

RECOMMENDATIONS OF THE OECD WORKING GROUP ON BRIBERY AND FOLLOW-UP

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

1. Recommendations

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

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

- a) integrate additional training, information and awareness-raising activities about combating foreign bribery in relevant anti-corruption initiatives of the Dutch government (Revised Recommendation, Paragraph I);
- b) encourage the accounting and auditing professions to develop initiatives to raise awareness of the foreign bribery offence and the accounting and auditing requirements under the Convention, and encourage both professions to develop specific training on foreign bribery in the framework of their professional education and training programmes (Revised Recommendation, Paragraph I).

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

- a) clarify the obligations of public servants to report suspicions of crimes, including foreign bribery, to Dutch law enforcement or prosecution authorities and raise awareness among public servants about their obligations, and the mechanisms and reporting channels available to fulfil these obligations (Revised Recommendation, Paragraph I);
- b) implement guidelines for the personnel of diplomatic missions, export credit agencies, and other institutions who are in a position to have privileged contacts with Dutch enterprises active abroad on specific measures to be taken if suspicions of foreign bribery should arise. Guidelines should include specific reporting channels and a reminder of the applicable obligations to report serious offences (Revised Recommendation, Paragraph I);
- c) following the enactment of the new legislation prohibiting the tax deductibility of bribes in April 2006, develop clear guidelines and provide training for tax officials as a matter of priority in order to maximise the detection of potential criminal conduct relating to foreign bribery, and to promote the reporting of suspicions to law enforcement or prosecution authorities (Revised Recommendation, Paragraph I, II);
- d) continue to take appropriate steps to improve the flow of information and feedback between the relevant actors in the anti-money laundering system (Revised Recommendation, Paragraph I);
- e) review, in the light of recent amendments to the Reporting Act and Identification Act, whether accountants in the Netherlands have adopted a restrictive application of their obligation to report STRs under the Unusual Disclosures Act, and assess whether further measures are required to ensure that accountants (and all reporting entities) in the Netherlands report unusual or suspicious transactions to the FIU Netherlands/MOT-

BLOM in accordance with the Unusual Disclosures Act (Convention, Article 5; Revised Recommendation, Paragraph I).

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

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

- a) investigate proactively foreign bribery allegations and monitor and evaluate on an on-going basis the performance of law enforcement authorities, including the *Rijksrecherche*, the National Public Prosecutor for Corruption (NPPC), and other relevant agencies, with regard to the initiation and conduct of investigations, as well as concerning decisions whether or not to prosecute foreign bribery cases (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraph I, II);
- b) clarify the competence of the *Rijksrecherche* and of the NPPC over foreign bribery cases, as well as ensure that other law enforcement agencies are aware of the coordinating role of the NPPC in this regard, and accordingly duly report all cases of foreign bribery to the NPPC (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraph I, II);
- c) ensure that sufficient training and resources, including specialised expertise, are made available to law enforcement authorities, including the Police, the *Rijksrecherche* and the NPPC for the effective detection, investigation and prosecution of foreign bribery offences (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraph I, II);
- d) encourage law enforcement authorities to make full use of the broad range of investigative measures available to Dutch investigative authorities to effectively investigate suspicions of foreign bribery (Convention, Article 5; Commentary 27; Revised Recommendation, Paragraph I, II);
- e) encourage Dutch authorities to request MLA to obtain and assess evidence available abroad of allegations of foreign bribery over which the Netherlands has jurisdiction, and ensure that this is reflected in the 2002 *Directive on Investigation and Prosecution of Corruption of Officials* (or subsequent Directives) and is underpinned by renewed efforts to raise awareness and, where necessary, training of police and prosecutors in relation to the need to obtain MLA (Convention, Articles 5, 9; Commentary 27; Revised Recommendation, Paragraph I, II);
- f) review and amend the 2002 *Directive on Investigation and Prosecution of Corruption of Officials*, issued by the Dutch Board of Procurators General, to ensure that the information contained therein may not be interpreted contrary to the Convention and the bribery offences in the Dutch Penal Code (Convention, Article 5; Commentary 7; Commentary 27; Revised Recommendation, Paragraph I, II).

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

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

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

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

6. With respect to the related money laundering offence, the Working Group recommends that the Netherlands continue to compile statistics on the offence, including the level of sanctions and the confiscation of the proceeds of crime (Convention Article 7).

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

2. Follow-up by the Working Group

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

a) given the recent entry into force of the new law prohibiting the tax deductibility of bribes to foreign public officials, whether its application in practice allows for the effective implementation of the 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials (Revised Recommendation, Paragraph I, II and IV; 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials);

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

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

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

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

Netherlands could usefully compile statistical information illustrating the use of confiscation measures by the prosecution and the courts (Convention, Article 3);
f) the use of out-of-court transactions for foreign bribery offences, as governed by article 74 of the Dutch Penal Code, to ensure that they result in the imposition of effective, proportionate and dissuasive sanctions (Convention, Article 3.1);
g) the application in practice of false accounting offences. To this end, the Netherlands could usefully provide information on the number of prosecutions and sanctions imposed under article 1.4 of the Economic Offences Act for contravention of article 361, et seq. of Book 2 of the Civil Code; article 225 of the Penal Code; and article 336 of the Penal Code (Convention, Article 8, Revised Recommendation, Paragraph V).