wetten.nl - Regeling - Aanwijzing opsporing en vervolging buitenlandse corruptie - BWBR0044138 (overheid.nl) (Dutch).

[12] wetten.nl - Regeling - Aanwijzing hoge transacties - BWBR0044047 (overheid.nl) (Dutch).

[13] https://www.prosecutionservice.nl/documents/publications/fp/hoge-transacties/feitenrelaas/statements-of-facts--settlement-agreements and https://www.prosecutionservice.nl/latest/news/2021/04/28/econosto-mideast-econosto-eriks-cmk-and-mammoet-salvage-reach-settlement-agreements-with-the-netherlands-public-prosecution-service (both in English).

In such a decision-making process, all relevant circumstances are taken into account, including the attitude of the suspect during the investigation. The interview also points out that this procedure corresponds to principles of fair trial and legal certainty and that predictability of the consequences of self-reporting can contribute to better and more detection.[14]

The Ministry of Justice and Security decided to commission an independent research into the use of self-investigation and self-reporting by companies.[15] On behalf of the Dutch Scientific Research and Documentation Centre for the Ministry of Justice and Security (*Wetenschappelijk Onderzoek- en Documentatiecentrum*; WODC), the *Vrije Universiteit Amsterdam* is currently conducting such research, focused on self-reporting and self-investigation by companies in the event of financial and economic crime.

The research is divided into several parts. For this recommendation, the second part of the research, that addresses the question how to deal with self-reports by companies regarding financial and economic crime, is relevant. This part of the research is an inventory of experiences with self-reporting of possible fraud and corruption by companies in several other countries on the basis of a systematic literature search, comparative literature search, possible case law and a number of interviews with experts in the field. Three countries where frameworks and preconditions for companies to report financial and economic crimes already exist, are considered for the study: France, the United Kingdom and the United States. The interviews are concerned with the opinions of proponents and opponents of self-examination and with the opinions of more 'neutral' experts.

Several public prosecutors as well as criminal investigators have been or will be interviewed in the course of this research. The research is expected to be completed in fall 2022. The research will be used as a basis for further discussions between the Ministry of Justice and Security and the PPS about, among other things, the possible drafting of guidelines for self-reporting procedures for financial-economic crimes, including foreign bribery.

**If no action has been taken to implement recommendation 3, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

## Recommendations regarding enforcement of the foreign bribery and related offences

**Text of recommendation 4:**

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

[14] Please see (in Dutch): https://magazines.openbaarministerie.nl/opportuun/2021/03/schikken-bij-corruptie.

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

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

The lead examiners welcomed the revisions to the Directive on the Investigation and Prosecution of Foreign Corruption that removed references to a policy of non-prosecution of small facilitation payments. The lead examiners reported that the Netherlands mentioned some awareness-raising activities on this issue, but they considered it necessary that the Netherlands strengthen and continue this awareness raising and conduct more targeted efforts.

Several efforts have been undertaken to inform companies and professionals of the auditing and accounting profession about small facilitation payments.

In 2022, the Foreign Bribery Brochure 'Fair business, without corruption', will be renewed and published by the end of August 2022. In this edition of the brochure, it will be explicitly stated that the PPS does not make an exception for facilitation payments in its policy. This brochure is a joint publication of the MFA, the Ministry of Justice and Security, the Ministry of Economic Affairs and Climate and the following business organisations: the International Chamber of Commerce Netherlands, the Confederation of Netherlands Industry and Employers (VNO-NCW) and the Royal Association MKB-Nederland (an organisation for small-and-medium-enterprises (SME)).

The Royal Dutch Association of Civil-law Notaries is currently preparing an amendment of its guidance (*handreiking*) 1137 'Corruption, work of the accountant'. FIOD/ACC will be able to review the draft amendments to this guidance and to provide input before the draft amendments will be open to consultation for the accounting profession. In this context, FIOD/ACC has already emphasised in conversations with the Royal Dutch Association of Civil-law Notaries that the guidance should pay attention to the fact that facilitation payments are criminally liable and will again pay attention to this when reviewing the draft amendments.

Finally, FIOD/ACC has organised workshops in April 2021 and January 2022 for employees of the TCA in which explicit attention was paid to the fact that facilitation payments constitute a criminal offence and the amended policy of the PPS in this respect. It is estimated that in total 60-70 persons attended these workshops. FIOD/ACC also had a meeting with the four largest Dutch banks in June 2022, during which it held a presentation that drew attention to this topic. In March 2022, FIOD/ACC already held a presentation for a different Dutch bank in which this topic was addressed as well. The knowledge document for banks (*kennisdocument voor banken*) will also be updated at the end of 2022; this documents pays explicit attention to facilitation payments.

The Directive on the Investigation and Prosecution of Foreign Corruption[16] states that the government is discouraging and preventing companies from committing corruption abroad, even when it concerns small amounts or payments to lower-ranking officials. The external webpage of the PPS that is devoted to corruption[17] provides a link to the Directive. In general, the PPS and FIOD are updating their websites to improve the access- and usability for the public.

[16] https://www.om.nl/onderwerpen/beleidsregels/aanwijzingen/specialistisch/aanwijzing-opsporing-en-vervolging-buitenlandse-corruptie-2020a006 and https://wetten.overheid.nl/BWBR0044138/2020-10-01 (both in Dutch).

[17] https://www.om.nl/onderwerpen/corruptie/aanpak-corruptie (Dutch).

The policy change on small facilitation payments did not go unnoticed, as illustrated by posts on websites of law firms[18] and other reliable sources of information used by professionals, such as https://www.bijzonderstrafrecht.nl/home/hoe-om-te-gaan-met-facilitation-payments-ncpa-publiceert-praktische-richtlijnen (in Dutch).

While a wide audience, including professionals and companies, can be reached through the external website, the internal website of the PPS is being used to inform law enforcement officials within the PPS. The internal webpage devoted to foreign bribery clarifies, with reference to the Directive, that small facilitation payments can be investigated and prosecuted. The webpage points out the change in policy, being that exceptions are no longer made for facilitation payments. The webpage further states that the amount of the facilitation payment can, like all other circumstances of the case, be included in the overall assessment framework for the opportunity to prosecute. The Directive was also presented to the heads of the Public Prosecution Offices and to the Director of the FIOD in a letter.

Moreover, in the corruption course of the SSR, which is given once or twice a year to judges, public prosecutors and their staff, attention is paid to facilitation payments and the amended Directive.

**If no action has been taken to implement recommendation 4, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 5(a):**

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

a. take urgent measures, as appropriate within its criminal justice system, to address delays caused by processes for assessing legal privilege claims in foreign bribery investigations [Convention Article 5, 2009 Recommendation Annex I B)];

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

During the Phase 4 evaluation the lead examiners raised serious concerns that processes for assessing legal privilege claims over large datasets obtained in the context of investigations are causing major delays in foreign bribery cases.

Since the Phase 4 evaluation report, several developments have taken place and (urgent) measures have been taken regarding (the processes for assessing) legal privilege claims, but none of these have (yet) fully solved the problem of delays that are caused by the processes for assessing these legal privilege claims.

[18] For example: https://www.debrauw.com/articles/dutch-guidance-on-investigation-and-prosecution-of-foreign-bribery-renewed and https://www.jonesday.com/en/insights/2020/10/new-guidance-for-dutch-prosecutor-on-the-investigation-and-prosecution-of-foreign-corruption (both in English).

As mentioned in our Phase 4 input, the issue of legal privilege will be addressed in the broader context of a reform to modernise the Dutch Code of Criminal Procedure as a whole, in close consultation with the concerned parties. Entry into force of the new Code of Criminal Procedure is currently scheduled for 2026. This measure is deemed crucial for the implementation of the recommendation, but will take time to complete.

The working process as provided for in the new Code of Criminal Procedure is currently being worked out in more detail by the relevant partners involved, who are led by the special investigative services in collaboration with a number of investigative judges. At some point, other relevant partners will be involved. Insofar as relevant for this recommendation, the work consists firstly of mapping out the work process regarding extensive digital attachments in all cases where this regularly occurs (including foreign bribery cases). This first step is still ongoing. Once there is sufficient progress regarding this first step (it does not necessarily need to be fully completed), it will be investigated how this process can be supported by information technology, so that the required time and manpower can be limited. The description of the work process is also intended to consider the requirements that a technical aid must meet (the right of non-disclosure tool). The preparations for the new Code of Criminal Procedure further take into account the WODC research into the bottlenecks due to professional privilege law that was published in March 2021.[19] The current expectation is that this work will be completed by the end of 2022, but this can be subject to change.

Important in this respect is that case law on this topic is continuously developing. See for instance the considerations of the Dutch Supreme Court regarding the legal privilege of in-house lawyers (English summary): https://www.hogeraad.nl/actueel/nieuwsoverzicht/2022/mei/supreme-court-clarifies-rules-on-the-right-house-counsels-to-invoke/ (ECLI:NL:HR:2022:760). These kind of clarifications can also be important to prevent undue delays, since they can prevent new extensive legal procedures. The new Code of Criminal Procedure aims to codify the relevant case law on legal privilege and to thus provide sufficient safeguards in this respect.

Furthermore, as a result of recent case law,[20] the PPS and FIOD have drawn up a temporary working method for digital data that is ordered/demanded from service providers.[21] According to this temporary working method, the internet service provider will be instructed to not provide e-mails from/to a lawyer in a dataset, if such material is expected to exist within the requested dataset and if it is known which lawyer is involved. Subsequently, further filtering can be applied on the provided dataset. We note that the temporary method only applies to data that is requested from service providers and that the PPS has appealed the decision of the District Court of Oost-Brabant which has led to the development of the temporary working method.[22] In other situations the regular policy still applies, as this policy was upheld in the recent aforementioned case law. For this policy, we refer to the previous input of the Netherlands.

Meanwhile the Attorney General of the Supreme Court recently published a conclusion on the filtering and removal of privileged material from a dataset. According to the Attorney General, the temporary

[19] Beroepen op het professioneel verschoningsrecht (wodc.nl) (summary in English).

[20] District Court of Oost-Brabant 22 March 2022, ECLI:NL:RBOBR:2022:1035 and Supreme Court 16 June 2020, ECLI:NL:HR:2020:1048 (both in Dutch).

[21] https://www.om.nl/documenten/richtlijnen/2022/04/19/voorlopig-beleid-uitspraak-kort-geding-verschoningsrecht (Dutch).

[22] https://www.om.nl/actueel/nieuws/2022/04/15/hoger-beroep-om-in-verschoningsrechtzaak (Dutch).

working method as described before is in accordance with the legal framework from which follows that the authorities should refrain from obtaining privileged material. Furthermore, the Attorney General concludes that when privileged material is expected to exist in a dataset obtained by the authorities – regardless of the manner in which the data was obtained – the examining magistrates should be involved in the filtering of the provided dataset.[23] The Supreme Court's ruling is expected to be announced this year.

The conclusion of the Attorney General, as well as other recent case law, show that examining magistrates have a central role in making rulings on the proceedings regarding legal privilege claims and the 'filtering process' of datasets on a case-by-case level. The examining magistrates however have limited capacity and proceedings can be extended for long periods of time, causing delays in investigations. Solutions can be sought in increasing the capacity of the examining magistrates and developing digital tools that make automatic filtering possible.

The development of better digital tooling based on artificial intelligence could also help. The investigative authorities have tried to develop this kind of tooling, but this is only possible if the tooling can learn from the relevant (confidential) information. Since the investigative authorities cannot have this information, the project was abandoned.

For the short term, the PPS is currently working on an updated working method (in a broader context than delays). This working method will be laid down in an new Directive. The PPS will consult with the Netherlands Bar Association about this updated Directive before it will be published on https://www.om.nl/onderwerpen/beleidsregels/aanwijzingen (Dutch).

One of the recommended improvements by the aforementioned WODC research is to increase the knowledge level of investigators and prosecutors on this topic. Several courses or other awareness raising activities address the issue of legal privilege, including delays caused by the processes for assessing legal privilege claims:

- The SSR course 'Professional Legal Privilege, Seizure and confidential documents'[24] focuses on non-disclosure and legal privilege, including the delays these duties/rights may cause in criminal investigations and proceedings.
- The subject is also covered in other relevant SSR-courses, such as the aforementioned corruption course and courses named 'PPS-strategy in fraud and environmental cases', 'Witness hearing training', 'Legal context witness examination in criminal proceedings' and 'Investigating Judges in criminal proceedings'.[25]
- Besides these courses, legal privilege is part of an ongoing conversation within the PPS and is discussed as part of the day-to-day business, during work meetings, in internal newsletters, on the intranet et cetera.

[23] Attorney General of the Supreme Court 05-07-2022, ECLI:NL:PHR:2022:647 (Dutch).

[24] https://ssr.nl/cursus/srrsvers/ (Dutch).

[25] https://ssr.nl/cursus/soosbsst/, https://ssr.nl/cursus/srrsgvth/, https://ssr.nl/cursus/srrsgvjc/, https://ssr.nl/cursus/slrcrcsz/ (all in Dutch).

- Since the abovementioned working method is rather complicated, the FIOD chooses to work with designated persons who are specially trained for this work. A presentation on this topic was already given at FIOD Schiphol. In the future, special courses and training on this topic may be provided.

- Relevant external courses are, for example, the legal privilege course of the *Bijzonder Strafrecht Academie* (last course was on 26 January 2022;[26] the next course is scheduled for January 2023)[27] and the course Financial-economic criminal law – enforcement, investigation and defence which also focuses on legal privilege (offered by *Vrije Universiteit Amsterdam*).[28]

These measures will lead to an unambiguous and more qualitative working method. It is not expected that the measures will directly lead to a reduction of the duration of the process. There is still also a need for more capacity, for example for 'examining magistrates' who have to make ruling in proceedings about legal privilege claims, as was mentioned before.

