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Evaluation Report on the Netherlands on „Incriminations (ETS 173 and 191, GPC 2)"

(Theme I)

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I. INTRODUCTION

1. The Netherlands joined GRECO in 2001. GRECO adopted the First Round Evaluation Report (Greco Eval I Rep (2003) 1E) on the Netherlands at its 13th Plenary Meeting (24-28 March 2003) and the Second Round Evaluation Report (Greco Eval II Rep (2005) 2E) at its 25th Plenary Meeting (Strasbourg, 10-14 October 2005). The aforementioned Evaluation Reports, as well as their corresponding Compliance Reports, are available on GRECO's homepage (http://www.coe.int/greco).

2. GRECO's current Third Evaluation Round (launched on 1 January 2007) deals with the following themes:

   - **Theme I - Incriminations:** Articles 1a and 1b, 2-12, 15-17, 19 paragraph 1 of the Criminal Law Convention on Corruption, Articles 1-6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (criminalisation of corruption).

   - **Theme II - Transparency of party funding:** Articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, and – more generally – Guiding Principle 15 (financing of political parties and election campaigns).

3. The GRECO Evaluation Team for Theme I (hereafter referred to as the "GET"), which carried out an on-site visit to the Netherlands from 5 to 6 November 2007, was composed of Ms Anna HODGSON, Crown Prosecution Service (CPS), CPS Policy (United Kingdom) and Mr Aurelijus GUSTAUSKAS, Associate professor in Criminal Law, Faculty of Law, University of Lithuania (Lithuania). The GET was supported by Ms Tania VAN DIJK and Mr Christophe SPECKBACHER from GRECO's Secretariat. Prior to the visit the GET experts were provided with a comprehensive reply to the Evaluation questionnaire (document Greco Eval III (2007) 12E, Theme I) as well as copies of relevant legislation.

4. The GET met with officials from the following governmental organisations: the Ministry of Justice, Public Prosecution Service, National Police Internal Investigations Department (*Rijksrecherche*) and the judiciary. Moreover, the GET met with a criminal defence lawyer and representatives of academia and the Dutch chapter of Transparency International.

5. The present report on Theme I of GRECO's Third Evaluation Round – Incriminations – was prepared on the basis of the replies to the questionnaire and the information provided during the on-site visit. The main objective of the report is to evaluate the measures adopted by the Dutch authorities in order to comply with the requirements deriving from the provisions indicated in paragraph 2. The report contains a description of the situation, followed by a critical analysis. The conclusions include a list of recommendations adopted by GRECO and addressed to the Netherlands in order to improve its level of compliance with the provisions under consideration.

6. The report on Theme II – Transparency of party funding –, is set out in Greco Eval III Rep (2007) 8E Theme II.

II. INCRIMINATIONS

a. Description of the situation

7. The Netherlands ratified the Criminal Law Convention on Corruption (ETS 173) on 11 April 2002. It entered into force in respect of the Netherlands on 1 August 2002. The Netherlands has made reservations to Article 12 (trading in influence) and Article 17 (jurisdiction)[1]. These reservations will be discussed in further detail below. The Netherlands has limited the territorial application of the Convention to the Kingdom of the Netherlands in Europe. The Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) was ratified on 16 November 2005 and entered into force in respect of the Netherlands on 1 March 2006. The reservations the Netherlands has made to the Convention also apply to the Additional Protocol[2]. The territorial application of the Additional Protocol is also limited to the Kingdom of the Netherlands situated in Europe.

Bribery of domestic public officials (Articles 1-3 and 19 of ETS 173)

Definition of the offence

8. Active bribery of domestic public officials is criminalised by virtue of articles 177 to 178a of the Criminal Code (hereafter: CC). The provisions on active bribery of public officials in articles 177 and 177a CC establish two forms of the offence: (1) bribery with the aim to get a public official to do something or omit to do something in violation of his/her duty (article 177 CC) (i.e. unlawful acts or omissions), and (2) bribery with the aim to get a public official to do something or omit to do something which is not in violation of his/her duty (article 177a CC) (i.e. lawful acts or omissions). These provisions also cover persons whose appointment as public official is pending, as well as former public officials. They apply to judges too, but in addition to this, article 178 CC covers the specific (aggravated) offence of active bribery of a judge to influence a decision in a case that is subject to his/her judgment or to obtain a conviction in a criminal case.

> **Article 177**
> 1. A prison sentence of no more than four years or a fine in the fifth category will be imposed on:
> 1^0: whoever gives a gift or makes a promise to a public official or provides or offers him a service with a view to get him/her to do something or omit to do something in his/her service, contrary to his/her duty;
> 2^0: whoever gives a gift or makes a promise to a public official or provides or offers him a service as a result of or in connection with something s/he has done or has omitted to do, in his/her current or previous service, contrary to his/her duty.
> 2. The same punishment will be imposed on anyone who commits an offence as described in the first paragraph, under (1^0), against a person who has prospects of an appointment as a public official, if the appointment as a public official has followed.
> 3. Deprivation of the rights mentioned in article 28, first paragraph, under (1^0), (2^0) and (4^0) can be pronounced.
>
> **Article 177a**
> 1. A prison sentence of no more than two years or a fine in the fourth category will be imposed on:
> 1^0: whoever gives a gift or makes a promise to a public official or who provides or offers him a service with a view to get him/her to do something or omit to do something in his/her service, not contrary to his/her duty;

[1] See Annex A
[2] See Annex B

2^0: whoever gives a gift or a makes promise to a public official or who provides or offers him a service as a result of or in connection with something s/he has done or has omitted to do, in his/her current or former service, not contrary to his/her duty.

2. The same sentence will be imposed on anyone who commits an offence as described in the first paragraph, under (1^0), against a person who has prospects of an appointment as a public official, if the appointment as a public official has followed.
3. Deprivation of the rights mentioned in article 28, first paragraph, under (1^0), (2^0) and (4^0), can be pronounced.

Article 178

1. Whoever gives a gift or makes a promise to a judge or provides or offers him/her a service with a view to exert influence over a decision in a case that is subject to his/her judgement will be sentenced to a prison sentence of not more than six years or a fine in the fourth category.
2. If the gift is given or promise is made or the service is provided or offered with a view to obtain a conviction in a criminal case, the guilty person will be punished with a prison sentence of not more than nine years or a fine in the fifth category.
3. Deprivation of the rights mentioned in article 28, first paragraph, under (1^0), (2^0) and (4^0), can be pronounced.

9. Passive bribery of domestic public officials is covered by articles 362 to 364a CC. Again – as before – a distinction is made between unlawful acts or omissions and lawful acts or omissions. Article 362 CC criminalises passive bribery of public officials, whereby the act or omission by the public official does not have to be contrary to his/her duty; article 363 criminalises passive bribery of public officials for acts/omissions contrary to his/her duty; and as before with active bribery, article 364 covers a specific (aggravated) offence of bribery of a judge to exert influence in a case over which s/he presides or to obtain a conviction in a criminal case.

Article 362

1. A prison sentence of not more than two years or a fine in the fifth category will be imposed on the public official:
   1^0: who accepts a gift, promise or service, knowing or reasonably suspecting that it is given, made or offered to him/her in order to induce him/her to do something or omit to do something in his/her service, not contrary to his/her duty;
   2^0: who accepts a gift, promise or service, knowing or reasonably suspecting] that it is given, made or offered to him/her as a result of or in connection with something s/he has done or has refrained from doing in his/her current or former service, not contrary to his/her duty;
   3^0: who asks for a gift, promise or service, in order to induce him/her to act or to refrain from acting in his/her service, not contrary to his/her duty;
   4^0: who asks for a gift, promise or service, as a result of or in connection with something s/he has done or has refrained from doing in his/her current or former service, not contrary to his/her duty;
2. The same sentence will be imposed on anyone who has prospects of an appointment as a public official, who commits an offence as described in the first paragraph, under (1^0) and (3^0), if this appointment has followed.
3. A person who commits a offence as described in the first paragraph in his/her capacity as minister, state secretary, royal commissioner, member of the provincial executive, mayor, aldermen or member of a public representative body, will be sentenced to a term of imprisonment of not more than four years or a fine of the fifth category.