**If no action has been taken to implement recommendation 5(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 5(b):**

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

b. conduct training and awareness raising for prosecutors and judges on the standards of the Anti-Bribery Convention, including the definition of foreign public official and liability for bribes paid through intermediaries and to third party beneficiaries [Convention, Article 1; 2009 Recommendation, III. ii) and V]

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

The lead examiners mentioned that the 2015 amendments to the foreign bribery offence (Article 177 Dutch Code of Criminal Procedure), largely conform to the requirements of Article 1 of the Convention. However, they were concerned that these amendments did not fully address issues identified in previous evaluations, such as: (i) the definition of foreign public official, and (ii) liability for bribes paid through intermediaries and to third party beneficiaries. The lead examiners therefore recommended to continue providing training and awareness raising for prosecutors and judges on the standards of the Convention, including the above mentioned definition issues.

[26] Verschoningsrecht — BijzonderStrafrecht.nl Academie (bijzonderstrafrechtacademie.nl) (Dutch).

[27] https://www.bijzonderstrafrechtacademie.nl/cursusaanbod (Dutch).

[28] Leergang Financieel-economisch strafrecht – handhaving, opsporing en verdediging VU Law Academy - Vrije Universiteit Amsterdam (Dutch).

In the Netherlands, many different courses and awareness raising activities are available in which public prosecutors and judges can participate. Several courses are relevant to this recommendation:

- Once or twice a year (depending on the demand), the SSR[29] provides a corruption course for judges, public prosecutors and their staff.[30] In 2021, two courses were organised which each had 24 participants. The course is now scheduled again for November 2022. On 8 July 2022, there were thirteen persons registered for the November-course (this number may still increase during the upcoming months). This course covers all corruption offences in the Dutch Code of Criminal Procedure, including subjects such as:
    - the legal framework for foreign bribery;
    - the definition of 'public official' and the assimilation with officials of persons in the public service of a foreign state or of an international organisation; and
    - the liability for and attribution of criminal offences to (legal) persons and *de facto* managers.
    - More in general, this course pays attention to the Phase 4 evaluation report.
- There are also several training other courses available at the SSR on topics relevant for foreign bribery cases. Such as courses on (i) Mutual Legal Assistance (MLA),[31] (ii) the liability of legal persons and managers (organised twice per year, 27 participants on average),[32] (iii) substantive and procedural economic criminal law (organised twice per year, 24 participants on average), and (iv) accessorial offences and forms of complicity[33] that may apply to intermediaries, third party beneficiaries, and the persons who make use of these services or facilitate the payment of bribes and/or benefit from it.
- The Dutch AML-framework also provides far-reaching possibilities to hold suspects liable for bribes paid through intermediaries and/or to third party beneficiaries, without having to proof what the predicate offence exactly was. General knowledge of an undetermined criminal origin is sufficient. Therefore, the SSR courses on money laundering, are also very instrumental for training and awareness raising purposes on the subject of liability for bribes paid through intermediaries and to third party beneficiaries.[34]

[29] https://ssr.nl/ssr-excellent-training-for-a-just-society/ (Dutch).

[30] https://ssr.nl/cursus/srrscorb/ (Dutch).

[31] https://ssr.nl/cursus/internationaal-aanbod-juridisch-medewerkers/, https://ssr.nl/cursus/soominte/, https://ssr.nl/cursus/soomindm/, https://ssr.nl/cursus/sarsinrh/, https://ssr.nl/collectie/internationale-samenwerking/, https://ssr.nl/cursus/sromsdnv/, https://ssr.nl/cursus/sromisdn/, https://ssr.nl/cursus/sromsbnv/ (all in Dutch).

[32] https://ssr.nl/cursus/srrsbaar/ (Dutch).

[33] https://ssr.nl/cursus/srrsdnvv/, https://ssr.nl/cursus/soomodod/, https://ssr.nl/cursus/ominit01/, https://ssr.nl/cursus/traiosdv/ (all in Dutch).

[34] The SSR provides several courses on money laundering and confiscation. Please refer to: https://ssr.nl/cursus/srrswitw/, https://ssr.nl/cursus/srrsvwit/, https://ssr.nl/collectie/witwassen/, https://ssr.nl/cursus/soospaki/, https://ssr.nl/collectie/afpakken/, https://ssr.nl/cursus/soospakb/, https://ssr.nl/cursus/traiomaf/, https://ssr.nl/cursus/srrscyht/ (all in Dutch).

- On 28 June 2021, the Financial Expertise Center (FEC) organised a FECademy focused on corruption for, among others, Public Prosecutors.
- On 13 September 2021, the 'Knowledge Group on Fraud and Environment' of the District Court of Amsterdam organised a corruption seminar, during which attention was briefly paid to the Convention.
- On 1 July 2022, a commercially organised anti-corruption conference took place, during which the National Coordinating Corruption Prosecutor and the head of the FIOD/ACC attended as speakers. Among others, prosecutors participated in this conference. This is an annual conference. The conference focused on the following topics:
    - Trends in enforcement.
    - Rewards for self-reporting and cooperation by companies.
    - Legal privilege: recent developments.
    - Procedural agreements between suspects and the PPS.
    - Whistleblower protection.
    - Environmental, social and corporate governance (ESG), human rights and corruption.
- Also, the commercially organised corruption course of *Bijzonder Strafrecht.nl* (6 July 2021 and 21 June 2022)[35] pays attention to foreign bribery, including the definition of public official, the use of (trade) agents and liability and relevant case law. This course is also open to prosecutors and judges. This is an annual course.

In addition to these courses, the PPS also employs other awareness raising activities: the Convention, the Phase 4 evaluation report, the 2021 OECD Anti-Bribery Recommendation and 'knowledge memos' (e.g. on 'Indirect bribery of officials through local agents'), are published on the internal webpage for foreign bribery and commercial bribery. Such topics are also discussed in thematic meetings of the FP's Anti-Corruption Team and with the dedicated public prosecutors. Members of the Anti-Corruption Team are encouraged to participate in (international) seminars, panel discussions et cetera.

**If no action has been taken to implement recommendation 5(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 5(c):**

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

[35] https://www.bijzonderstrafrechtacademie.nl/corruptie-in-binnen-buitenland) (Dutch).

c. ensure that the BES islands have appropriate resources, training, expertise and capacity to investigate and prosecute foreign bribery and related offences [Convention, Article 5 and Annex I D]

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

The lead examiners mentioned that they welcomed the more active approach taken by the Netherlands to promote enforcement of foreign bribery and other financial crimes on Bonaire, Sint Eustatius and Saba (BES-islands), such as stationing officers from the National Internal Investigations Department (NIID; *Rijksrecherche*) and FIOD-investigators on the BES-islands. They were, however, concerned by the lack of detection of foreign bribery or related offences by BES-island authorities and therefore recommended that the Netherlands ensure that the BES-islands have appropriate recourses, training, expertise and capacity to investigate and prosecute foreign bribery and related offences.

The capacity of the BES-islands has been or will be strengthened in various areas.

Firstly, the structural stationing of two *Rijksrechercheurs* from the NIID on the BES-islands. The appointment of the two *Rijksrechercheurs* in 2020 on the BES-islands started as a three-year pilot. This pilot ends in 2023. Notwithstanding this, the government has already decided to structurally allocate funds to ensure the permanent placement of two *Rijksrechercheurs* from the NIID on and for the BES-islands. In addition, the pilot is currently being evaluated. The results of this evaluation will be included in the discussions for the focus in the coming years.

Furthermore, two investigators with financial expertise from the FIOD will be permanently stationed on the BES-islands. The aim is to strengthen cooperation in the financial and economic field and to expand expertise in tackling money laundering/subversive crime. Subversive crime and corruption often go hand in hand, so this placement will contribute to the fight against corruption. Although the NIID focuses on 'official' corruption (corruption of public officials) and 'non-official' corruption, sometimes there is overlap with the FIOD's tasks. In those situations, the NIID and the FIOD will of course collaborate. This can be part of the chain-wide approach to subversive crime at the BES islands.

Finally, the public prosecutor's office for the BES-islands (*OM BES*) will also be strengthened with an additional two FTE. The government has decided to make structural funds available for this purpose as of 2023. As the population has grown strongly in recent years, especially on Bonaire, the number of cases has doubled since 2017. With the extra FTE, the OM BES will be able to (better) handle the inflow of cases. In addition, more attention can be paid to the substantive tasks of the public prosecutor and the public prosecutor's office secretaries.

The structural establishment and physical presence of the two *Rijksrechercheurs* from the NIID and two FIOD-investigators will probably also lead to an increase in the number of cases, which can also be better accommodated with this extra FTE. This increase is already seen in the first stage of the evaluation of the pilot.

Finally, with regard to training, we note that SSR courses are also open for participation of prosecutors who work at OM BES.

**If no action has been taken to implement recommendation 5(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 5(d):**

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

d. conduct systemic training among Dutch officials posted abroad on the MFA's protected reporting framework, the standards set out in the Convention, including Article 5, and the confidential nature of criminal investigations [Convention, Article 5 and Annex I D].

**Action taken as of the date of the follow-up report to implement this recommendation:**
The lead examiners recommended that the MFA conduct systematic trainings among Dutch officials posted abroad.

As mentioned in our Phase 4 input, the MFA has its own integrity code of conduct, including an annex entitled 'Bribery of foreign officials, annex to the MFA code of conduct'. New employees are made aware of the existence of the integrity code of conduct when taking the oath/promise. In this document, MFA officials are reminded that if they have a reasonable suspicion that a Dutch citizen or a company established in the Netherlands is bribing a foreign official, they are obliged to report this (via their supervisor or directly) to the MFA Integrity Reporting Centre. The annex explains, among other things, which facts are important, what the PPS pays attention to, under what circumstances the information must be passed on and where people can go. The code of conduct and reporting mechanisms are the point of departure for presentations and trainings on this subject.

Annually, integrity trainings are offered to different groups of employees on integrity and a safe working environment. For example, at the annual conference for all Dutch ambassadors and Consuls-General (172 in total, spread around 140 embassies and consulate-generals). In 2022, this conference took place from 13-16 June. Another example are more broad training sessions for employees posted abroad, such as Operational Managers, attaches, et cetera. In 2021, a new general training was developed and offered by the Department of Integrity of the MFA. This training (available in English and Dutch) is called 'Doing The Right Thing' and focuses on integrity rules and desired behaviour. The training consists of two three-hour sessions and is aimed at MFA-employees, local MFA-employees and managers within MFA. This training is offered several times a year. In 2021, approximately 46 persons participated in the training. The training will again be given in October 2022.

During the last Economic Week, which was organised for the heads of the economic departments of Dutch embassies (40 attendees in total), one of the themes was corruption. The MFA, PPS and the International Chamber of Commerce Netherlands all participated in the discussion. During this session, the officials' duty to report, the relevant legal framework and the available support for businesses were discussed.

Furthermore, tools have been developed to ensure that teams have attention for integrity and a safe working environment. For instance, there is a dilemma game which also focuses on corruption (e.g. doing business with a dubious contact person or 'valuable business gifts').

Finally, the MFA participates in the interdepartmentally organised 'Integrity week' each year (last edition: week of 29 November 2021). In several program components, attention is drawn to the content of the code of conduct and reporting mechanisms.

**If no action has been taken to implement recommendation 5(d), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

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

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

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

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

Although no new action has been taken since the 2021 follow-up report, there is additional information that should be taken into account when assessing recommendation 6(a).

As described in the 2021 follow-up report, press releases of non-trial resolutions in foreign bribery cases and statements of facts are published on the public website of the PPS (https://www.om.nl/onderwerpen/hoge-transacties (Dutch)) and, if necessary, in other languages on a separate webpage (https://www.prosecutionservice.nl/latest/). Examples of published large non-trial resolutions are the *Nelson*-case[36] and (although not foreign bribery) the *Guardian*-case[37] and the *Gourmande*-case.[38]

In addition to the press release and statement of facts, other documents are published, such as the advice of the review committee (see recommendation 6(b) below), the decision of the Board of Procurators-General, the transaction agreement and the advice of the chief advocate-general of the PPS. Please note that the (translated) site www.prosecutionservice.nl does not always contain every document that can be found on the Dutch website https://www.om.nl/onderwerpen/hoge-transactions. A press release is used to publicly justify that a case has been settled out of court.

The Directive on Information about Investigation and Prosecution determines that when the PPS settles a case, this is actively reported, for example "*by means of a press release and a statement of facts*" if the case is of social and/or political interest.[39] The interest of informing the public carries more weight

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

[37] https://www.prosecutionservice.nl/latest/news/2021/04/19/abn-amro-pays-eur-480-million-on-account-of-serious-shortcomings-in-money-laundering-prevention (English).

[38] https://www.om.nl/onderwerpen/hoge-transacties/nieuws/2021/08/31/pwc-nederland-betaalt-300.000-euro-vanwege-onjuist-informeren-fiscus (Dutch).

[39] https://wetten.overheid.nl/BWBR0044027/2020-09-01 (Dutch).

when a case is relevant to the public debate. Examples of such cases are cases which concern a politician, a suspect that holds a public position or the integrity of public administration. Therefore, not only in large, but also in other (sensitive) foreign bribery cases, the essential elements of a non-trial resolution will be published if necessary and in compliance with the relevant rules. The extensiveness of the press release and statement of facts are always dependent upon the facts and circumstances of the case in question.[40]

For large transactions, the (temporary) Directive on Large Transactions (*Aanwijzing Hoge Transacties*) contains provisions about the publication of press releases and extensive statements of facts when reaching transactions.[41] Paragraph 6 of the Directive states (translated): "*If it is decided to impose a large transaction, the Public Prosecution Service will, in principle, announce this by means of a press release. This press release also compensates for the lack of publicity as a result of a public hearing in court and a court decision pronounced in public. This press release, in which, among other things, the amount of the transaction is mentioned, will have a general preventive effect.*

*In addition, the press release is accompanied by an extensive statement of facts. A statement of facts concerns an overview of facts and events that led to the criminal case. The statement of facts discusses the investigative findings, the actual conduct that is the basis for the transaction, the suspicion related to the applicable criminal offences and the role of the suspect.*

*An overview of large transactions is published on http://www.om.nl. [...].*"

All in all, these Directives together ensure that, if necessary and in compliance with the relevant rules, the essential elements of non-trial resolutions of foreign bribery cases will be published.

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

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

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

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

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

Although legislative reforms are still pending and no new action has been taken since the 2021 follow-up report, the temporary oversight that is in place is appropriate. Furthermore, there are developments

[40] For example (although not foreign bribery): https://www.om.nl/onderwerpen/hoge-transacties/nieuws/2022/04/01/vermilion-betaalt-een-transactie-van-27.500-euro (Dutch).

[41] https://www.om.nl/onderwerpen/hoge-transacties/nieuws/2020/09/04/nieuwe-aanwijzing-hoge-transacties, https://wetten.overheid.nl/BWBR0044047/2020-09-04 (both in Dutch).

and additional information that should be taken into account when assessing recommendation 6(b). For your convenience and context, the information from the 2021 follow-up report is included in this update.

In September 2020, the first steps were taken to introduce a new system of oversight. The new Directive on Large Transactions, which came into effect on 4 September 2020, introduced a (temporary) independent review commission. This new procedure ended the approval role of the Minister of Justice and Security in the process. A letter to the Dutch Parliament on this topic (in Dutch) can be found on the website of the Dutch government: Kamerbrief over publicatie Aanwijzing hoge transacties door het Openbaar Ministerie | Kamerstuk | Rijksoverheid.nl

The review commission consists of, in changing compositions, a former lawyer, a former judge, a professor in criminal law and criminal procedural law and former public prosecutors.[42] The names of the commission's members are a matter of public knowledge. They can be found in the written reports on the proposed non-trial resolutions and in media reports, e.g. an interview in het *Financieele Dagblad* with one of the members of the review commission, a former judge. [43] A proposed transaction will be reviewed by three members of the commission. The commission advises the Board of Prosecutors-General. If the advice is positive, the Board can decide whether the transaction may be proposed to the suspect. If the advice is negative, the Chief Public Prosecutor must make a new prosecution decision. If the decision is again to offer a large transaction, the proposed transaction again needs to be reviewed by the review commission.[44]

Since September 2020, the new regime has been applied in several cases (not all related to foreign bribery). More particularly, the regime has been applied in the aforementioned *Nelson*-case,[45] (although not foreign bribery) the *Guardian*-case[46] and the *Gourmande*-case.[47] The advices of the review commission are attached to the Dutch versions of the press releases in these cases.[48] These cases concern (respectively) bribery, money laundering and providing incorrect and incomplete information to the TCA.

The temporary system of oversight is thus operational, as shown by these examples. As was already shared with the Working Group, this is a temporary regime, before the introduction of a new system of judicial oversight ("*verlofprocedure*") for a specific category of transactions (the so called "*hoge transacties in de sfeer van de rechtspersonen*", in other words: large transactions with legal persons),

[42] Nieuwe Aanwijzing hoge transacties | Nieuwsbericht | Openbaar Ministerie (om.nl) (Dutch).

[43] 'Een schikking mag niet worden gebruikt om verantwoordelijken uit de wind te houden' (fd.nl) (Dutch).

[44] Nieuwe Aanwijzing hoge transacties | Nieuwsbericht | Openbaar Ministerie (om.nl) (Dutch).

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

[46] https://www.prosecutionservice.nl/latest/news/2021/04/19/abn-amro-pays-eur-480-million-on-account-of-serious-shortcomings-in-money-laundering-prevention (English).

[47] https://www.om.nl/onderwerpen/hoge-transacties/nieuws/2021/08/31/pwc-nederland-betaalt-300.000-euro-vanwege-onjuist-informeren-fiscus (Dutch).

[48] https://www.om.nl/onderwerpen/hoge-transacties/documenten/publicaties/fp-hoge-transacties/feitenrelaas/map/advies-toetsingscommissie-hoge-transacties-nelson-dd-26-april-2021, https://www.om.nl/onderwerpen/hoge-transacties/documenten/publicaties/fp-hoge-transacties/feitenrelaas/map/advies-toetsingscommissie-hoge-transacties, https://www.om.nl/onderwerpen/hoge-transacties/documenten/publicaties/fp-hoge-transacties/feitenrelaas/map/hersteladvies-toetsingscommissie-hoge-transactie-gourmande-d.d.-3-mei-2021 (all in Dutch).

for which legislation is underway. This judicial oversight aims to increase the legitimacy of such transactions, increase legal protection for all parties involved and increase the transparency of transaction procedures. This also aims to increase public acceptance of these types of transactions. On 11 March 2021, the draft bill was published for internet consultation and interested parties could (publicly) submit their views on the draft bill. At this moment, the results of the public consultation are being processed and a cost analysis of the bill is being made. It is not yet possible to provide a time estimate for these steps. Subsequently, the bill will be sent for advice to the Dutch Council of State.

Please also refer to our response to recommendation 6(e) and the legal framework for non-trial resolutions, as described in paragraphs 176 to 193 of the Phase 4 evaluation report. Regarding oversight on non-trial resolutions, of special importance is the appeal mechanism of Article 12 of the Dutch Code of Criminal Procedure, as mentioned in paragraph 193 of the Phase 4 evaluation report. Cases in which this appeal mechanism was used, show that it is effective and can lead to prosecution in cases where this was first deemed not opportune.[49] Furthermore, the oversight procedure, as described in paragraph 3.4.3 (out of court settlements of value confiscation procedures) of the Confiscation Instruction, [50] is also of importance for the total oversight-framework. This procedure and the oversight as described in the Directive on Large Transactions provide, in our opinion, an appropriate (temporary) oversight mechanism for proposed non-trial resolutions, including for foreign bribery cases.

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

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

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

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

**Action taken as of the date of the follow-up report to implement this recommendation:**
Please see the input for recommendation 3.

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

[49] https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2020:2344 (Dutch), https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2020:2347 (Dutch), and https://www.prosecutionservice.nl/latest/news/2018/09/04/ing-pays-775-million-due-to-serious-shortcomings-in-money-laundering-prevention (English).

[50] https://zoek.officielebekendmakingen.nl/blg-794560.pdf (Dutch).

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

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

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

**Action taken as of the date of the follow-up report to implement this recommendation:**
No new action has been taken since the 2021 follow-up report.

The Directive on Large Transactions, the Confiscation Directive, the Confiscation Instruction and the Directive on the PPS Penalty Order[51] contain the conditions under which a non-trial resolution can be offered to a natural person. These conditions are based on Article 74 of the Dutch Criminal Code (transaction), Article 257 of the Dutch Code of Criminal Procedure (penalty order) and Article 511c of the Dutch Code of Criminal Procedure (value confiscation settlement). In foreign bribery cases, the conditions of the Directive on the Investigation and Prosecution of Foreign Corruption also have to be taken in to account when considering to offer a non-trial resolution to a natural person. These conditions are described in paragraphs 176 - 181 of the Phase 4 evaluation report ("Criteria for proposing non-trial resolutions").

All these Directives and Instructions apply to legal persons and natural persons alike, with the exception that the Directive on Large Transactions states that generally:

- Large transactions only occur in relation to legal persons, due to the fact that, among other things, in most cases against legal persons a court can impose no other penalty on a legal person than a fine.
- The Directive prescribes as a pre-condition to *offer* a large transaction that there needs to be a reasonable expectation that if the case would be submitted to court, a financial penalty would be imposed. So, if it is expected that the court would impose a prison sentence or community service (which can only be true for natural persons), no large transaction can be imposed. In addition, the Directive states that (generally speaking) with regard to natural persons, a penalty other than a fine can be imposed, both by a court or by a PPS penalty order.
- Regarding *de facto* managers as referred to in Article 51 of the Dutch Criminal Code, the basic principle is that they will be prosecuted, insofar as possible.

Notwithstanding the above, for each suspect, legal or natural, the case will be judged on its own merits in connection with the decision to prosecute. The seriousness of the facts and the (personal) circumstances are taken into account in this regard. So these circumstances can differ between a legal person and a natural person, but the conditions that apply for non-trial resolutions are the same.

[51] https://wetten.overheid.nl/BWBR0046521/2022-04-15 (Dutch).

Apart from those remarks, the (additional) conditions under which non-trial resolutions are available to natural persons in foreign bribery cases are the same as for legal persons. Paragraph 180 and 181 of the Phase 4 evaluation report deal with the "Criteria for proposing non-trial resolutions".

With regards to the future "*verlofprocedure*" or judicial review by the court of appeal: this is still foreseen in a draft bill. At this moment, we can share that the current goal of instituting criminal proceedings against natural persons, where possible will not be altered by the draft bill. In the case of an intended transaction offer to natural persons, testing against the Directive on Large Transactions entails that the court of appeal checks whether it can reasonably be expected that the judge in the case in question would not impose a prison sentence on the suspect. After all, only in that case it is possible to make a transaction offer to a natural person on the basis of the temporary Directive on Large Transactions. In these exceptional cases, a public prosecutor may offer a transaction to a natural person who is (criminally) involved in the illegal conduct of the legal person. In these circumstances, the transaction with the natural person will always be subject to judicial review, also if the intended transaction itself remains (far) below the two thresholds. Therefore, no transaction will be agreed upon without judicial leave (*verlofprocedure*). The court of appeal assesses whether a public prosecutor could reasonably decide to make the provisional transaction offer after considering all the relevant interests.

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

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

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

e. provide further guidance and training on factors to be taken into account when determining penalties in non-trial resolutions, and imposing and enforcing additional measures such as compliance monitors and remedial compliance actions. [Convention Article 3(1), Article 5; 2009 Recommendation III(ii)]

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

*Guidance and training – General*

As described in our input to recommendations 6(a) – 6(d), we are of the opinion that the framework for determining penalties in non-trial resolutions has in the meantime become sufficiently clear and is applied in a manner compliant with the Convention. Besides the introduction of the current (temporary) Directive on Large Transactions, guidance (both internal (intranet PPS) and external[52]) on the application of this Directive was introduced.

The SSR provides several courses that cover determining penalties and additional (compliance) measures. Especially the following two courses are of relevance: 'Determining penalties in fraud cases'[53] and 'Master on effectiveness of punishments and measures'.[54] While the guidance and training

[52] For example https://www.om.nl/actueel/nieuws/2020/09/04/nieuwe-aanwijzing-hoge-transacties (Dutch).

[53] https://ssr.nl/cursus/srrstoem/ (Dutch).

[54] https://ssr.nl/cursus/srrmmaef/ (Dutch).

facilities are not focused on one specific type of resolution, the subject matters that are covered are equally or even more applicable when it comes to non-trial resolutions.

The determination of penalties and measures is a very important subject, not only in the process of reaching a non-trial resolution, but more generally the work of public prosecutors. Therefore, it is also a key element in several other courses.[55] The topic is also discussed in work meetings and in day-to-day business. Furthermore, when it comes to complex cases such as foreign bribery cases, the practice within the FP is to plan a special meeting with several prosecutors and advisers, when necessary supported by the involved investigating officers. During this meeting, the (sort and amount of) penalties and measures that should be imposed are discussed (a '*strafmatenoverleg*').

Specifically for non-trial resolutions, the SSR provides a training on 'Skillful negotiation'.[56] This training focuses on teaching certain skills that are very important to achieve the best result in negotiating a non-trial resolution. These skills can thus lead to imposing better additional (compliance) measures.

*Guidance and training – Confiscation measures*

Regarding "*guidance and training on factors to be taken into account when […] imposing and enforcing additional measures*", the most important measure to mention is value confiscation. In contrast to object confiscation (Article 33a Dutch Criminal Code), value confiscation (Article 36e Dutch Criminal Code) is not a penalty, but a measure. Substantial case law on confiscation provides clear guidance on the determination of (the amount of) confiscation measures. For training, the SSR provides several courses on confiscation.[57] These courses focus to a great extent on the determination of the amount that should be confiscated (either in a non-trial resolution or in an object- or value confiscation procedure).

In this regard, page 63 of the Phase 4 evaluation report states that the Directive on Large Transactions does not provide any reference to *"confiscation of the instrument and proceeds of the crime*" when reaching non-trial resolutions. We note that the Confiscation Directive[58] and the Confiscation Instruction[59] apply to value confiscation. These documents offer sufficient guidance, especially when consulted in combination with the Directive on Large Transactions which is also applicable to confiscation.

The Directive on Large Transactions considers that a non-trial resolution is referred to as a 'large transaction' when the total imposed amount, including confiscation, is at least EUR 1,000,000 (or an amount excluding confiscation of at least EUR 200,000). It is common knowledge among public prosecutors and their legal staff that the Confiscation Directive and the Confiscation Instruction apply when investigating and calculating proceeds of crime and when imposing value confiscation (also in non-trial resolutions).

[55] Such as https://ssr.nl/cursus/srromast/ (*Fraude Master*) (Dutch).

[56] https://ssr.nl/cursus/sooshand/ (*Training Vaardiger onderhandelen voor OM*) (Dutch).

[57] https://ssr.nl/cursus/soospaki/ , https://ssr.nl/collectie/afpakken/, https://ssr.nl/cursus/soospakb/, https://ssr.nl/cursus/traiomaf/, https://ssr.nl/cursus/srrscyht/ (Dutch).

[58] https://wetten.overheid.nl/BWBR0038996/2017-01-01 (Dutch).