Article 363

1. A prison sentence of not more than four years or a fine in the fifth category will be imposed on the public official:
   1^0: who accepts a gift, promise or service, knowing or reasonably suspecting that it is given, made or offered to him/her in order to induce him/her to act or to refrain from acting in his/her service, contrary to his/her duty;

2⁰: who accepts a gift, promise or service, knowing or reasonably suspecting that it is given, made or offered to him/her as a result or in connection with something s/he has done or has refrained from doing in his/her current or former service, contrary to his/her duty;
3⁰: who asks for a gift, promise or service, in order to induce him/her to act or to refrain from acting in his/her service, contrary to his/her duty;
4⁰: who asks for a gift, promise or service, as a result of or in connection with something s/he has done or has refrained from doing, in his/her current or former service, contrary to his/her duty.

2. The same sentence will be imposed on anyone who has prospects of an appointment as a public official, who commits an offence as described in the first paragraph, under (1⁰) and (3⁰), if this appointment has followed.
3. A person who commits a offence as described in the first paragraph in his/her capacity as minister, state secretary, royal commissioner, member of the provincial executive, mayor, aldermen or member of a public representative body, will be sentenced to a term of imprisonment of not more than six years or a fine of the fifth category.

Article 364

1. A judge who accepts a gift, promise or service, knowing or reasonably suspecting that it is given, made or offered to him/her in order to exercise influence over the decision in a case that is subject to his/her judgement will be sentenced to a term of imprisonment of not more than nine years or a fine of the fifth category.
2. A judge who asks for a gift, promise or service in order to induce him/her to exercise influence over the decision in a case that is subject to his/her judgment will be sentenced to a term of imprisonment of not more than nine years or a fine of the fifth category.
3. If the gift, promise or service is accepted, knowing or reasonably suspecting that it is given, made or offered to obtain a conviction in a criminal case, the judge will be sentenced to a term of imprisonment of not more than twelve years or a fine of the fifth category.
4. If the gift, promise or service is asked in order to induce him/her to obtain a conviction in a criminal case, the judge will be sentenced to a term of imprisonment of not more than twelve years or a fine of the fifth category.

Elements of the offence

"Domestic public official"

10. The Dutch authorities have indicated that all the categories of persons listed in Article 1(a) and (b) of the Convention are covered by the bribery provisions in the Criminal Code. Although there are separate articles (178 and 364) dealing with bribery of judges in certain specific situations, it should be emphasised that they are already included in the general notion of 'public official' in articles 177, 177a, 362 and 363 CC. As the Criminal Code does not contain an autonomous definition of 'public official', case law plays an important role in determining the exact scope of the term 'public official'. In case law, a public official is understood to include "anyone who has been appointed by the public authorities to a public position, in order to perform a part of the duties of the state and its bodies" (Supreme Court, 30 January 1911, W9149). A later case further clarifies: "Whether the person can also be classified as a public official in terms of employment law is irrelevant" (Supreme Court, 18 October 1949, NJ 1950, 126).

11. Reference is furthermore made to article 84 CC, which extends the meaning of 'public official' to certain other categories of officials.

Article 84

1. 'Public officials' include members of general representative bodies.
2. 'Public officials' and 'judges' include arbiters; 'judges' include those who exercise administrative jurisdiction.
3. All personnel of the armed forces are also to be regarded as 'public officials'.

12. The application of the abovementioned criteria has resulted in those carrying out the following functions – amongst others – being classified as public officials:
    - a tram driver employed by a privatised public transport company (Supreme Court, 1 December 1992, NJ 1993, 354)
    - a security officer of a university, as s/he had been appointed "under the supervision and responsibility of the government to a position that cannot be denied a public character" (Supreme Court, 18 May 2004, NJ 2004, 527).

    Although these two cases did not concern corruption offences, the Dutch authorities indicate that they are by analogy also applicable to corruption offences involving public officials.

"*Promising, offering or giving*" *(active bribery)*

13. The elements "promising, offering or giving" are included by reference to the words "gives a gift or makes a promise, or provides or offers a service" in the provisions on active bribery of public officials.

"*Request or receipt, acceptance of an offer or promise" (passive bribery)*

14. The provisions on passive bribery of public officials include the elements "accepts a gift, promise or service" and "asks for a gift, promise or service".

15. The Dutch authorities indicate that the term 'accepts' implies that the public official had or should have had knowledge of the fact that a gift was given or that an attempt was made to give a gift. In this context, the Court of Appeal (Court of Appeal Arnhem, 25 March 2005, LJN: AT2539) ruled that the accused public official had to be acquitted with regard to part of the passive bribery charges concerned, since he was not aware (and could not have been aware) of the fact that the bribe-giver had paid a company some of the costs for the catering at his (i.e. the public official's) wedding.

16. Furthermore, the Dutch authorities indicate that it is irrelevant whether the public official has accepted the gift or promise in his/her capacity as public official. Gifts s/he accepts outside the direct framework of his/her activities are also classified as bribery (Supreme Court, 10 April 1893, W6333).

"*Any undue advantage"*

17. The relevant provisions on active and passive bribery of public officials and judges do not explicitly use the term advantage, but instead refer to 'gift', 'promise' and 'service'.

18. The Dutch authorities indicate that when the Criminal Code was amended in 2001 it was decided to clarify the existing corruption provisions by explicitly introducing the term 'service' in articles 177, 177a, 178, and 362 to 364. As becomes clear from the explanatory memorandum to the draft law amending the corruption provisions[3], it was the Minister of Justice's intention to establish unequivocally that the provision of a service, such as providing a holiday home for an exceptionally low rent or the offer of a supervisory directorship, were included in the provisions on bribery.

[3] Amendments to the corruption provisions (*Memorie van toelichting)*, Second Chamber (1998-1999), 26469, No. 3, p. 4.

19. A gift, promise and service involves both material and immaterial advantages, as illustrated by a judgment of 1994 in which the Supreme Court ruled that a gift would also include – for instance – sexual favours (Supreme Court, 31 May 1994, NJ 1994, 673). In reference to case law (*inter alia* Supreme Court, 25 April 1916, NJ 1916, p.551, which provides that handing over something that has some sort of value to the receiver is considered to constitute a gift), the Dutch authorities furthermore indicate that although the gift, promise or service will need to have some value for the recipient, this could be of a non-commercial nature and may be of value only to the person who receives it. Thus, the gift does not have to have a monetary value.

20. The Dutch authorities further report that it was expressly decided not to make a distinction between gifts according to their monetary value. This implies that all gifts, including customary gifts of little value (for example representational gifts) potentially fall within the scope of the provisions on bribery. The Minister of Justice considered that to make such a distinction would be undesirable as certain situations involving the receipt of a relatively small advantage for the performance of an official act, which would be deemed reprehensible by the public, would potentially fall outside the scope of the criminal provisions.[4] In the abovementioned explanatory memorandum to the draft law for the 2001 amendments of the corruption provisions, the Minister of Justice has made an express reference to the discretion of the public prosecution service in this regard. The Instruction for the Investigation and Prosecution of Corruption of Public Officials in the Netherlands (*Aanwijzing opsporing en vervolging ambtelijke corruptie in Nederland*) reiterates the previous point by stating "as the law does not provide any hard limits, these instructions do not set any limits expressed in euros, on the one hand because accepting/soliciting gifts with a value of – for example – €50, on more than one occasion may be deserving of prosecution, on the other hand because a relatively small, single bribe leading to an official act would render the case, in the eyes of society, deserving of prosecution".