[59] https://zoek.officielebekendmakingen.nl/blg-794560.pdf (Dutch).

Paragraph 8.1 of the Confiscation Directive stipulates and paragraph 3.4 of the Confiscation Instruction elaborates on the factors that should be taken into account and the procedures that should be followed when considering a non-trial resolution in a case in which a suspect gained proceeds of crimes. Chapter 7 of the Confiscation Directive stipulates that the term "*unlawfully obtained gains*" refers to the increased value of assets due to punishable offences, including subsequent profit of the person concerned.[60] Chapter 7 further states that unlawfully obtained gains also include the amount by which the assets have not decreased due to savings. Costs saved include expenses not incurred to purchase goods and/or the provision of services for personal use and the costs that would necessarily have been incurred in order to legally perform the activities concerned, but have not been incurred in the case concerned. Paragraph 3.3 of the Confiscation Instruction[61] elaborates on factors that should be taken in to account and the ways to calculate these unlawfully obtained gains (such as: per individual offence or calculations over a period of time, fox example by comparing the cash assets, cash income and cash expenses of moment X with moment Y). Other factors of relevance are the financial capacity (chapter 6 of the Directive), injured parties (paragraph 6.6 of the Directive) and several factors that are relevant for the determination of value confiscation measures (paragraph 3.3 of the Instruction), such as partial acquittal (3.3.1.1), costs (3.3.1.3), follow-up profits (3.3.3) and the attribution of benefits (3.3.5).

In conclusion, the various Directives, Instructions, case law and training provide sufficient guidance and training on factors to be taken into account when imposing and enforcing (additional) confiscation measures and these certainly concern "*confiscation of the instrument and proceeds of the crime*" when reaching non-trial resolutions.

*Additional measures*

The second part of the recommendation focuses on imposing and enforcing additional measures, such as compliance monitors and remedial compliance actions.

The Directive on Large Transactions states that when considering to impose a (large) non-trial resolution, several factors are taken into account such as, among others, the measures that suspects have taken to prevent the repetition of criminal behaviour. Transactions have the added value (compared to a court trial) that they can contain a condition for the suspect to take compliance measures to prevent further violations. The acknowledgement by the suspect that the actual conduct took place is important, as without this acknowledgment, the awareness that these changes have to be made by the suspect and/or within the company to prevent this kind of error in the future is lacking.

In the *Nelson*-case, an important factor that was taken into account in the decision to impose a non-trial resolution, was that the parent company and its subsidiaries had "*taken remediation measures and compliance measures to prevent the committing of criminal offences in the future*".[62] This factor is mentioned several times in the interview with the public prosecutors involved in this case. For example in the quote that "*in the meantime, through compliance measures, their entire supervision of subsidiaries*

[60] In general (i.e., not only when considering a non-trial resolution).

[61] https://zoek.officielebekendmakingen.nl/blg-794560.pdf (Dutch).

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

*has been arranged differently, and they have also literally distanced themselves from persons involved in these facts. This company no longer accepts this behaviour*".[63]

In other (non-bribery) non-trial resolutions, remediation measures were also taken into account. Such as in the *ABN AMRO*-case. The press release of this case states that "*consideration has been given to the fact that ABN AMRO, under strict supervision by DNB [Dutch Central Bank; De Nederlandsche Bank], has developed and is implementing a remediation programme covering, […] the improvement of its compliance function and changing its internal governance and culture to prevent further violations […]*".[64]

As we already mentioned in our 2021 follow-up report: this recommendation will be addressed by the draft bill to amend the Code of Criminal Procedure and several other laws (the Draft Bill).[65] The Draft Bill changes the regulation of non-trial resolutions of criminal offences, the confiscation order and the penalty order.

Article 553 of the Draft Bill states that a public prosecutor can offer a transaction to a defendant (i.e., a legal person or a natural person who (provided instructions to) perform(ed) a criminal act) to prevent prosecution, provided that:

a) The defendant acknowledges the established facts.
b) The established facts concern a criminal offence which is punishable by a prison sentence of six years maximum.
c) The established facts can be proven and are punishable.

Additionally, the transaction offer contains one or more conditions on which prosecution can be prevented. These conditions are outlined in Article 554 of the Draft Bill. The following conditions are possible:

a) Payment of an amount to the Dutch State, i.e. at least EUR 3 and at most the maximum fine, as determined under Dutch law.
b) Renounce objects that were confiscated and that can be forfeited or withdrawn from circulation.
c) Extradite objects that can be forfeited or pay the estimated value of such objects to the Dutch State.
d) Payment of an amount to the Dutch State or transfer of the ownership of confiscated objects with the purpose of confiscation of illegally gained advantages.
e) Deposit an amount in the damages fund violent crimes or to the benefit of an organisation with the objective to represent the interests of victims of criminal offences, considering that the amount to be deposited cannot be higher than the maximum fine for the criminal offence in question.
f) Part or full compensation of the damage caused by the criminal offence.
g) Performing unpaid work or following a learning course of maximum 120 hours.
h) Following instructions in the context of behavioural supervision aimed at compliance policies.

[63] Please see (in Dutch): https://magazines.openbaarministerie.nl/opportuun/2021/03/schikken-bij-corruptie.

[64] https://www.prosecutionservice.nl/latest/news/2021/04/19/abn-amro-pays-eur-480-million-on-account-of-serious-shortcomings-in-money-laundering-prevention (English).

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

With regard to the condition outlined in Article 554 sub h of the Draft Bill, the draft explanatory memorandum elaborates that such instructions can for instance entail that the defendant needs to establish, implement and comply with a compliance programme. The draft explanatory memorandum further stipulates that external, independent supervisory authorities can be involved to verify that the conditions of the transaction are being upheld and to ensure that the legal person will in the future comply with the relevant legislation and regulations. In the Draft Bill, external supervisory authorities are authorised to impose binding measures and will report to both the PPS as well as the legal person. The legal person will pay the costs of the supervisory authority's activities in this context. The rationale of this procedure is that by instating independent compliance monitoring, the PPS will be better equipped to ensure that the legal person will uphold the conditions of the transaction and future violations of the law can be prevented. Alternatively, the compliance programme will not be overseen by the supervisory authority, but by a compliance manager that is paid by the legal person and reports to the PPS or the relevant supervisory authority. The choice for either a compliance manager or a supervisory authority as compliance monitor is based on the circumstances of the case.

In 2021, the Draft Bill went into internet consultation. The internet consultation has since been completed. The results of the consultation are currently being incorporated into the Draft Bill. In addition, it is being examined to which incidental and structural costs the Draft Bill will lead. At the moment, no time indication for the completion of these steps can be given. After completion of these steps, the legislative process will be submitted to the Dutch Council of State for advice.

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

**Text of recommendation 7:**

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

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

The lead examiners noted in relation to natural persons that despite the increase in maximum prison sentences, the very few concluded foreign bribery cases all constituted non-trial resolutions. The lead examiners were concerned that the level of fines available would be too low to ensure that criminal penalties for natural persons are effective, proportionate and dissuasive in practice.

No action has been taken to increase the maximum fine for foreign bribery committed by natural persons. In the opinion of the Netherlands, such an increase is not necessary and not suitable within the further Dutch framework for penalties. The following response therefore focuses on the second part of the recommendation, by substantiating that, in our view, the sanctions that can be and are imposed in the Netherlands for (foreign) bribery, meet the standards set out under Article 3 of the Convention. To better

understand the developments and case law, we would like to provide some background information regarding the framework (that did not change since the Phase 4 evaluation report).

Since January 2015, the penalty for both active and passive public bribery is six years and/or a fifth-category fine, the highest category for natural persons in the Dutch Criminal Code. Since the last indexation in January 2022, the highest fine category for natural persons is EUR 90,000 (the fifth fine category).

We note that there is no limit to the accumulation of fines. For each separate criminal act, the maximum fine may be imposed. These fines can cumulate without a maximum of the total sum (Article 57(s) of the Dutch Criminal Code). Examples of such accumulation of fines in practice are:

- ECLI:NL:RBAMS:2004:AO4871: a total fine of EUR 300,000 and a prison sentence of 32 months for passive bribery (multiple offences), participating in a criminal organisation and filling an incorrect tax declaration (multiple offences).
- ECLI:NL:GHSHE:2020:3260: a fine of EUR 90,000 (twice the maximum fine at the time of committing these crimes) and a prison sentence of six months for money-laundering of proceeds of bribery and forgery.

Moreover, main punishments can be combined. It is possible to simultaneously impose a prison sentence, a fine, an object confiscation order and/or an obligation to pay damages (Article 9 Dutch Criminal Code). A prison sentence (or community service) and a fine can be imposed together (Article 9(3) Dutch Criminal Code). A prison sentence and community service can also be imposed together, when the unconditional part of the prison sentence amounts to a maximum of six months (Article 9(4) Dutch Criminal Code). An object confiscation order and/or an obligation to pay damages can be imposed together with other penalties (Article 9(5) Dutch Criminal Code). Finally, for foreign bribery, as an additional punishment a person may be deprived of certain rights, including the right to fulfil a certain position within Dutch government institutions (Articles 177(4) and 178(4) Dutch Criminal Code).

In addition to penalties, measures can be imposed. Such as a value confiscation measure for the amount of the advantage which was unlawfully obtained through the offence(s) for which the suspect was convicted. Value confiscation can also be imposed for advantages from other (undetermined) offences that the suspect is likely to have committed or from which the suspect has obtained an advantage, regardless of who committed these offences (Article 36e Dutch Criminal Code). Value confiscation measures can be imposed in proceedings separate from the criminal proceedings. Under such circumstances, two separate rulings need to be considered to determine the total amount of imposed sanctions and measures.

The penalties ultimately imposed depend on all facts and circumstances of the case. This can be illustrated by recent verdicts in the *Ikszes*-investigation.[66] In this case concerning commercial (non-foreign) bribery, the District Court of The Hague sentenced nineteen natural persons and the sanctions

66 https://uitspraken.rechtspraak.nl/#zoekverfijn/zt[0][zt]=Ikszes&zt[0][fi]=AlleVelden&zt[0][ft]=Alle+velden&so=Relevance&ps[]=ps1 (Dutch).

for each person varied greatly. The imposed penalties for natural persons ranged from 30 months of imprisonment to varying periods of community service.

Until 2015, the maximum prison sentence was dependent on the lawfulness or illegality of the public official's intended consideration. If the public official acted in violation of their legal obligation under Articles 177 (old) and 363 (old) of the Dutch Criminal Code, a maximum sentence of four years imprisonment and a fine of the fifth category could be imposed. In the case of a lawful consideration under Articles 177a (old) and 362 (old) of the Dutch Criminal Code, the maximum sentence was a prison sentence of two years and a fifth category fine. In amending the law (increase of maximum prison sentence from two / four to six years), the Minister considered that a global analysis showed that in most cases at that time an unconditional prison sentence was not imposed for violations of official corruption offences. The increase was therefore (partly) motivated because "*[a] certain signal effect for all organs involved in criminal justice may therefore also be expected from this increase in sentence*."[67] According to this legislative history, links have been sought with other financial and economic offences such as forgery and fraudulent bank breach, both of which are also threatened with a prison sentence of six years and a fine of the fifth category.

By comparison, deception (scam/swindle; Article 326 Dutch Criminal Code) is punishable by a prison sentence of four years and a fine of the fifth category, embezzlement (Article 321 Dutch Criminal Code) with three years and a fine of the fifth category and qualified embezzlement (e.g. in employment) with four years and a fifth category fine. Money-laundering (Article 420bis Dutch Criminal Code) is also punishable, since January 2015, with a prison sentence of six years and a fifth category fine, as a result of the legislative amendments of 2015. For financial offences, only the maximum prison sentence for customary money-laundering is higher, namely (also since January 2015) eight years and again the maximum fifth fine category for natural persons.

Besides penalties, measures can be imposed. The maximum fine of the fifth category makes it possible to impose a value confiscation measure for the amount of the advantage which was unlawfully obtained through the offence(s) for which the suspect was convicted. This measure can also be applied to advantages from other (undetermined) offences which the suspect is likely to have committed or through which the suspect has obtained an advantage, regardless of who committed these offences (Article 36e Dutch Criminal Code). These value confiscation measures can be imposed either in the same or in separate proceedings. In the latter case, the total amount of imposed sanctions/measures, is divided over two separate judgements

In view of the foregoing, an increase in the sentence, both with regard to the fine and the maximum prison sentence, is in the opinion of the Netherlands not necessary and also not suitable within the further Dutch framework for penalties.

**If no action has been taken to implement recommendation 7, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

[67] https://zoek.officielebekendmakingen.nl/kst-33685-3.html (Dutch).

**Text of recommendation 8(a):**

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

a. to the fullest extent possible within its legal system, ensure that a broad range of MLA can be provided to Parties to the Convention that apply civil or administrative (and not criminal) liability to legal persons for foreign bribery and take necessary measures to ensure that information covered by data protection can be disclosed to the fullest extent possible [Convention Article 9.1].

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

The lead examiners mentioned the strong and effective Dutch framework for international cooperation in foreign bribery cases. They noted, however, difficulties in providing full international cooperation, especially in countries with non-criminal forms of corporate liability.

*Broad range of MLA to Parties that apply civil or administrative liability to legal persons*

In the Netherlands, a legal person can be held criminally liable for foreign bribery. We understand that the lead examiners received a report that at least two MLA-requests were refused by the Dutch authorities in foreign, corruption-related, non-criminal proceedings concerning legal persons for a supposed lack of legal basis to execute the measures requested. As we are not aware which two MLA-requests this finding concerns, we can only respond in a general sense.

In this context, we note that Article 5.1.1 of the Dutch Code of Criminal Procedure allows for mutual legal assistance to the "*thereto competent authorities of a [foreign] state*". Decisive in this respect is which authority is competent to make such a request according to the law of the requesting state. The fact that an MLA-request was made by a non-criminal authority would thus not automatically lead to refusal of such a request. However, if the MLA has no basis in a treaty or EU law, Article 5.1.1 (2) of the Dutch Code of Criminal Procedure only allows for MLA with respect to criminal proceedings or proceedings which are closely connected to such criminal proceedings. Examples of such closely connected proceedings are legal pardon proceedings (*gratie*), review of conviction proceedings and certain proceedings for damages (such as compensation for wrongful detention). In line with international treaties, the Netherlands can also provide MLA in proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the requesting state where this decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters.

Furthermore, Article 5.1.1 (2) of the Dutch Code of Criminal Procedure explicitly mentions the possibility of mutual legal assistance in the context of confiscation. The explanatory memorandum of the legislative amendment that inserted this provision, explains that for MLA in the context of confiscation, it is not relevant what legal form these proceedings take under the law of the requesting State.[68] This means that the Netherlands can provide mutual legal assistance in case of civil or administrative confiscation proceedings, including non-conviction based confiscation procedures.

[68] https://zoek.officielebekendmakingen.nl/kst-34493-3.html (Dutch).

In situations not governed by the above rules, when an MLA-request is made for foreign civil / administrative proceedings and the MLA-request would require the execution of Dutch criminal law instruments / competencies, this MLA would require a treaty-basis or basis in EU law. Under Dutch law, the Convention does not provide such a basis in itself, as it obliges countries to provide MLA to the fullest extent possible under national law. Dutch law thus imposes limitations in this respect, also due to the possibly far-reaching and impactful nature of criminal law instruments/competencies. In relation to other EU Member States Article 4, paragraph d of the European Investigation Order (Directive 2014/41/EU) can provide a basis for MLA with respect to proceedings concerning legal persons in the situations mentioned there.

If the civil or administrative MLA concerns information that already has been obtained in a criminal investigation by the Dutch PPS on its own authority, this information could be provided to the requesting foreign (civil or administrative) authority if the request meets the requirements of the Judicial and Criminal Data Act and the respective Directive.[69] Furthermore, administrative authorities can provide international assistance in administrative matters, such as mutual assistance by the TCA[70] and the Dutch Authority for the Financial Markets (*Autoriteit Financiële Markten*).[71] For evidence gathering in civil proceedings, a request can be addressed to the District Court of The Hague, based on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.[72] Depending on the requesting country, there may be other bilateral or multilateral conventions with provisions on civil procedure.

In conclusion: although the Phase 4 evaluation report mentions that the Netherlands refused to carry out two MLA-requests, the Netherlands has ensured that a broad range of MLA can be provided to Parties to the Convention to the fullest extent possible within our legal system, including to countries that apply civil or administrative (and not criminal) liability to legal persons for foreign bribery.

*Information covered by data protection*

We understand that the recommendation to take necessary measures to ensure that information covered by data protection can be disclosed to the fullest extent possible concerns outgoing MLA-requests (i.e. requests from the Netherlands to other countries). In this context, paragraph 231 of the Phase 4 evaluation report states: "*In accordance with Dutch data protection laws, responding countries could not include any identifying information in their replies to MLA requests (for example, name, photo, and address of bank account holders*)."

We note that this consideration *de facto* only applies to photos and does not pose any problems for requesting (or providing) MLA. The Netherlands distinguishes between sensitive information (i.e. race, and therefore a passport photo[73], religious beliefs, political preferences, health, sexual life or

[69] https://wetten.overheid.nl/BWBR0041090/2018-07-01 and https://wetten.overheid.nl/BWBR0014194/2020-01-01 (both in Dutch).

[70] https://www.belastingdienst.nl/bibliotheek/handboeken/html/boeken/HDU/internationale_wederzijdse_bijstand-inleidende_bepalingen.html (Dutch).

[71] Article 1:90 of the Financial Supervision Act (*Wet op het financieel toezicht*; https://wetten.overheid.nl/BWBR0020368/2022-03-03) (Dutch).

[72] https://wetten.overheid.nl/BWBV0001993/1981-06-07 (Dutch).

[73] https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2010:BK6331 (Dutch).

membership of a professional association) and non-sensitive information, i.e. general identifying information (such as name and address). The PPS will always first determine which information is required. If no sensitive information is required, the PPS will indicate in its MLA-request that it only requires non-sensitive information. This is because Article 126nf of the Dutch Code of Criminal Procedure only allows to demand sensitive information as described in Article 126nd(2) (third sentence) of the Dutch Code of Criminal Procedure if this is urgently required in the interest of an investigation into a crime as defined in Article 67(1) of the Dutch Criminal Code which constitutes a serious breach of the rule of law due to its nature or due to the connection with other crimes committed by the suspect. Therefore, such sensitive (personal) information should not be requested, if the investigation into such a crime does not require this information. If this information is not necessary, the PPS will emphasise in the MLA-request that sensitive information should be excluded from the response to its MLA-request. This thus may indeed entail an extra step for responding authorities (i.e. removing sensitive information from the information to be provided), but it is the responsibility of the responding authorities whether or not to fulfil this extra step before responding to the Netherlands.

We note that non-sensitive information (such as name and address) may still be included in the response to an MLA-request. The Netherlands can request sensitive information when this is urgently required in the interests of the investigation into a crime as defined in Article 67(1) of the Dutch Criminal Code which constitutes a serious breach of the rule of law due to its nature or due to the connection with other crimes committed by the suspect. In these circumstances, the PPS asks the investigative judge's authorisation for requesting sensitive information prior to sending the MLA-request to the foreign authorities (Articles 126nf and 126nd(2) of the Dutch Code of Criminal Procedure). In practice, requesting such approval will take approximately three days, but in urgent cases, the approval procedure can be sped up.

In addition: we would like to note that the abovementioned issue is also not a problem for providing MLA that another country requests from the Netherlands. When the MLA-request explains that sensitive information is urgently required for the investigation (into a crime that the Dutch authorities, on the basis of the information in the MLA, can classify as a crime as defined in Article 67(1) of the Dutch Criminal Code constituting a serious breach of the rule of law due to its nature or due to the connection with other crimes committed by the suspect), an investigative judge can be requested to provide the needed authorisation, after which the sensitive information can be collected and subsequently provided to the requesting country. Again, this procedure does not apply to names and address of bank account holders. Of the information that paragraph 231 of the Phase 4 evaluation report mentions, this procedure only applies to (passport) photos, because the Dutch Supreme Court has ruled that a passport photo is classified as sensitive information due to the racial information it could provide.

**If no action has been taken to implement recommendation 8(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 8(b):**

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

b. amend the Protocol on International Cooperation to reflect the role of the FIOD in international cooperation and to ensure that the opening of an investigation in the requested country does not constitute the sole ground for refusing to issue an MLA request [Convention, Article 9; 2009 Recommendation XIII.]

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

The lead examiners noted that the Protocol on International Cooperation is silent as to the role and powers of the FIOD in international cooperation. Furthermore, the lead examiners mentioned that it should be ensured that the possibility of opening an investigation in the requested country is not the sole ground for refusing to issue an MLA-request.

In a letter to the Dutch Parliament of 28 October 2021, it was announced that the Ministry of Justice and Security, in consultation with the PPS, would consider in the first quarter of 2022 whether minor adjustments to the Protocol on International Cooperation were necessary. From discussions with the International Legal Assistance Centres it seems that such adjustments are not necessary. One of the concerns of the lead examiners was that the possibility that foreign authorities will start their own criminal investigation could constitute the sole reason to refuse an MLA-request. The Netherlands confirms that this cannot be the sole reason for such refusal and there is thus no reason to change the Protocol on International Cooperation on this point. To explain this more in detail: this is not a list of grounds for refusal. The International Legal Assistance Centre and the relevant authority within the Ministry of Justice and Security do not only assess whether the intended cooperation with a foreign country is legally possible, but also whether it might be undesirable in view of possible consequences, thus considering relevant aspects. A consideration is made of the aspects mentioned in the non-exhaustive list, including the possibility of the foreign country carrying out its own investigation on the basis of the information contained in the request for legal assistance.

We note that a new version of the Protocol on International Cooperation will be adopted this year, which will include some administrative adjustments. In addition, the role of the FIOD in international cooperation will be defined.

**If no action has been taken to implement recommendation 8(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 8(c):**

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

c. take necessary measures to ensure that the database for requests for international cooperation records information on the existence and status of extradition requests, by category of crime including bribery,

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| to monitor whether any Dutch nationals not extradited for foreign bribery offences are prosecuted, as appropriate. [Convention, Articles 9 and10]. |
| **Action taken as of the date of the follow-up report to implement this recommendation:**<br>The lead examiners were, with respect to extradition, disappointed that the Netherlands was unable to provide information on extradition requests in bribery cases since Phase 3.<br><br>A new system with more features, the Dutch International Assistance System (DIAS), will be introduced. This system is expected to come into effect in October 2022. Within DIAS, it will be possible to filter by offence (including bribery) and to view the status of an extradition request. It is therefore expected that the relevant recommendation of the Working Group will be met. If an extradition request is refused, the requesting country can of course ask the competent Dutch authorities whether they will initiate legal proceedings against the person in question. |
| **If no action has been taken to implement recommendation 8(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:** |

## Recommendations regarding liability of, and engagement with, legal persons

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| **Text of recommendation 9:**<br><br>9. Regarding liability of legal persons, the Working Group recommends that the Netherlands issue guidance for companies on effective anti-bribery compliance programmes, and disseminate more targeted information for SMEs on implementing anti-bribery compliance measures to effectively prevent and detect foreign bribery [2009 Recommendation C i) and ii)]. |
| **Action taken as of the date of the follow-up report to implement this recommendation:**<br><br>The lead examiners encouraged the efforts of various Dutch authorities to engage the private sector and noted strong awareness of foreign bribery risks among large companies. However, they were concerned that guidance is lacking on what is expected of a company in terms of adequate procedures and an anti-bribery compliance program, in particular given that this could be a relevant factor when establishing liability or calculating penalties and imposing remedial measures.<br><br>The MFA is currently revising the brochure 'Fair business, without corruption' together with various partners, including the International Chamber of Commerce Netherlands, VNO-NCW, Royal Association MKB-Nederland, the Ministry of Justice and Security and the Ministry of Economic Affairs and Climate. The target group of this guidance document consists of Dutch SMEs that are or want to become internationally active. The focus is on SMEs active in countries prone to corruption. The brochure specifically addresses the importance of awareness at different levels within the company regarding the legal, financial and reputational risks of corruption, and the possibilities for implementing anti-bribery compliance measures. The revised brochure will be distributed through various newsletters/websites/social channels in August 2022. |

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| In addition, the Netherlands Enterprise Agency (*Rijksdienst voor Ondernemend Nederland*) offers information and training courses aimed at equipping its employees to support businesses with their questions about corruption. The training explains how to deal with (suspicions of) corruption as well as how to recognise and prevent corruption. In in-depth courses, participants learn to estimate the effectiveness of anti-corruption programs and to identify good practices. As a result, government employees are better suited to assist companies with questions on implementing anti-bribery compliance measures to effectively prevent and detect foreign bribery. |
| **If no action has been taken to implement recommendation 9, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:** |

## Recommendations regarding other measures affecting implementation of the Convention

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| **Text of recommendation 10:**<br><br>10.Regarding tax measures to combat foreign bribery, the Working Group recommends that the Netherlands ensure a consistent approach to tax treatment of confiscated amounts in foreign bribery cases [2009 Recommendation, VIII.i; 2009 Tax Recommendation]; |
| **Action taken as of the date of the follow-up report to implement this recommendation:**<br>The evaluation team was concerned that the enforcement approach to tax treatment of confiscation could result in inconsistencies, particularly between cases concluded by non-trial resolution and cases decided by trial and therefore recommended to ensure a consistent approach to tax treatment of confiscated amounts in foreign bribery cases.<br><br>As reported in the Phase 4 evaluation report, under Article 3.14(1)(c) of the Income Tax Act, "*costs and expenses connected with*" prosecution are not tax deductible. This includes legal fees, fines and other amounts paid to avoid prosecution. However, amounts paid to the Dutch State by way of value confiscation measures imposed by courts (or in a penalty order) are tax deductible (Article 3.14(3)(a) Income Tax Act). It thus follows from the Income Tax Act that amounts subject to value confiscation are tax deductible if and insofar as these amounts were previously taxed in the Netherlands. However, in a past non-trial resolution, it was agreed that not only the fine, but also the confiscation amount would not be charged to the taxable result (see the previous input of the Netherlands).<br><br>Also due to the recommendation of the Working Group, specific attention is now being paid to the subject of tax deductibility in non-trial resolution discussions to ensure a consistent approach. FIOD/ACC, the PPS and the TCA are in consultation with each other in this respect to ensure that all involved parties are aware of the relevant tax rules and will also communicate these rules within their own organisations. All parties are aware that it is important to involve the TCA early on in negotiations to ensure a proper and consistent approach. This will be a continuous point of attention, monitored by the 'steering and assessment team'. The Guidance on Value Confiscation (*Aanwijzing Afpakken*; **Annex C**) also states that if a transaction or other settlement includes or concerns value confiscation for an amount of more than EUR 5,000, the intention to conclude such a resolution is reported to the TCA.[74] |

[74] wetten.nl - Regeling - Aanwijzing afpakken - BWBR0038996 (overheid.nl) (Dutch).

**If no action has been taken to implement recommendation 10, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 11(a):**

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

a. take steps to promote the use of the Certificate of Conduct (VOG/GVA) by contracting institutions on both natural and legal persons to verify that tenderers have not been convicted of foreign bribery in the Netherlands [Convention, Article 3(4); 2009 Recommendation XI.i];

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

Contracting authorities must not conduct business with economic operators that have been convicted of certain types of offences. The Dutch Public Procurement Act 2012 contains a list of exclusion grounds in line with the European Public Procurement Directives (e.g., 2014/24/EU). A contracting authority can apply this list to ensure that convicted economic operators are excluded from participating in a public procurement procedure.