"*Directly or indirectly"*

21. The Dutch authorities indicate that although the provisions on bribery of public officials and judges do not indicate whether gifts or services can also be received/requested or given/offered indirectly, it is not necessary for the bribe-giver him/herself to provide the gift or service to the public official him/herself. Likewise, it is not necessary for the applicability of the bribery provisions that the service is rendered by the bribe-giver in person. It may also concern a promise that, if the public official performs a certain act, s/he will receive something from a third party (Supreme Court, 21 October 1918, NJ 1918, p. 1128). The Minister of Justice has also emphasised this point in the debate on the 2001 amendments to the corruption provisions, by indicating that the text of the provisions were deliberately formulated in a broad manner to ensure that intermediaries also fall within the scope of the provisions.[5]

"*For himself or herself or anyone else"*

22. The Dutch authorities indicate that a gift or service rendered does not have to be for public official him/herself. This has been confirmed by case-law: for example, as recently as 2004, the District Court of Rotterdam ruled that the provision, by a construction firm, of an apartment free of charge for a period of 5 years to the daughters of a public official should be regarded as a gift to the public official. (District Court Rotterdam, 14 December 2004, LJN: AR7472, as confirmed on appeal by the Court of Appeal The Hague, 19 April 2006, LJN: AW2327).

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[4] Amendments to the corruption provisions (*Nota naar aanleiding van het verslag*), Second Chamber (1998-1999), 26469, No. 5, p. 6.

[5] Parliamentary debate (*Handelingen II),* Second Chamber (1999-2000), No. 91, p. 5893.

"*To act or refrain from acting in the exercise of his or her functions"*

23. Both the provisions on active and passive bribery of public officials (articles 177, 177a, 362 and 363 CC) use the phrase "to do something or to omit to do something, in his/her service". In this regard, the Supreme Court ruled (Supreme Court, 26 June 1916, NL 1916, p. 916) that it was not required that the public official is authorised to carry out the official act, it is only required that his/her function enabled him/her to carry out the desired act.

24. The provisions on bribery furthermore make a distinction if the act or omission constitutes a violation of the public official's duty (Articles 177 and 363 CC) or not (Articles 177a and 362 CC). These latter provisions (i.e. bribery not in violation of a public official's official duties) were introduced in the law in 2001, in particular for situations in which it is not possible to prove that the gift received by the public official was the result of a promise made before the public official carried out the act in question.

25. The Dutch authorities stress that the provisions on active and passive bribery relate to both the acts and omissions of public officials. In this regard, it is irrelevant whether the desired act or omission actually took place. Furthermore, further specification of the act or omission on the part of the public official is not considered to be of particular relevance. The Supreme Court ruled that the terms 'in violation of his duty to do or omit something' are sufficiently specific in themselves (Supreme Court, 19 June 2001, LJN: ZD2851). In this regard, the Dutch authorities also point to a judgment in which the Supreme Court ruled that active bribery (in that particular case Article 177 CC) not only relates to situations "in which there is a direct connection between the gift/promise on the one hand and a specific consideration on the other, but also to making gifts/promises to a public official in order to establish and/or maintain a relationship with that public official with the aim to obtain preferential treatment" (Supreme Court, 20 June 2006, NJ 2006, 380).

"*Committed intentionally"*

26. The Dutch authorities indicate that as regards 'intent', a distinction is to be made between active and passive bribery. Active bribery (Articles 177, 177a and 178 CC) requires intent to actually give a gift, make a promise or provide a service: if something is given, promised or provided the intent requirement has been fulfilled (for this part of the act). In addition, it is required that the gift, promise or service is provided with the aim – intention – to make a public official do or not do something. Whether the public official indeed does (or omits to do) whatever it is the bribe-giver desires him to do is not relevant. If it was the aim (intent) of the bribe-giver to have the public official do (or omit to do) something contrary to his/her duty, article 177 will apply. Unlike the requirement of intent in making the gift, so-called 'conditional intent' does not suffice here: the aim consists of the objective the perpetrator means to achieve by his conduct. Therefore, some form of awareness on the part of the bribe-giver that the act, which s/he required the public official to do or to omit to do, was contrary to the duties of this official is required. If this awareness cannot be established, article 177a (active bribery, not contrary to the duty of the public official) will apply.

27. In the case of passive bribery, the *mens rea*[6] is construed differently. In addition to intentional acts on the part of the public official, the legislative amendments of 2001 (as referred to above) introduced the phrase 'or reasonably suspecting' in Articles 362, 363 and 364 CC. This means that the public official will also be held criminally liable, if it can be established that s/he *should*

[6] Criminal intent or knowledge that an act is wrong (literally: *guilty mind*).

have understood that s/he received an advantage for a particular purpose. The earlier-cited judgment of the Court of Appeal in Arnhem (see paragraph 15 above) confirms this (*a contrario*): the accused public official had to be acquitted with regard to a part of the passive bribery charge, because he was not aware, and in the opinion of the court, did not need to have been aware of the fact that the bribe-giver had paid to a company a contribution towards the catering costs of his wedding.

Sanctions

28. The sanctions for active bribery of a public official to act (or refrain from acting) contrary to his/her duty (Article 177 CC) are a maximum of four years' imprisonment or a fine of the fifth category (€67,000). In addition, a so-called disqualification sanction can be imposed: the offender can be 'deprived of certain rights' (Article 28 CC). The rights of which the bribe-giver can be deprived are the occupation of a specific public office or public office in general (which includes the possibility of depriving someone of the right to be a public official), a position in the armed forces or a position as trustee. For active bribery of a public official to act (or refrain from acting) not necessarily contrary to his duty (Article 177a CC), a maximum of two years' imprisonment or a fine of the fourth category (€16,750) can be imposed. S/he can also be deprived of the aforementioned rights.

29. Under Article 178 CC (active bribery of a judge to exert influence over a case) a person can be sentenced to up to six years' imprisonment or a fine of the fourth category (€16,750). If the gift, promise or service was offered or provided to the judge with a view to securing a conviction in a criminal case, the sentence can be up to nine years' imprisonment or a fine of the fifth category. In addition, 'deprivation of certain rights' can be imposed: as before this refers to deprivation of the right (1) to hold a certain office or public office in general; (2) to serve in the armed forces, and (3) to be a trustee.

30. Passive bribery of a public official, involving an act or omission not contrary to his/her duty (Article 362 CC), carries a maximum sentence of two years' imprisonment or a fine of the fifth category (€67,000). However, if this offence has been committed by a minister, state secretary, royal commissioner, member of the provincial government / a provincial deputy, mayor, alderman or a member of a public representative body, a maximum sentence of four years' imprisonment or a fine of the fifth category can be imposed.

31. Passive bribery of a public official, involving an act or omissioncontrary to his/her duty (Article 363 CC) carries a maximum sentence of four years' imprisonment or a fine of the fifth category. As before, if this offence has been committed by a minister, state secretary, royal commissioner, member of the provincial government / provincial deputy, mayor, alderman or a member of a public representative body, the maximum sentence can be increased to six years' imprisonment or a fine of the fifth category (€67,000).

32. Passive bribery of judges under article 364 CC (i.e. acceptance of or request for a gift, promise or service by a judge to influence a case) can be sentenced to up to nine years' imprisonment or a fine of the fifth category (€67,000); if the gift, promise or service is requested or received to secure a conviction in a criminal case, the judge in question can be sentenced to up to 12 years' imprisonment or a fine of the fifth category (€67,000).

33. In addition, pursuant to article 29 CC for all offences involving 'abuse of office' or 'malfeasance in office', which include corruption offences in as far as they have been committed by public officials

(i.e. articles 362, 363 and 364 CC), deprivation of the right to hold a certain office or public office in general, as well as to serve in the armed forces, can be imposed.