There are two types of exclusion grounds, namely, mandatory and voluntary exclusion grounds.

- Mandatory exclusion grounds: fraud, money laundering, terrorist offences, child labour, participation in a criminal organisation and **bribery**.
- Voluntary exclusion grounds: bankruptcy or subject of insolvency, grave professional misconduct, conflict of interest, among others.

Contracting authorities may apply the voluntary exclusion grounds in their public procurement procedure. If a contracting authority decides to do so, this must be stated in the tender documents. The mandatory exclusion grounds must be applied by the contracting authorities in each public procurement procedure. A final sentence by a judge is required for most mandatory exclusion grounds. In practice, the voluntary exclusion grounds are nearly always applied along with the mandatory exclusion grounds by contracting authorities in the Netherlands. This means that all grounds (mandatory and voluntary) will lead to an economic operator being excluded from a public procurement procedure.

In order for a contracting authority to (fairly) easily check whether an economic operator has been (criminally) convicted or whether any other exclusion grounds apply, a contracting authority may request a certificate of conduct for public procurement (*Gedragsverklaring Aanbesteden*; GVA) from economic operators. Although the Dutch Public Procurement Act 2012 does not oblige contracting authorities to require a GVA, it is standard practice in the Netherlands that contracting authorities ask economic operators to hand over a GVA. Contracting authorities are informed and kept up to

date about the latest developments via the website of the Dutch Public Procurement Expertise Centre[75] (known as PIANOo).

Justis, the screening authority of the Ministry of Justice and Security, is responsible for the assessment of the database of convictions and for granting the GVAs in the Netherlands. Justis consults the Ministry of Justice and Security's database of convictions and checks whether any relevant decisions have been taken by the Dutch Authority for Consumers and Markets (*Autoriteit Consument & Markt*; ACM) and the European Commission. Furthermore, the Ministry's database not only includes Dutch records, but also registers of convictions in other EU member states as well as from countries with which the Netherlands has a treaty. Please find below a table with the total amount of GVA's applied for, issued and denied over the past five years, which indicates that it is indeed standard practice to request a GVA. We note that a GVA is valid for two years.

| Year | Number of GVA's applied for |
|---|---|
| 2017 | 9,486 |
| 2018 | 8,964 |
| 2019 | 10,134 |
| 2020 | 9,382 |
| 2021 | 12,685 |
| Total | 50,651 |

| Year | Number of GVA's issued |
|---|---|
| 2017 | 9,403 |
| 2018 | 8,837 |
| 2019 | 10,030 |
| 2020 | 11,195 |
| 2021 | 12,811 |
| Year | Number of GVA's denied |
| 2017 | 0 |
| 2018 | 0 |
| 2019 | 6 |
| 2020 | 9 |
| 2021 | 12 |

**If no action has been taken to implement recommendation 11(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 11(b):**

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

b. conduct training and awareness raising activities with procurement agencies on the debarment framework with respect to foreign bribery convictions, including in relation to the database of

[75] Please see https://www.pianoo.nl/nl/themas/integriteit/bedrijven/uitsluitingsgronden-integriteit and https://www.pianoo.nl/nl/regelgeving/gedragsverklaring-aanbesteden (both in Dutch).

convictions and Certificates of Conduct (VOG/GVA). [Convention, Article 3(4); 2009 Recommendation XI.i]

**Action taken as of the date of the follow-up report to implement this recommendation:**
The Working Group also recommends to raise further awareness of the exclusion grounds in relation to foreign bribery convictions among contracting authorities. An integrity session, with around 60 participants, was held in 2021 at the annual PIANOo-congress for contracting authorities/public buyers, during which attention was paid to exclusion grounds and the GVA.[76] In addition, PIANOo pays extensive attention to these subjects in its educational activities. An example of such an educational activity is the public procurement law course, taught by PIANOo-jurists/professors twice per year.[77] The framework for exclusion grounds and the GVA are an extensive part of the course. On average, 25 jurists and 25 public buyers participate in this course. Another example are two courses which are thought twice a year (one for jurists, one for public buyers) and lectures taught by PIANOo-jurists/professors at the *Vrije Universiteit Amsterdam*, of which the lecture is specifically on exclusion grounds.[78] In addition, PIANOo is intending to organise a series of smaller courses throughout each year for public buyers; this intention still needs to be further developed.

**If no action has been taken to implement recommendation 11(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 12:**

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

**Action taken as of the date of the follow-up report to implement this recommendation:**
The lead examiners welcomed the policies developed by Atradius Dutch State Business (Atradius DSB) and were encouraged by Atradius DSB's actions to temporarily suspend credit to a Dutch company and conduct enhanced due diligence following its debarment by the World Bank. However, the lead examiners remained concerned about a lack of proactivity where it related to companies sanctioned for foreign bribery in the Netherlands through non-trial resolutions.

The evaluation of Atradius DSB's policies is in its last phase and will likely be sent to the Dutch Parliament at the end of 2022, complemented with the government's reaction to the results of the evaluation. In anticipation of this, a task force has been set up. The task force consists of public officials from the Ministry of Finance and employees of Atradius DSB. The task force will deal with the most urgent recommendations of the evaluation. A prioritisation is currently being made, with the focus, among other things, on clearer recording of the due diligence procedures. As a result of the Working

[76] PIANOo congres 2021 | PIANOo - Expertisecentrum Aanbesteden (Dutch).

[77] Leergang Aanbestedingsrecht | PIANOo - Expertisecentrum Aanbesteden (Dutch).

[78] Leergang Verdieping aanbestedingsrecht voor inkopers VU Law Academy - Vrije Universiteit Amsterdam and Leergang Aanbestedingsrecht voor juristen VU Law Academy - Vrije Universiteit Amsterdam (both in Dutch).

Group's recommendations, Atradius DSB has hired two extra employees (a compliance manager and compliance officer) to enhance its compliance department. Additionally, there will be extra trainings aimed at identifying red flags for corruption and bribery. The first training (general introduction to compliance) took place on 4 July 2022. The training covered the usefulness and necessity of compliance, the scope of compliance (in addition to anti-bribery, sanctions, fraud, money laundering et cetera). Furthermore, attention was paid to the role of the compliance officer, the introduction of the three lines of defence model (see below) and the steps that will be taken to achieve this. Regarding these steps, it will be added to current processes, when compliance is mandatory. Starting by giving advice to high-risk cases on whether a risk, as seen from the compliance-perspective, is acceptable or not and how that risk can be mitigated. Trainings in the future will address beneficial owner-identification, integrity risk analysis and sanction risks.

Finally, in 2022, the three lines of defence model will be implemented. With this model, (integrity) risks are further controlled by applying a separation of duties and creating different lines which each have their own responsibilities. The first line (underwriting) is responsible for testing and judging (integrity) risks. The second line monitors that the first line actually and adequately manages (integrity) risks. The second line also provides advice and training to the first line. The third line performs audits on the first and second lines to ensure that procedures are being followed.

**If no action has been taken to implement recommendation 12, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Text of recommendation 13:**

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

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

The lead examiners commended the Netherlands for implementing a robust and comprehensive framework to prevent, detect and sanction bribery of foreign public officials in the context of Official Development Assistance (ODA) projects. The lead examiners considered, however, that MFA officials overseeing ODA projects need further training on the indicators and reporting requirements for suspected foreign bribery and, more generally, corruption risks at large.

The detection of foreign bribery in ODA projects falls within the MFA's broader, existing risk management procedures, which – broadly – consist of (i) an MFA-performed risk assessment through the so-called "risk-paragraph" prior to the approval of any ODA projects, and (ii) structural monitoring through, amongst other things, field visits, audits and narrative- and financial reports. Within the risk paragraph, an assessment has to be made of the relevant contextual-, programme-, and organisational risks based on the chance of occurrence (i.e., "low", "medium" or "high"), the potential impact on the outputs of the activity (i.e., "low", "medium" or "high"), mitigating measures to reduce the chance and/or impact of a risk and the acceptance of any residual risk. Within the risk

paragraph, MFA personnel is obliged to assess risks related to: monitoring and evaluation, financial and administrative management, quantity and quality of capacity available for the activity, and fraud and corruption on the contextual, programme and organisational level.

Additionally, organisations are contractually obliged (e.g. condition 6 of the contribution agreement between the MFA and the contracting partner) to report any suspicion of fraud and/or corruption to the MFA. These reports are handled by the MFA's Fraud and Corruption Unit, which deals with the registration, follow-up and closing of any potential fraud and/or corruption case. Moreover, it is responsible for reporting substantiated cases to the Dutch Parliament (structurally through the MFA's annual report and ad hoc for cases in which the MFA's financial damages are higher than EUR 100,000). Finally, the MFA's Fraud and Corruption Unit is responsible for prevention through, amongst other things, analyses, lessons learned and improvement of the just-mentioned risk assessment.

In November 2021, the MFA completed a two-year project aimed at improving its risk assessment, by assigning risk managers at all departments and mission dealing with ODA projects. The risk managers support the departments and missions with composing their risk assessment and, moreover, help to build institutional expertise. This is also done through a recently launched Community of Practice, which is aimed at sharing experiences and lessons learned between relevant MFA stakeholders (including the risk managers) on risk analysis and risk management. The Netherlands Government Audit Service (*Auditdienst Rijk*; ADR) recently completed its 2021 audit of the MFA, in which audit the aforementioned risk assessment was a focus. With regard to fraud and the inappropriate use of assets, the ADR concluded that the MFA acts proactively in dealing with allegations of misuse, and it considers its related policy of an adequate standard.

**If no action has been taken to implement recommendation 13, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

## PART II: ISSUES FOR FOLLOW-UP BY THE WORKING GROUP

*Regarding Part II and as per the procedures agreed by the Working Group in December 2019, countries are invited to provide information with regard to any follow-up issue identified below where there have been relevant developments since the Phase 4 report. Please also note that the Secretariat and the lead examiners may also identify follow-up issues for which it specifically requires information from the evaluated country.*

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

**Text of issue for follow-up 14(a):**

a. The interpretation of the offence in practice to ensure that:

i. The offer of a bribe is criminalised and enforced [Convention Article 1];

ii. That the definition of 'foreign public official' is autonomous, sufficiently broad to cover employees of public enterprises and consistent with Article 1 of the Anti-Bribery Convention [Convention Article 1 and Commentary 3].

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

*i. The offer of a bribe is criminalised and enforced*
Both passive and active bribery are criminalised in the Netherlands. Regarding active bribery, in addition to the answer given by the Netherlands in August 2020 on question SQ 8.a.7 (payments via intermediaries) of the questionnaire, the Netherlands now states the following: with the introduction of the Dutch Criminal Code (the drafts of 1842 and 1847 to be precise), the legislator stated: "*It is possible to remain silent [in the Dutch Criminal Code] about gifts by 'interfering persons' here and elsewhere. Under art (…) [47] to commit and to have committed are completely equivalent*." The fact that the handing over of a gift is left to a third party therefore does not affect the criminality of the action.[79] The explanatory memorandum to the Corruption Legislation Review Act (1998/1999) emphasises that making a gift or promise or providing or offering a service must be understood in the broadest sense. This also applies when this takes place indirectly, for example through an intermediary: "*For example, it is conceivable that an agent takes receipt of the payment or that the benefit is deposited into a specific account that is accessible to the official concerned, in the sense that he can dispose of the balance*." [80] Thus, the provision for criminal bribery is sufficiently broad.

For a foreign bribery case that has been (partially) concluded since the Phase 4 evaluation, we refer to the *Nelson*-case.[81] For examples of non-foreign bribery cases that have been concluded since the Phase 4 evaluation please refer to the *Ikszes*-case[82], *Sputnik*-case[83] and *Pioneer*-case.[84] In all these cases, at least one suspect was prosecuted not only for the bribe, but also for the offer of a bribe. For example in the *Pioneer*-case, the court ruled that the agreement to divide provisions, constituted a promise within the meaning of Article 328ter of the Dutch Criminal Code.

*ii. That the definition of 'foreign public official' is autonomous, sufficiently broad to cover employees of public enterprises and consistent with Article 1 of the Convention*
As previously submitted, the relevant Dutch laws use the term '*ambtenaar'* when it comes to the bribery of (foreign) public officials. We believe that the definition of foreign *ambtenaar* (foreign

[79] T.R. van Roomen and E. Sikkema, *Corruptiedelicten* p. 35 and 60-61 (Dutch).

[80] *Kamerstukken II* 1998/99, 26 469 (*Herziening corruptie-wetgeving*), nr. 3 (Explanatory Memorandum), p. 12 (Dutch)..

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

[82] For (ten of) the court rulings of the *Ikszes*-case please refer to the ruling of the District Court of The Hague of 24 December 2021: https://uitspraken.rechtspraak.nl/#zoekverfijn/zt[0][zt]=Ikszes&zt[0][fi]=AlleVelden&zt[0][ft]=Alle+velden&so=Relevance&ps[]=ps1 (Dutch).

[83] District Court of Rotterdam 24 November 2021: https://uitspraken.rechtspraak.nl/#zoekverfijn/zt[0][zt]=sputnik&zt[0][fi]=AlleVelden&zt[0][ft]=Alle+velden&so=Relevance&ps[]=ps1 (Dutch).

[84] District Court of Amsterdam 13 December 2021: https://uitspraken.rechtspraak.nl/#zoekverfijn/zt[0][zt]=Pioneer&zt[0][fi]=AlleVelden&zt[0][ft]=Alle+velden&zt[1][zt]=omkoping&zt[1][fi]=AlleVelden&zt[1][ft]=Alle+velden&so=Relevance&ps[]=ps1&rg[]=r3 (Dutch).

public official) is sufficiently broad to cover employees of public enterprises and is consistent with Article 1 of the Convention.

Public official– interpretation in Dutch criminal law (Articles 177 and 363 of the Dutch Criminal Code regarding active and passive domestic public bribery) – case law

The definition of 'public official' is not limited to persons mentioned in the Civil Servant Act 2017 (*Ambtenarenwet 2017*). 'Public official' as used in the Dutch Criminal Code has an autonomous and broad meaning. This already follows from Article 84 of the Dutch Criminal Code, in which the scope of the definition of public official is broadened to amongst others members of general representative bodies (at national, regional and local level), judges and personnel of the armed forces. So this means members of general representative bodies such as the Dutch Parliament, provincial and municipal councils, ministers, state secretaries, King's commissioners, deputies, mayors and aldermen, judges as well as members of representative bodies, such as water authorities, are all public officials within the meaning of the Dutch Criminal Code.

Moreover, as has been pointed out in previous evaluations, the term 'public official' is interpreted independently by the criminal courts in the Netherlands. In criminal case law, the term public official is interpreted more broadly by the Dutch (supreme) court than the term public official under civil service law. In criminal case law, the term public official is defined in such a way that "*it also includes a person who has been appointed under the supervision and responsibility of the authorities to a position which is clearly of a public character for the purpose of performing any part of the task of the State or its organs.*" (Supreme Court 30 May 1995, ECLI:NL:HR:2009:BJ6793;[85] regarding a probation officer employed by a privatised company). The legal form of a company is (therefore) not decisive in this assessment. The director of a theatre, although operated in the form of an public limited company (*naamloze vennootschap*; NV), qualified as a public official because the municipality was the sole shareholder of the NV and its director was appointed under the supervision and responsibility of the municipality (ECLI:NL:GHAMS:2015:2753).[86] Another example is the case of an employee of a private security company who was hired by a university and therefore qualified as a public official (Supreme Court 18 May 2004 ECLI:NL:HR:2004:AO2599).[87]

[85] https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2009:BJ6793 (Dutch).

[86] https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2015:2753 (Dutch).

[87] https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2004:AO2599 (Dutch).

In summary in criminal case law, it is not the formal legal construction, but the social reality that is decisive when assessing whether someone falls under the term public official.[88] In practice this approach has resulted in a very broad concept of public official.[89]

Specifically with regard to the questions if the definition covers "*employees of public enterprises*", please refer to the answer to Q 8.a.4. of the questionnaire of August 2020 (*"What is the scope of "public service" under Article 178a? Does it cover officials of public enterprises, regardless of their legal forms; or officials of public enterprises where there is direct or indirect control of the enterprise?"*). The therein cited case law on the concept of public official makes it clear that the legal form of an enterprise is not decisive when answering the question of whether some qualifies as a public official. Not only persons who fall under the Civil Servants Act 2017; e.g. an employee of a municipal transport company (Supreme Court 26 June 1984, *NJ* 1984, 790), but also persons who work for a privatised transport company (Supreme Court 1 December 1992, *NJ* 1993, 354) qualify as a public official. In other words, Articles 177 jo 178a and 363 jo 364a of the Dutch Criminal Code cover officials of public enterprises regardless of their legal forms and officials of public enterprises where there is direct or indirect government control, both central and local, of the enterprise. Moreover, it is assumed in the Dutch literature that the concept of foreign public official is aligned with the definition of the Convention in this regard.[90] This question can therefore be answered in the affirmative.

*"Would "Public service" include any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement? Would evidence of the nature of the employment contract or procurement project be required to prove that the individual was 'working in the public service.' …."*

As explained above, the court will assess whether someone is acting on behalf of the government on the basis of the facts and circumstances of a specific case. An employment contract will certainly not always be necessary to conclude that someone qualifies as a public official. We refer to the judgment of the District Court of Amsterdam in the *Takilant*-case.[91] This case concerned an off-shore company through which bribes were channelled in the *Vimpelcom*- and *Teliasonera*-cases. The court considered the President of Uzbekistan's daughter to be the beneficial owner of Takilant and a public official, noting her actual "*control over government bodies in Uzbekistan, including those working in the telecom market*". Takilant has been convicted of co-perpetrating in accepting a gift as a public official (multiple accounts). The evaluation team noted that this case was tried in absentia for the passive bribery offence and that it concerns domestic bribery. The ruling however makes clear in our

[88] See Van 't Hart's note on Supreme Court 30 May 1995, *NJ* 1995, 620 (probation officer employed by a privatised company) (translated from Dutch): "*As a rule of thumb, it can be assumed that criminal law often looks at social reality and social functioning through legal constructions and restrictions in other areas of law, and then independently broadly determines the concept content*." On the term 'official', see H.A. Demeersseman, *The autonomy of substantive criminal* law, Arnhem 1985, p. 479–514; Noyon/Langemeijer/Remmelink for art. 84; P.H.S. van Rest, *The official order as a ground for exclusion from punishment*, Arnhem 1991, p. 65–72; L.T. Wemes in Text & Commentary Criminal Law, p. 363–364."

[89] T.R. van Roomen en E. Sikkema, *Corruptiedelicten*, p. 48 (translated; Dutch): "*Our conclusion is that the autonomous and functional approach in the judiciary deserves approval. This does not alter the fact that in practice this approach has resulted in a very broad definition of public officials."*

[90] J.F.L. Roording, Corruptie in het Nederlandse strafrecht, *DD* 2002, p. 118-119 (Dutch).

[91] ECLI:NL:RBAMS:2016:4520: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2016:4520 (Dutch).

opinion that the court assesses the factual situation and in this case concluded that the president's daughter qualified as a public official on the basis of her actual power.

**Text of issue for follow-up 14(b):**

b. Whether the increase in resources increases the FIU Netherlands' ability to process UTRs and provide feedback on their overall quality to the private sector, as it relates to the detection of foreign bribery [Convention Article 7; 2009 Recommendation III.i];

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

Due to additional incidental and structural resources in 2018 and 2019 and resources in the context of countering money laundering, organised crime and cybercrime, FIU-NL has been expanded with nineteen FTE. In the context of the implementation of the amendment to the fourth anti-money laundering directive, it was decided at the end of 2020 to allocate additional structural resources to FIU-NL. The aim of this allocation was to further expand the number of FTE with approximately six FTE, in addition to the aforementioned nineteen FTE. As a result, the capacity of FIU-NL has increased from 63 FTE in 2019 to 82 FTE at the beginning of 2022. In the course of 2022, the total FTE will increase further to 90 FTE. Additionally in September 2021, the previous government made extra resources available for a broad approach to organised crime. Funds have also been made available for FIU-NL from this structural investment, for example for capacity expansion and technological investments by FIU-NL in the coming years.

The increase in resources has enabled FIU-NL to, amongst other issues:

- Revise the already developed corruption-query based on acquired knowledge and experience. The first impression is that the query has now become more effective, resulting in fewer false positives and more relevant hits. This has enabled the analysts to work up corruption-files more effectively.
- Invest in technical innovation and support. The query built by the strategic analyst serves as input for the development of a phenomenon monitor in the field of corruption.
- To continue the intensive cooperation with FIOD/ACC.
- Provide more feedback. FIU-NL has shared knowledge documents and case studies with obliged entities and various public partners. FIU-NL has contributed to the FECademy 'Together against Corruption', a public-private initiative. To be specific, we refer to the case of 'Unexplained Commission Funds', which was shared and brought to the attention via the website of FIU-NL and social media on 30 June 2021. In addition, we refer to the annual reports of the FEC 2020 and 2021 in which the FEC PPP project combating corruption is mentioned. FIU-NL has contributed to the Egmont Project *'FIU's role in the fight against money laundering of corruption proceeds*

*within the context of COVID 19'*. The report was published in February 2022 and promoted via the website.[92]

- Attention is also drawn to corruption in the newsletters that FIU-NL has issued about COVID-19 and more recent in the newsletters with regard to Ukraine. The final report of the FEC-PPS working group was delivered in June 2021 (FIU-NL was part of this) and the aforementioned FECademy was organised afterwards. A webinar was organised in the Caribbean (please see **Annex D**). Finally, the subject of corruption is always mentioned in the annual overview of FIU-NL.

**Text of issue for follow-up 14(c):**

c. The implementation of the Source Protection in Criminal Matters Act, as it relates to ensuring protection of sources who report foreign bribery [2009 Recommendation IX (iii)];

The lead examiners welcomed the strong legal framework in place to protect freedom of the press in the Netherlands, along with regular monitoring of the media by law enforcement authorities as a source of detection. The lead examiners, however, raised concerns about reports of a journalist being detained for not identifying their sources, in a case unrelated to foreign bribery.

The Source Protection in Criminal Matters Act has not been amended since the last evaluation. To our knowledge/as far as available data show, there have been no new cases in 2020, 2021 or 2022 in which a journalist has been detained for not revealing their sources. On the contrary, in a case that occurred shortly after the case mentioned in the Phase 4 evaluation report, the PPS opposed against an investigating judge who wanted to detain a journalist, and the court of appeal accordingly decided not to impose detention.[93]

The relevant Directive of the PPS (*Aanwijzing strafvorderlijk optreden tegen journalisten*) further strengthens the legal framework for freedom of the press. The Directive puts first as a principle that it is not allowed to use coercive measures against a journalist to have them unveil the identity of a source or if it is foreseeable that source protection will be at stake. The amendment of the Directive on 1 June 2020 provided that the same guarantees are also applied, as much as possible, to journalists who work abroad and that journalists have to be informed if, for example, a tapped conversation between the suspect and that journalist is used in a criminal casefile.[94]

More in general, the Netherlands aims to protect journalists against threats. In 2019, the project *PersVeilig* (PressSafe) was created by the Dutch Society for Journalists, the Society of Editors-in-Chief, the Police and the PPS. PersVeilig includes several preventative measures, such as trainings,

[92] New Publication: FIU Tools and Practices for Investigating Laundering of the Proceeds of Corruption (Public Summary) | FIU-Nederland.

[93] https://nos.nl/artikel/2308568-gerechtshof-den-haag-ziet-af-van-gijzeling-ad-journaliste (Dutch).

[94] https://www.om.nl/actueel/nieuws/2020/05/25/aanwijzing-strafvorderlijk-optreden-tegen-journalisten, https://wetten.overheid.nl/BWBR0043567/2020-06-01 (both in Dutch).

information sharing, an online reporting system and legal assistance. The Protocol PersVeilig (as part of the overall project) states that cases involving aggression and violence against journalists are registered in a consistent manner, victims are informed about their reports to the police and journalists have a preferential position in the reporting process. Every police unit has a regional contact person for cases related to the safety of journalists. The PPS will demand a +200% higher sentence in case of aggression and violence against journalists and such cases have high priority. The WODC has been commissioned to research whether violence against journalists can be punished by community service. [95]

**Text of issue for follow-up 14(d):**

d. The application of the foreign bribery offence in practice to ensure it is interpreted in conformity with the Convention [Articles 1 and 4 (a)];

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

In consultation with the OECD secretariat, it was decided that this follow-up issue seems to be a duplication and that therefore no response is required.

**Text of issue for follow-up 14(e):**

e. The adequacy of human and financial resources to investigate and prosecute foreign bribery [Convention Article 5; 2009 Anti-Bribery Recommendation Annex I.D];

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

There is a staff shortage across the whole PPS. This capacity shortage also indirectly puts pressure on the capacity to conduct corruption investigations, just as with investigations into other types of crime. For corruption cases, the PPS has an Anti-Corruption Team which is staffed with high quality, motivated, experienced and partly dedicated public prosecutors, policy officers and legal assistants (*parketsecretarissen*). At the moment, the PPS can still deal with the investigations submitted by the FIOD. However if the investigative capacity that the FIOD has reserved for corruption would be fully utilised, the current staffing at the PPS would not be sufficient.

**Text of issue for follow-up 14(f):**

f. The use of 'self-investigations' in foreign bribery cases [Convention Article 5; 2009 Anti-Bribery Recommendation Annex I.D];

[95] *Kamerstukken II* 2021-2022, 3630684 and *Kamerstukken II* 2021-2022, 3909423 (Dutch).

The Ministry of Justice and Security decided to commission independent research into the use of self-investigation and self-reporting by companies. On behalf of the WODC, the *Vrije Universiteit Amsterdam* is currently conducting this research, focused on self-reporting and self-investigation by companies in the event of financial and economic crime. This research is divided into several parts.

For this recommendation, the part on how companies suspected of financial and economic crime regularly engage their own in-house lawyers to investigate the state of affairs within the company is relevant. The reliability and usefulness of the results of such self-examination for investigative authorities is the subject of the first part of this study. Advantages and disadvantages of self-examination are inventoried.

The analysis of the topic of self-investigation should also include the role of forensic accountants who are hired by the suspected companies or by their lawyers for self-examination. In addition to the perceived advantages and disadvantages of self-examination by suspected companies, it is also necessary to ask about conditions that (the design of) any regulation of self-investigation should meet. A reflection is also requested on the results of the conclusions of the first sub-study.

The research is expected to be completed this summer. The investigation will be used as a basis for further discussions with relevant stakeholders, among other things, about the possible drafting of guidelines for self-investigation (for financial-economic crimes, including foreign bribery).

The original timeframe for completion was 2021, but that has been revised to fall 2022 (estimate). The WODC research will be made public upon completion and it will then be determined if and what follow-up is required. At this time we cannot comment on the possible measures which will follow.

For the PPS and FIOD, the following principles already apply. The PPS and FIOD decide whether and how information shared by companies from internal investigations is used in the context of criminal investigations. It is up to the PPS and FIOD to decide upon how this information is dealt with. The FIOD and the PPS have their own investigative responsibility. This means that they do not solely use the information that is provided by companies. An independent investigation is performed, for example by hearing witnesses and suspects. Information provided in the course of the investigation is verified, for example by checking the underlying documentation.