34. Moreover, as regards all the abovementioned active and passive bribery offences, pursuant to article 33 CC so-called 'ordinary confiscation' can be imposed. Ordinary confiscation – as opposed to special confiscation under article 36e CC[7] – is a penal sanction which can, upon conviction of the defendant, be applied to objects directly obtained from the criminal offence (in whole or in part), and/or to the instruments used or intended to be used to commit or prepare the offence.

35. Furthermore, it should also be noted that, pursuant to Article 9, paragraph 3 CC, in case of conviction to a term of imprisonment a fine may be imposed in addition to this prison sentence, even in case where the provision itself mentions a prison sentence *or* a fine.

36. The Dutch authorities indicate that the maximum sentences for active and passive bribery are comparable with those applicable to other serious financial and economic offences and, in the case of passive bribery, other offences involving 'abuse of office' or 'malfeasance in office'. For example, embezzlement (Article 321 CC) carries a maximum sentence of three years' imprisonment, fraud (Article 326 CC) and intentional money-laundering (Article 420*bis* CC) carry a maximum sentence of four years' imprisonment. The maximum prison sentence for offences involving 'abuse of office' / 'malfeasance in office', such as embezzlement of funds while holding public office (Article 359 CC) and forgery of books or registers (Article 360 CC) is six years and three years' imprisonment respectively.

Bribery of members of domestic public assemblies (Article 4 of ETS 173)

37. Members of domestic public assemblies are considered to be public officials, pursuant to Article 84, paragraph 1, CC, which provides that the term 'public official' includes members of general representative bodies (see also paragraph 11 above). The elements of the offence and the applicable sanctions described in the paragraphs on bribery of (domestic) public officials therefore apply accordingly to bribery of members of domestic public assemblies.

Bribery of foreign public officials (Article 5 of ETS 173)

38. The Dutch authorities indicate that, following an amendment of the Criminal Code in 2001, bribery of foreign public officials has been criminalised by making the general provisions on bribery of public officials (articles 177, 177a, 362 and 363 CC) as well as the specific offences involving judges (articles 178 and 364 CC) also applicable to foreign officials/judges. To this end, two provisions (articles 178a and 364a CC) have been added to the Criminal Code:

[7] Special confiscation under article 36e is a measure which may be issued by the court, at the request of the prosecution service, in the form of a "non-punitive order". The imposition of a special confiscation order obliges the offender to pay a sum of money to the State in relation to certain illegally obtained profits or advantages. See in this regard GRECO's Second Round Evaluation Report on the Netherlands (Greco Eval II Rep (2005) 2E), 'proceeds of corruption', in particular paragraph 6.

Article 178a

1. With regard to articles 177 and 177a, persons working in the public service of a foreign state or an organisation governed by international law are equated with public officials.
2. With regard to articles 177, first paragraph, under (2^0), and 177a, first paragraph, under (2^0), former public officials are equated with public officials.
3. With regard to article 178, judges of a foreign state or an organisation governed by international law are equated with judges.

Article 364a

1. With regard to articles 361, 362 and 363, persons working in the public service of a foreign state or an organisation governed by international law are equated with public officials.
2. With regard to articles 362, first paragraph, under (2^0) and (4^0), and 363, first paragraph, under (2^0) and (4^0), former public officials are equated with public officials.
3. With regard to article 364, judges of a foreign state or an organisation governed by international law are equated with judges.

39. The elements of the offence and applicable sanctions detailed under bribery of public officials thus apply accordingly to bribery of foreign public officials.

Bribery of members of foreign public assemblies (Article 6 of ETS 173)

40. The Dutch authorities indicate that members of foreign public assemblies are considered to be "persons working in the public service of a foreign state" within the meaning of articles 178a and 364a CC. As before, the elements of the offence and applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of members of foreign public assemblies.

Bribery in the private sector (Articles 7 and 8 of ETS 173)

Definition of the offence

41. Active and passive bribery in the private sector is criminalised by article 328ter CC.

Article 328ter

1. A person who, in a capacity other than that of a public official, either in the service of his/her employer or acting as an agent, accepts a gift or promise in relation to something s/he has done or has refrained from doing or will do or will refrain from doing in the service of his/her employer or in the exercise of his/her mandate, and who, in violation of the requirements of good faith, conceals the acceptance of the gift or promise from his/her employer or principal, will be sentenced to a term of imprisonment of not more than one year or a fine of the fifth category.
2. The same sentence will be imposed on a person who gives a gift or makes a promise to another person who, in a capacity other than that of a public official, is employed or acts as an agent, in relation to something that person has done or has refrained from doing or will do or will refrain from doing in his/her employment or in the exercise of his/her mandate, the gift or promise being of such nature or made under such circumstances that s/he might reasonably assume that the latter, in violation of the requirements of good faith, will conceal the acceptance of the gift or promise from his/her employer or principal.

Elements of the offence

"*Persons who direct or work for, in any capacity, private sector entities"*

42. Article 328ter CC uses the description "in a capacity other than that of a public official, either in the service of his/her employer or acting as an agent". According to the Dutch authorities this description is intended to include anyone working in any other capacity than as a public official, whether or not as a regular employee. The Dutch authorities furthermore indicate that because of the broad scope of the term 'public official' in Dutch law, in certain circumstances persons working for a private sector organisation would be regarded as public officials. In such cases articles 177, 177a, 362 and 363 CC on bribery of public officials would be applicable, and not 328ter CC.

"*Promising, offering or giving" (Active bribery)*

43. Article 328ter, paragraph 2, on active private sector bribery only refers to "making a gift or promise".

"*Request or receipt, acceptance of an offer or promise" (Passive bribery)*

44. Article 328ter CC does not contain an express reference to the request for an advantage or acceptance of an offer: it criminalises accepting a gift or promise.

45. The Dutch authorities indicate that a central element of the provision on passive private sector bribery does not so much concern the acceptance of a gift or a promise, but the concealment – contrary to good faith – of the acceptance of the gift or promise from the employer or principal.

"*Any undue advantage"*

46. Article 328ter CC refers to "gift or promise". In this regard, article 328ter is different from the provisions on bribery of public officials (articles 177, 177a, 362 and 363 CC) in that it does not refer to a service. As mentioned before (see paragraph 18 above), the provisions on public officials were amended in 2001 to explicitly include the acceptance, request, provision and/or offer of a service. However, the Dutch authorities report that although the addition of 'service' was made to the provisions on bribery of public officials, this would not have been necessary on the basis of case law. The Supreme Court had already before this amendment ruled that the provision of a service should be considered to be a gift[8]. The amendments of 2001 were thus a codification of case law, but – according to the Dutch authorities – there would be no reason to assume that the provision on private sector bribery is less wide than the established case-law and provisions on public sector bribery: providing or offering a service should thus be regarded as being included in the scope of article 328ter, paragraph 2, CC.

47. As indicated above, the Dutch authorities stress that the decisive element in establishing whether the gift was undue is the concealment of the acceptance of the gift from the bribe-taker's employer "in violation of the requirements of good faith". For establishing active private sector bribery it is necessary that the gift or promise is of "such a nature or made under such circumstances that s/he [the bribe-giver] might reasonably assume that the latter [the bribe-

[8] For example, in 1994 the Supreme Court ruled that providing sexual favours to a public official was a gift (Supreme Court, 31 May 1994, NJ 1994, 673).

taker], in violation of the requirements of good faith, will not disclose the gift or promise to his/her employer or principal".

"Directly or indirectly"

48. The Dutch authorities indicate that – as described above with respect to bribery of public officials – it is not necessary that a gift or promise is made directly by the bribe-giver to the bribe-taker and/or that the act in return is rendered by the bribe-taker him/herself. Private sector bribery through an intermediary is covered in a similar manner as for bribery of public officials (see paragraph 21 above).

"*For themselves or for anyone else"*

49. Article 328ter does not indicate whether the gift or promise can be for a third party, but the Dutch authorities again stress that case-law on this issue regarding bribery of public officials would also be applicable to private sector bribery in as far as third party beneficiaries are concerned (See paragraph 22 above).

"*To act or refrain from acting"*

50. Article 328ter CC includes the words "in relation to something s/he has done or has refrained from doing" (as well as "will do or will refrain from doing"), both as regards passive bribery (Article 328ter, paragraph 1, CC) and active bribery (Article 328ter, paragraph 2, CC).

51. The Dutch authorities furthermore clarify that, as was the case for bribery of public officials, no connection is required between the gift and a specific act that can be termed as 'doing or not doing something'. The District Court in Rotterdam ruled that the provision of a car together with cards to obtain free fuel should indeed be regarded as a gift based on a particular performance on the part of the employee within the meaning of Article 328ter CC. The counsel for the defence had argued that there was no causal relationship between the gift and a performance on the part of the employee. According to the Court, no such relationship was required: "the assumption that this would only involve a criminal offence in case of a particular performance on the part of the accused [employee] is not correct" (District Court Rotterdam, 24 May 2006, LJN: AX4719).

"*In the course of business activity"*

52. Article 328ter CC does not explicitly restrict the criminalisation of private sector bribery to acts committed 'in the course of business activity', but provides that the bribe-taker is doing something or omitting to do something in the service of his employer or in the exercise of his mandate. The Dutch authorities indicate that the nature of the activities or the mandate is irrelevant: in other words, this may also involve non-commercial activities.

"*In breach of duties"*

53. The Dutch authorities indicate that the central element in the criminalisation of private sector bribery is not the breach of duties as such, but the concealment of the gift or promise from the employer "contrary to the requirements of good faith": by concealing the acceptance of a gift or promise the employee has breached his/her duties.

"Committed Intentionally"

54. The Dutch authorities report that cases of active private corruption (Article 328*ter*, paragraph 2, CC) should, in addition to the provision of the gift – in respect of which so-called 'conditional intent' (see paragraph 26 above) is sufficient –, also involve intent or guilt with regard to other elements of the offence. Regarding the connection between the act (or omission) on the part of the corrupted employee and the gift or promise, the law stipulates that the bribe-giver's intent should be aimed at this act or omission. Pursuant to the earlier-cited judgment of the District Court (see paragraph 51 above), however, no reference needs to be made to specific acts on the part of the corrupted employee. The Dutch authorities furthermore indicate that a decisive element in establishing the bribe-giver's intent is the non-disclosure of the gift or promise – contrary to good faith – by the employee to his employer. Article 328ter, paragraph 2, provides that the gift or promise is of "such nature or made under such circumstances that he [i.e. the bribe-giver] might reasonably assume that the latter [i.e. the bribe-taker], in violation of the requirements of good faith will not disclose the gift or promise to his employer or principal". This also means that the perpetrator of active private corruption is criminally liable even if the receiving employee, contrary to expectations, does disclose the gift to his employer.

55. In cases of passive private sector corruption (Article 328ter, paragraph 1, CC), the requirement of intent applies to the receipt of the gift. The Dutch authorities indicate that another important point is that the recipient should have recognised, or "given the circumstances, should have understood" the purpose of the gift (cf. the above-cited judgment of the District Court Rotterdam, 24 May 2006, LJN: AX4719). Furthermore, the employee's intent will have to be established as regards the concealment of the gift or promise from the employer. It can be assumed that the employee has some time within which to make the disclosure: he will have to inform the employer within a reasonable period of time.

Sanctions

56. Active and passive bribery in the private sector carries a maximum sentence of a year's imprisonment or a fine of the fifth category (€67,000). As indicated before, pursuant to article 9, paragraph 3, CC a fine can also be imposed in addition to the term of imprisonment. In addition, 'ordinary confiscation' (see paragraph 34 above) can be imposed and the judge may order, upon convicting the offender for private sector bribery, publication of the judgment and may disqualify the offender from practising the profession in which s/he committed the crime (pursuant to article 339 CC).

Bribery of officials of international organisations (Article 9 of ETS 173)

57. Pursuant to article 178a, paragraph 1, CC and 364a, paragraph 1, CC, persons working in the public service of an organisation governed by international law are considered to be public officials, in the meaning of articles 177, 177a, 362 and 363 CC (see paragraphs 38 above). The elements of the offence and the applicable sanctions detailed under bribery of public officials apply accordingly to bribery of officials of international organisations. The Dutch authorities furthermore clarify that the term 'international organisation' in Dutch law refers to a form of collaboration between states that finds its origin in international law: it has a common objective and has at least one body to fulfil the duties of the organisation.

Bribery of members of international parliamentary assemblies (Article 10 of ETS 173)

58. Members of an international parliamentary assembly are considered to be "persons working in the public service of an organisation governed by international law", within the meaning of 178a and 364a CC. As before, the elements of the offence and applicable sanctions detailed under bribery of public officials apply accordingly to members of international parliamentary assemblies.

Bribery of judges and officials of international courts (Article 11 of ETS 173)

59. The abovementioned articles 178a and 364a (first paragraph) provide that "persons working in the public service of (…) an organisation governed by international law", which includes judges and officials working for international courts, are equated for the purpose of the law with public officials. The elements of the offence and the applicable sanctions detailed under bribery of public officials thus apply accordingly to bribery of judges and officials of international courts. In addition, the third paragraphs of the two aforementioned articles provide that judges of an organisation governed by international law are equated with judges within the meaning of articles 178 and 364: the applicability of these two articles on aggravated active and passive bribery of judges is thus extended to judges of international courts.

Trading in influence (Article 12 of ETS 173)

60. Trading in influence is not an offence as such in the Netherlands. To this end, the Netherlands made a reservation to the Convention, which states "In accordance with Article 37, paragraph 1, the Netherlands will not fulfil the obligation under Article 12*"* (See also Annex A).

61. The Dutch authorities maintain that certain forms of influence (whether financial or not) over decisions of public officials or politicians may be lawful, for instance where representatives of interest groups perform lobbying activities. It is only when the lobbying or the attempt to exert influence results in holding out the prospect of specific advantages to public officials who are involved in the decision-making process, that the bounds of propriety are overstepped. The Dutch authorities contend that at that moment the regular bribery provisions – whether or not in the form of an attempt or in combination with the forms of participation set out in Articles 47 and 48 CC – come into play, which leads the Dutch authorities to conclude that these provisions already sufficiently provide for adequate protection against unauthorised and actual exertion of influence on the administrative system and no separate offence needs to be established in order for this to be a criminal offence.

Bribery of domestic arbitrators (Article 1, paragraphs 1 and 2 and Articles 2 and 3 of ETS 191)

62. Article 84, paragraph 2, CC (see also paragraph 11 above) provides: "Public officials and judges include arbiters; judges include those who exercise administrative jurisdiction". The Dutch authorities indicate that according to the explanatory memorandum to the law introducing this article in the Dutch legal system in 1881 – to which the Minister of Justice and Minister of Foreign Affairs referred in their explanatory memorandum to the ratification documents concerning the Additional Protocol in 2005[9] – the term 'arbiter' in Dutch law refers to a person "holding a *munus publicum*[10], albeit by virtue of a mandate under private law". The term 'arbiter' is thus understood to mean a person who renders a (binding) decision in a dispute submitted to him/her by virtue of an agreement under private law. Consequently, the elements of the offence and the applicable

[9] States-General (2004-2005), 30156 (R1791, A and no. 1), p. 4.
[10] Public office

sanctions detailed under bribery of public officials (as well as the specific offences of aggravated bribery of judges), pursuant to articles 177, 177a, 178, 362, 363 and 364 CC, apply accordingly to bribery of domestic arbitrators.