Please refer to the statement of facts in the *Nelson*-case for an example of a combination of self-investigation and cooperation with the investigation performed by the FIOD.[96] The statement of facts in the sub-casefile *Gali* states: "*5.2.1 Cooperation with the investigation[.] After being informed of the criminal investigation by the NPPS and the FIOD, Mammoet Salvage cooperated fully with this investigation. For example, the company supplied all documents requested by the FIOD. An extensive investigation was also carried out on behalf of SHV, the relevant findings of which were shared with the NPPS. Finally, (former) employees were made available for issuing a statement to the FIOD."*

Please also see the input for recommendation 3 (regarding self-reporting).

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

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| **Text of issue for follow-up 14(g):**<br><br>g. The ability of the Minister of Justice and Security to request information from the OM in specific cases, and the exercise of these powers in foreign bribery cases [Convention Article 5]; |
| Article 129 of the Law on the Judicial Organisation states that the Minister of Justice and Security receives the information that they require. This is a general principle which thus applies to all cases, including foreign bribery cases. The rationale of this provision lies in the circumstance that the PPS does not have separate political responsibility and thus cannot be heard or questioned by the Dutch Parliament. As the Minister of Justice and Security is politically responsible for the PPS, they need to answer parliamentary questions about the functioning of the PPS. Due to this, the Minister needs to be provided with the information that they require (either because they request such information, e.g. after receiving a parliamentary question or because the PPS finds it necessary to pro-actively inform the Minister). We note that information provided to the Minister cannot always be shared with Parliament, due to its confidential and/or sensitive nature (e.g. the Minister cannot inform Parliament about ongoing, non-public criminal investigations, in the interest of such investigations).<br><br>The public prosecutor has a special position under Dutch criminal law. Under Article 167 of the Dutch Criminal Code they are entrusted with the decision to pursue prosecution or waive prosecution if they find this contrary to public interest. It also follows that the public prosecutor decides independently which resolution in a case is suitable and required. Nevertheless, the Minister of Justice and Security bears full political responsibility for the PPS, as stated above, and may in theory give instructions regarding the general policy pursued by the PPS or in any specific proceeding (Article 127 of the Law on Judicial Organisation). This is an extraordinary competence that has not been used since at least 1999, when the current Act came into force. |

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| **Text of issue for follow-up 14(h):**<br><br>h. The implementation of the UBO register in the Netherlands, including in the BES Islands, to ensure that it records adequate, accurate and current beneficial ownership information on companies incorporated in their jurisdictions, and provides sufficient access by law enforcement authorities in foreign bribery cases [Convention Articles 5 and 7 and Annex I D]; |
| In accordance with the (amended) fourth EU anti-money laundering directive, the Netherlands has an Ultimate Beneficial Owner (UBO)-register since 27 September 2020, with the transitional period ending in March 2022. Its aim is to prevent abuse of the financial systems for e.g. laundering money and financing terrorism. The register has a public part and a part that is only accessible to competent authorities. Up to and including February 2022, 465,267 extracts were requested from the register, excluding requests made by competent authorities. Currently, the level of registrations is circa 60% of the companies required to register. The Ministry of Finance, the Ministry of Justice and Security and the Ministry of Economic Affairs and Climate are in contact with branch organisations, |

institutions with a duty to report (banks, other financial institutions and selected natural persons, legal persons or companies acting in the context of their professional activities) and service providers. Legislation is underway for trusts.

As of 27 September 2020, upon registration in the Trade Register, new legal entities must register their UBOs immediately. As of 28 March 2022, existing legal entities are banned from entering into new business relationships with AML-regulated institutions if they have not registered their UBOs. However, the Dutch Ministry of Finance has stated that, while registration is being completed, AML-regulated institutions (such as banks, investment institutions, law firms, auditors and tax advisers) may follow a special procedure until 1 September 2022 when starting a new business relationship with legal entities if they provide: confirmation of a request for UBO-registration and all publicly available UBO-information as provided to the register. The legal entity will be notified when its UBO-registration has been completed and the legal entity must inform the relevant AML-regulated institutions.

AML-regulated institutions must report to the UBO-register any discrepancy between information about a client's UBO that they have on file and the information set out in the UBO-register extract. This means that reporting can only take place if a client's UBO-registration has been completed. The reporting obligation does not apply if the AML-regulated institution has reported an unusual transaction to FIU-NL.

By not registering, companies are in violation of the Trade Register Act (*Handelsregisterwet*), which constitutes an economic offence. Several penalties are possible, including an administrative fine, a penalty payment or, in exceptional cases, a prison sentence. The Bureau Economic Enforcement is the relevant administrative authority. In exceptional cases, the Bureau can send a case to the PPS. Before a penalty is ordered, a company will receive a final warning in writing with a deadline to still register. The Bureau has 20 FTE available for a period of five/six years and six FTE on a structural basis. In enforcement, the focus will be on legal entities with the highest money laundering and financing of terrorism risks. Other entities will be supervised on a risk-based basis. Later on, they will be supervised by sampling their entries in the register and they will of course be encouraged to register.

As the Directive does not apply to the BES-islands, they do not have a BES-register. Notwithstanding this, Dutch investigative authorities have access to UBO-information from the BES-islands. This is because institutions that have a duty to report need to identify the UBOs of legal entities on the BES-islands and need to take reasonable measures to ensure that such identities can be verified. Institutions can either claim this information under criminal law or FIU-NL can request this information.

**Text of issue for follow-up 14(i):**

i. That natural persons involved in foreign bribery schemes are held liable [Convention Arts. 3 and 5, 2009 Recommendation Annex I.D];

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

Natural persons are being held liable for foreign bribery. For an example of natural persons held liable in a (non-foreign) bribery case, please refer to the judgments in the *Ikszes*-case (mentioned under recommendation 7),[97] the *Sputnik*-case[98] and the *Pioneer*-case.[99]

As of 1 January 2022, the fifth category fine was set to a maximum of EUR 90,000 (and as mentioned can be applied cumulatively in cases involving multiple offences). For completeness' sake, we note (again) that the PPS can impose a community service order of 180 hours by means of a penalty order and a community service order of 120 hours by means of a transaction. A combination of community service and a fine can not only be imposed by the court, but also by the PPS in the context of a non-trial resolution.

**Text of issue for follow-up 14(j):**

j. Relevant case law developments to ensure that:

i. Parent companies can be held liable for the acts of foreign subsidiaries;

ii. Jurisdiction can be exercised over mailbox companies for the purposes of prosecuting foreign bribery [Article 4(1) of the Convention];

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

*i. Parent companies can be held liable for the acts of foreign subsidiaries;*

Parent companies can be held liable for the acts of foreign subsidiaries. We refer to the input for the Phase 4 evaluation. There are no relevant updates.

*ii. Jurisdiction can be exercised over mailbox companies for the purposes of prosecuting foreign bribery*
There are no new foreign bribery cases to report in which jurisdiction over mailbox companies is an issue. Therefore, please refer to our previous input during the Phase 4 evaluation. We do not consider exercising jurisdiction over mailbox companies as a problem.

For more information on measures of the Dutch government to mitigate the risks of mailbox companies (conduit companies), please refer to

97 https://uitspraken.rechtspraak.nl/#zoekverfijn/zt[0][zt]=Ikszes&zt[0][fi]=AlleVelden&zt[0][ft]=Alle+velden&so=Relevance&ps[]=ps1 (Dutch).

98 District Court of Rotterdam 24 November 2021 https://uitspraken.rechtspraak.nl/#zoekverfijn/zt[0][zt]=sputnik&zt[0][fi]=AlleVelden&zt[0][ft]=Alle+velden&so=Relevance&ps[]=ps1 (Dutch).

99 District Court of Amsterdam 13 December 2021 https://uitspraken.rechtspraak.nl/#zoekverfijn/zt[0][zt]=Pioneer&zt[0][fi]=AlleVelden&zt[0][ft]=Alle+velden&zt[1][zt]=omkoping&zt[1][fi]=AlleVelden&zt[1][ft]=Alle+velden&so=Relevance&ps[]=ps1&rg[]=r3 (Dutch).

- the Report of the Committee on Conduit Companies, that investigated activities of conduit companies in the Netherlands at the request of the House of Representatives;[100] and
- p. 2-6 of annex 2 "Business and tax evasion" of the agenda for fiscal policy and operational priorities (**Annex E**).

In addition, it is relevant that the Netherlands strictly regulated trust and company service providers by requiring licenses, fit and proper testing of directors, imposing very strict customer due diligence measures and prohibiting certain activities, for example the combination of trust services and tax advice. Also, measures to enhance transparency of legal entities, such as the UBO-registry, help to investigate possible cases of international corruption that involve Dutch conduit companies.

**Text of issue for follow-up 14(k):**

k. The application of the dual criminality requirement for exercising extraterritorial jurisdiction, to ensure that it does not provide an impediment in foreign bribery cases; [Convention Article 1, 2009 Recommendation, III (ii), V, VI and Annex I A]

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

As recognised in the Phase 4 evaluation report, the Netherlands' framework for exercising jurisdiction in foreign bribery cases is consistent with the standards of the Convention. Also in practice, this requirement does not form an impediment in foreign bribery cases. For an example of a foreign bribery case that was (partly) concluded after the Phase 4 evaluation, please again refer to the *Nelson*-case.[101]

On 1 December 2020, the Articles 420bis - 420ter of the Dutch Criminal Code (Money Laundering) were included in the International Obligations Extraterritorial Jurisdiction Decree (IVER Decree). Thus, jurisdiction for money laundering can be derived from Article 6 of the Dutch Criminal Code without the requirement of dual criminality. Article 6 of the Dutch Criminal Code and the IVER Decree concern offences committed "outside the Netherlands" and thus not crimes that are (partly) committed in or from the Netherlands. This new jurisdiction for money laundering applies to Dutch nationals or foreign nationals who have permanent residence in the Netherlands (Article 4 paragraph 7 of the IVER Decree). Although, this is not a direct change for foreign bribery cases, it applies to related offences. Together with the existing possibilities for exercising jurisdiction over foreign bribery acts, in practice the jurisdiction that can be exercised is sufficient to investigate and prosecute foreign bribery cases and related offences.

The rules are also sufficient in respect of incoming and outgoing MLA-requests. MLA-requests are registered in the Luris-system. When registering, the registrant can indicate the reason that a matter has ended. For the period 2015-2020, 96 MLA-requests have been identified that were denied due to

[100] The road to acceptable conduit activities | Report | Government.nl (English).

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

a lack of dual criminality (the entries that were taken into account are entries with the following descriptions: “lack of dual criminality”, “not a criminal act in the Netherlands” and “not a list-fact”). We have not been able to identify a corruption-case among these 96 MLA-requests. However, we cannot say for certain that such a case is not contained among the 96 cases, as registrants are also free in the description of the case.

**Text of issue for follow-up 14(l):**

l. The re-assessment of tax returns to ensure non-deductibility as foreign bribery case law developments [2009 Recommendation III.iii and VIII.i, Tax Recommendation II].

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

The FIOD and TCA have been in contact regarding this matter. There are procedures in place to make sure that the fiscal implications of foreign bribery investigations are handled by the TCA, including the re-assessment of tax returns to ensure non-deductibility of bribes. For the (foreign) bribery investigations that were completed in the years 2017 – 2022, it is examined whether the procedures are being complied with in practice. This examination will be finished at the end of 2022.

**Text of issue for follow-up 14(m):**

m. The use of the Ministry of Justice and Security’s database of convictions among public agencies to enhance due diligence and the application of exclusion rules [2009 Recommendation XI.(i)].

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

Even though the Dutch Public Procurement Act 2012 does not oblige contracting authorities to require a GVA, it is standard practice in the Netherlands that contracting authorities ask economic operators to hand over a GVA. As explained under recommendation 11a, Justis consults the Ministry of Justice and Security’s database of convictions (including those of other EU member states) and checks whether any relevant decisions have been taken by the ACM and the European Commission.

Contracting authorities do not have direct access to the Ministry of Justice and Security’s database of convictions. Contracting authorities may request an economic operator to apply for a GVA through Justis, the screening authority, who will decide on the basis of the database of convictions to either grant or deny that economic operator a GVA. It is not the contracting authority that decides whether a GVA is granted.

In addition, as stated under recommendation 11a, there are two types of exclusion grounds; mandatory or voluntary grounds. Contrary to what is stated on page 50 of the Phase 3 Report, contracting authorities

are obliged to exclude companies convicted of bribery and corruption offences as these are part of the mandatory exclusion grounds.

For further explanations, please refer to the input under recommendation 11a and 11b of this template.

## PART III: DISSEMINATION OF EVALUATION REPORT

**Please describe the efforts taken to publicise and disseminate the Phase 4 evaluation report:**
The Phase 4 evaluation report was offered to the Dutch Parliament with an accompanying letter on 9 November 2020. Both this letter and the report itself were published on the government's official website.[102] Additionally, the report was posted on the internal PPS knowledge website on corruption. Finally, the report was sent to all dedicated anti-corruption officers and relevant staff (*parketsecretarissen*) of the FP's Anti-Corruption Team.

[102] For the letter, please see: *Kamerstukken II* 2020-21, 29911, no. 294 (Kamerstuk 29911, nr. 294 | Overheid.nl > Officiële bekendmakingen (officielebekendmakingen.nl)). For the report, please see *Kamerstukken II* 2020-21, 29911, attachment to no. 294 (Informatie over Bijlage 957097 | Overheid.nl > Officiële bekendmakingen (officielebekendmakingen.nl)) (both in Dutch).

www.oecd.org/corruption/anti-bribery