Bribery of foreign arbitrators (Article 4 of ETS 191)

63. As indicated in the previous paragraph, the terms 'public official' and 'judge' also apply to arbitrators, pursuant to article 84, paragraph 2, CC (and the abovementioned explanatory memorandum to the Criminal Code). Furthermore, by virtue of article 178a and 364a (paragraphs 1 and 3), public officials and judges in the public service of a foreign state are equated with public officials and judges within the meaning of articles 177, 177a, 362 and 363 on active and passive bribery of public officials and articles 178 and 364 CC on specific active and passive bribery offences as regards judges. Consequently, the elements of the offence and the applicable sanctions detailed under bribery of public officials (and judges) also apply to foreign arbitrators.

Bribery of domestic jurors (Article 1, paragraph 3 and Article 5 of ETS 191)

64. The concept of trial by jury is not known in the Dutch legal system. Nevertheless, the Dutch authorities report that jurors are equated with judges for the purpose of the provisions on corruption in the Criminal Code. A judge has been described in (authoritative) academic literature[11] as "someone whose judgment has legal force". In the abovementioned explanatory memorandum to the ratification documents concerning the Additional Protocol in 2005[12] the Ministers of Justice and of Foreign Affairs have explicitly referred to (and adopted) this interpretation and have thus endorsed the interpretation that the term 'judge' includes 'juror'. As judges are in turn considered to be public officials the elements of the offence and the applicable sanctions detailed under bribery of public officials (and judges) apply accordingly to bribery of domestic jurors.

Bribery of foreign jurors (Article 6 of ETS 191)

65. As already mentioned above as regards bribery of domestic jurors, the Dutch authorities indicate that the term 'judge' includes a 'juror'. In turn, judges are considered to be public officials and therefore jurors are also considered to be public officials for the purpose of the bribery provisions. As indicated in paragraph 38 above, pursuant to articles 178a and 364a foreign public officials (i.e. "persons working in the public service of a foreign state") are equated with domestic public officials. Consequently, the elements of the offence and the applicable sanctions detailed under bribery of public officials (and judges) also apply to foreign jurors.

Other questions

Participatory acts

66. Participation in the commission of all of the abovementioned criminal offences is criminalised in articles 47 (accomplice/accessory, provocation and solicitation) and 48 CC (aiding and abetting).

[11] cf. T.J. Noyon, G.E. Langemeijer, J. Remmelink, "The Criminal Code" (*Het Wetboek van Strafrecht*), 1982 (loose-leaf), note 4, supplement 78, p. 630.
[12] States-General (2004-2005), 30156 (R1791, A and no. 1), p. 5.

Article 47

1. The following persons are punishable as perpetrators of a criminal act:
   1°: those who commit a criminal offence, either personally or jointly with others, or cause a criminal offence to be committed;
   2°: those who, by means of gifts, promises, abuse of authority, use of violence, threat or deception or by providing the opportunity, means or information, intentionally solicit the commission of a criminal offence.
2. With regard to the last category, only those actions intentionally solicited by them, in addition to the consequences of these actions, are to be taken into consideration.

Article 48

The following persons are punishable as accessories to a serious crime:
1°: those who intentionally assist during the commission of the serious crime;
2°: those who intentionally provide the opportunity, means or information necessary to commit the serious crime.

Jurisdiction

67. The Netherlands has made a reservation to Article 17 of the Convention: see Annex A.

68. The Netherlands has established jurisdiction over all bribery offences committed on its territory (territoriality principle), pursuant to article 2 CC, which according to the Dutch authorities has a wide scope because of application of the 'doctrine of ubiquity'[13].

Article 2

Dutch criminal law applies to anyone who commits an offence in the Netherlands.

69. Furthermore, Article 4 (under 10°) CC establishes jurisdiction (limited passive nationality and personality principle) over active bribery of public officials committed abroad, in case the public official in question has Dutch nationality, subject to dual criminality. Article 4 (under 11°) CC establishes jurisdiction (limited active nationality and personality principle) over active bribery of public officials abroad in cases in which the bribe-giver is a Dutch public official or a person in the service of an international organisation based in the Netherlands, subject to dual criminality.

Article 4

Dutch criminal law applies to anyone who, outside of the Netherlands, is guilty of:
(…)
10° one of the crimes, described in articles 177 and 177a, insofar as the crime was committed against a Dutch person and the crime is punishable in the country where it was committed;
11° any of the crimes described in Articles 177, 177a, 225, 227b and 323a, insofar as the offence was committed by a Dutch public official or by a person in the public service of an international organisation based in the Netherlands, and is liable to punishment under the law of the country where it was committed;
(…)

[13] The doctrine of ubiquity refers to the possibility to assume jurisdiction over an offence, if only part of the offence occurs on the territory of the state. If part of the criminal provision is fulfilled in the Netherlands, the Netherlands has jurisdiction (jointly) pursuant to the principle of territoriality. The Dutch authorities report that the doctrine of ubiquity also applies to participatory acts and participation in a criminal organisation (140 CC).

70. Article 5 CC, paragraph 1 (under 2⁰) establishes jurisdiction (limited active personality principle) over all active and passive bribery offences committed by Dutch persons abroad, subject to dual criminality.

> **Article 5**
> 1. Dutch criminal law applies to a Dutch citizen who has committed outside the Netherlands:
> 1⁰: one of the crimes described in Chapters I and II of the Second Book and in articles197a, 197b, 197c, 206, 237, 272, 273, as well as – to the extent this concerns a crime directed against the administration of justice by the International Criminal Court, as intended in article 70, first para., of the Statute of Rome – in articles 177, 177a, 178, 179, 180, 189, 200, 207a, 285a and 361;
> 2⁰: an offence which is considered a crime under Dutch criminal law and which is liable to punishment under the law of the country where it was committed;
> 3⁰: (…)
> 4⁰: (…)
> 2. Prosecution of the offences described in the first paragraph under 2⁰ and 3⁰ can also take place if the suspect only becomes a Dutch citizen after having committed the offence.

71. As regards the dual criminality requirement, the Dutch authorities indicate that this refers to a requirement that the offence is also an offence under the law of the foreign jurisdiction, which does not mean that it would have been possible in reality to prosecute the crime in the foreign jurisdiction in question. In this connection, the Supreme Court ruled – for example – that it is irrelevant that the statute of limitation in the foreign jurisdiction has run out for these offences (Supreme Court, 18 December 2001, NJ 2002, 300). Under established case law, furthermore, the qualification of the offence does not have to be the same in both countries (Supreme Court, 2 February 1903, W 7880). The decisive factor is whether the criminal provision in the other country essentially protects the same right.[14]

72. An example of the application of the active personality principle is the case in which a Dutch citizen had committed private sector bribery in the UK (Court of Appeal Amsterdam, 4 April 2003, NJ 2003, 291). The Dutch authorities furthermore indicate that the active personality principle as laid down in Article 5 CC also applies to Dutch legal entities. This will even be the case if criminal liability of legal entities is unknown in the law of the foreign state (Supreme Court, 18 October 1988, NJ 1989, 496).

73. Finally, article 6 CC provides for jurisdiction (active personality principle) with regard to 'abuse of office offences' (or 'malfeasance in office offences') committed by Dutch public officials outside the Netherlands (Article 6, paragraph 1, CC). 'Abuse of office offences' of Title XXVIII of the Criminal Code include the provisions on passive bribery of public officials (Articles 362 to 364a CC). Article 6, paragraph 2, of the Criminal Code declares Dutch criminal law applicable to acts of passive bribery of public officials – Articles 362 to 364a CC – committed by persons in the public service of an international organisation based in the Netherlands who are bribed abroad. It should be emphasised that article 6 does not require dual criminality.

[14] The Supreme Court for example ruled it to be irrelevant that a drugs crime would be prosecuted as 'import of hazardous substances' in the foreign state, while under Dutch law it is classified as 'import of narcotics' (Supreme Court, 4 February 2003, LJN: AF0451).

Article 6
Dutch criminal law applies to:
1º a Dutch public officials who, outside of the Netherlands, commits one of the crimes described in Chapter XXVIII of the Second Book;
2º a person in the public service of an organisation governed by international law, which is situated in the Netherlands, who commits one of the offences described in articles 362 to and incl. 364a outside of the Netherlands.

Statute of limitations

74. Pursuant to article 70 CC the statute of limitation is calculated on the basis of the maximum sentence for the offence: a statute of limitations of two years for misdemeanours; six years for crimes for which the maximum sentence is a fine, detention or a term of imprisonment of not more than three years; twelve years for crimes for which the maximum sentence is a term of imprisonment of more than three years; twenty years for crimes for which the maximum sentence is a term of imprisonment of more than ten years. Crimes carrying a sentence of life imprisonment do not have a statute of limitations.

75. The statute of limitations under the abovementioned provisions is thus as follows:

Article CC	Offence	Sanction (Imprisonment)	Statute of limitations
Bribery in the public sector			
177	Active bribery of a public official, in violation of his/her duty	4 years	12 years
177a	Active bribery of a public official, not in violation of his/her duty	2 years	6 years
178 (1)	Aggravated active bribery of a judge	6 years	12 years
178 (2)	Aggravated active bribery of a judge (to get a conviction)	9 years	12 years
362 (1)	Passive bribery of a public official, not in violation of his/her duty	2 years	6 years
362 (3)	Passive bribery of certain high-ranking officials, in violation of duties	4 years	12 years
363 (1)	Passive bribery of a public official, in violation of his/her duty	4 years	12 years
363 (3)	Passive bribery of certain high-ranking officials, in violation of duties	6 years	12 years
364 (1), (2)	Aggravated passive bribery of a judge	9 years	12 years
364 (3), (4)	Aggravated passive bribery of a judge (to get a conviction)	12 years	20 years
Bribery in the private sector			
328ter (1)	Passive bribery in the private sector	1 year	6 years
328ter (2)	Active bribery in the private sector	1 year	6 years

76. The Dutch authorities report that the statute of limitations is interrupted by an act of prosecution, which may also concern parties other than the prosecuted person (article 72, paragraph 1, CC).[15] An act of prosecution would for example be the opening of a preliminary inquiry or bringing charges. After the interruption, a new statute commences automatically. The limitation period is however not to exceed twice the standard statute of limitations applicable to the particular offence (Article 72, paragraph 2, CC).

Defences

77. The Dutch authorities report that Dutch criminal law does not provide for the possibility to invoke any special defence as regards the commission of any of the abovementioned bribery offences.

Data

78. The Dutch authorities report on the following cases relating to bribery of public officials and private sector bribery and stress that the difference between the number of cases and the number of convictions and dismissals does not only reflect the number of acquittals; it also refers to cases awaiting final judgment.

Year	**Cases**	**Convictions**	**Dismissals**
Active bribery of public officials (incl. judges): articles 177, 177a and 178 CC			
2004	36	21	10
2005	44	17	15
2006	29	10	8
Passive bribery of public officials (incl. judges): articles 362, 363 and 364 CC			
2004	56	22	23
2005	23	5	11
2006	25	2	11
Passive bribery in the private sector: article 328ter, paragraph 1, CC			
2004	13	3	9
2005	8	2	4
2006	7	1	1
Active bribery in the private sector: articles 328ter, paragraph 2, CC			
2004	9	8	-
2005	4	1	1
2006	1	-	-

Legislative amendments

79. The Dutch authorities report that a draft bill (partially) amending the Criminal Code, the Code of Criminal Procedure and a number of other laws has been submitted to the Second Chamber of the parliament on 20 March 2008[16]. This bill will raise the fine applicable to the bribery offences under Articles 177a and 178, paragraph 1, of the Criminal Code from the fourth (€16,750) to the fifth category (€67,000). This amendment implements a recommendation issued in GRECO's Second Evaluation Round. Furthermore, it is the intention that the bill will extend possibilities for

[15] For example, if a preliminary inquiry is opened in a criminal case concerning a person who – as it later turns out – did not commit the offence, this would also interrupt the statute of limitations in the case of the real offender.
[16] Second Chamber (2007-2008), 31391, No. 2.

imposing a professional disqualification in the event of active bribery of public officials, by means of a reference in the criminal provisions to Article 28(1)(5) of the Criminal Code. In addition, the bill will clarify that the additional punishment of professional disqualification also comprises disqualification of persons acting in a leading position in a legal person.

III. ANALYSIS

80. The Netherlands appears to have a pragmatic and flexible approach to anti-corruption legislation. The offences criminalised by articles 177, 177a, 178, 362 to 364 and 328ter CC cover a wide range of corrupt behaviour. In addition, the relevant provisions appear to be interpreted broadly by prosecutors and judges. The GET was provided with a significant number of cases to underscore various interpretations of the law, which has significantly contributed to the GET's understanding of the scope of the provisions on corruption and has helped to clarify a number of issues. The GET welcomes the fact that, although a number of interlocutors pointed to a desire for greater clarity of the existing provisions, not one of the interviews held by the GET left it with the impression that the bribery provisions were significantly deficient. This substantiated the GET's view that the Dutch criminal provisions on corruption are on the whole in line with the requirements of the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191). However, this is not to say that there are no issues of concern.

81. The Criminal Code contains four central provisions concerning bribery in the public sector (Articles 177, 177a, 362 and 363 CC), in addition to two provisions dealing with bribery of judges in certain specific situations (Articles 178 and 364 CC). For various historical reasons these provisions are spread across separate parts of the Criminal Code, with the provisions on passive bribery (Articles 362-364 CC) contained in a special part of the Criminal Code under the title 'abuse of office offences' (or 'malfeasance in office offences').

82. The aforementioned provisions on bribery in the public sector, although not always employing the exact terminology used in the Convention and the Additional Protocol, cover all types of acts of active bribery (promising, offering or giving) and passive bribery (request or receipt, acceptance of an offer or a promise). With regard to the latter it should perhaps be noted that although the notion of the mere 'receipt' of an advantage seems to be absent on paper, it is considered to be covered by the term 'accepts' in articles 362 to 364 CC. As it would appear that this acceptance could be deduced from the factual circumstances of a case, the GET is satisfied that this covers intentional receipt as required by Article 3 of the Convention. The GET furthermore found it convincingly clear that the provisions cover material and immaterial advantages, direct and indirect bribery, as well as third party beneficiaries. Moreover, the GET commends the Dutch authorities for a particularly strong feature of the provisions on passive bribery: the inclusion of the words 'reasonably suspecting' in articles 362 to 364 CC, which ensures that a public official will also be held liable if it can be established that s/he *should* have understood that s/he received an advantage to do or omit to do something in return. In addition, the GET welcomes the extended applicability of the main provisions on bribery of public officials to also include persons whose appointment as public official is pending as well as former public officials.

83. The GET examined in detail the concept of public official in Dutch law. In this regard, the GET also took into account that the Dutch offence of bribery in the private sector is much narrower in scope (see on this issue paragraph 90 below) than public sector bribery (and attracts only a maximum sentence of one year's imprisonment, compared to two or four years' imprisonment for public sector bribery). Given the fact that boundaries between the private and public sector are often and increasingly blurred, the GET wanted to make sure that the concept of public official as

it is used in the Dutch Criminal Code unequivocally meets the requirements of Article 1 of the Convention.

84. In this context, the GET noted that the Criminal Code contains no explicit definition of what is to be considered a public official. The GET was informed, however, that it was not unusual in the Dutch criminal law system that certain concepts are not defined in the law.[17] According to the Dutch authorities, by leaving room for interpretation of these concepts to the courts, a certain amount of flexibility of the Criminal Code is guaranteed, which avoids frequent amendments of the law. In light of this, the GET was somewhat surprised to see that article 84 CC (see paragraph 11 above) nevertheless extended the undefined notion of a public official to also include certain other functions.

85. In the absence of a definition in the Criminal Code, much of the understanding of who is to be considered a public official in the Criminal Code derives from case law and – in certain cases – also from the explanatory memorandum to the law. As regards the latter, the GET took note of the interpretation adopted by the Minister of Justice in the explanatory memorandum to the ratification documents concerning the Additional Protocol (ETS 191), that judges would include jurors. Although the GET finds that this reasoning is somewhat convoluted and that in order to establish liability of, for example, foreign jurors it required quite a number of steps to be taken (i.e. a foreign juror is equated with a foreign judge, who in turn is equated with a domestic judge, who in turn is considered to be a public official), it accepts that the Dutch courts, when confronted with a bribery offence committed by a (foreign) juror, would refer to the explanatory memorandum to the ratification documents, in which it is stressed that the term 'judge' is meant to cover jurors as well.

86. Turning to the interpretation of the concept 'public official' deriving from case law, the GET took note of the standard set by a Supreme Court judgment of 1911, which provides that a public official is "anyone who has been appointed by the public authorities to a public position, in order to perform a part of the duties of the state and its bodies"[18]. In a more recent case (1995) the Supreme Court ruled in a similar way that public officials are "those who have been appointed under supervision and responsibility of the government to a position which has a public character to perform part of the tasks of the State or its bodies"[19]. The GET was provided with a number of examples of cases (not necessarily corruption cases) in which a person, whose relationship to the public sector was indirect, was deemed to be a public official for the purpose of the Criminal Code – for example a tram driver employed by a privatised public sector company or a security officer of a university. However, a few interlocutors cast doubt on the clarity of who is or is not a public official.[20]

87. Although the GET found that the concept of public official as interpreted by the courts appeared to encompass the functions mentioned in Article 1 of the Convention (and would – as indicated above – pursuant to the explanatory memorandum to the ratification documents also include the functions mentioned in the Additional Protocol), it did agree with some of its interlocutors that the scope of this concept is unclear. In this regard, it had some particular concerns that a person

[17] Examples of such undefined concepts include 'legal entity' in article 51 CC and the concept 'item' used in the provisions on theft in article 310 CC. The interpretation of these concepts is entrusted to criminal courts, also in recognition of the significant role the Supreme Court has in the development of law.

[18] Supreme Court, 30 January 1911, W9149.

[19] Supreme Court, 30 May 1995, NJ 1995, 620

[20] One interlocutor gave the example of a case in which the court had decided that an employee of the railway police was considered to be a public official, but stressed that this did not provide further clarity as to whether all employees of railway companies or other persons with a similar status to railway police officers would now be considered 'public officials' within the meaning of the Criminal Code.

might not be aware that s/he was considered to be a public official for the purpose of the Criminal Code. In the view of the GET, this could also have a bearing on the guilt of the giver of the advantage, if s/he does not realise that the recipient is to be considered a public official under the Criminal Code and has no reason to think that the receiver of the advantage would not disclose this to his/her employer (which is the crucial element for determining the guilt of a person under the provisions on private sector bribery). Although it was stressed by the Dutch authorities that ignorance of the law would not be a defence, the GET was also made aware of instances in which courts deemed the extent of the defendant's knowledge as to his/her or another's status as a public official a relevant factor in deciding on the guilt of the person concerned.[21] These particular cases were relatively clear-cut in that the bribe-taker was a person in a relatively high-ranking position, carrying out duties generally regarded as public. However, if a person working for a private company carrying out a task, which is public in nature, does not occupy such a high-ranking position, the situation could very well be less straightforward. The GET took note of the argument of the Dutch authorities that the disadvantage of providing a further clarification of the concept of 'public official' in the law could outweigh its advantages, as providing a clarification in the law could have an inhibiting effect on the development of case-law (cf. a court may be more readily inclined to judge that the bribe-taker is not a public official if his/her function does not correspond with the definition provided by the law in a strict sense). Nevertheless, despite the sympathy the GET has for these arguments, the GET also considers that public tasks are now so often performed by private entities and the fact that – unlike the other examples mentioned above of undefined legal concepts – whether someone is a public official (or not) may have a bearing on the guilt of the parties concerned. The GET therefore finds that it should be analysed if – despite the aforementioned disadvantage – there is a need, for the sake of legal certainty, to define the groups of persons/functions, which would be covered by the term 'public official' in the provisions on bribery in the Criminal Code, in particular in light of the fact that persons who do not work in the civil service may not always be aware that the notion of 'public official', as contained in articles 177, 177a, 362 and 363 CC, could also apply to them. Therefore, the GET recommends **to analyse if there is a need, for the sake of legal certainty, to clarify which functions are covered by the notion of 'public official' in articles 177, 177a, 362 and 363 of the Criminal Code.**

88. The GET noted that bribery where the desired or obtained outcome is a breach of an official's duty is treated more seriously (Articles 177 and 363 CC: maximum four years' imprisonment) than situations in which there is no element of a breach of duty (Articles 177a and 362 CC: maximum two years' imprisonment). The interlocutors met on-site assured the GET that this distinction between the provisions would not lead to unnecessary complications (and would not risk defendants charged under article 177 or article 363 being acquitted if a breach of duty could not be established), as it would be possible to prosecute a person on the basis of both provisions (i.e. with and without a breach of duty) with the judge making the final decision.

89. The GET discussed at length the extent to which a relationship between the advantage and act needed to be established, also in light of the remarks of a few interlocutors that the courts may ask for a causal link between the two to be demonstrated (and that as regards this link there could be substantial differences in verdicts dealing with similar situations). The GET focused in particular on situations in which a climate of corruption is created by giving a series of advantages with a view to being favoured by an unspecified act (or omission) of the public official in future, which should also be covered by the corruption provisions. In this context, the GET was made aware of a case in 2006 in which a conviction for passive bribery was overturned with the reasoning that "it is one of the tasks of a public official with a position/function like the defendant

[21] cf. Court of Appeal Den Bosch, 12 October 2007, LJN: BB5551 and LJN: BB5556.

has, to maintain and improve business relations/contacts with the contractual partner".[22] However, the Dutch authorities subsequently pointed out that the judgment in this case was rendered on the basis of the old corruption provisions (as the alleged offence had taken place before February 2001). Since February 2001, the words "reasonably suspecting" have been included in articles 362 to 364 CC, which unequivocally establish that a public official will also be held liable if it can be determined that s/he should have understood that s/he received an advantage to get him/her to do or omit to do something in return. In addition, the Dutch authorities have referred to a judgment[23] rendered a few months after the aforementioned decision of the Court of Appeal, in which the Supreme Court established – on the basis of the old bribery provisions – that bribery "is not just limited to situations in which there is a direct relationship between the gift/promise on the one hand and the concrete act in return on the other hand. It also encompasses situations in which a gift is provided or a promise made to a public official to form and/or maintain a relationship with the public official with the aim of obtaining preferential treatment." Considering that the judgments of the Supreme Court guide the lower courts in their interpretation of the law, the GET trusts that this case further clarifies the extent to which a direct causal link between the bribe and a specific act needs to be demonstrated in practice.

90. Turning to bribery in the private sector, the GET was surprised to note how differently this offence was formulated compared to bribery in the public sector. While that in itself would not pose particular problems, crucial elements of the offence which are covered by the provisions on public sector bribery, seem to be excluded from article 328ter CC on bribery in the private sector. Elements such as 'request' or 'acceptance of an offer' are not covered as regards passive bribery (article 328ter, paragraph 1, CC), an 'offer' is not included in the provision on active private sector bribery (article 328ter, paragraph 2, CC) and the notion of 'service' which has been included in the provision on public sector bribery is absent from article 328ter CC. The Dutch authorities met on-site explained that it was widely accepted that the elements present in the provisions on public sector corruption would by analogy also be applicable to the private sector offence. Other interlocutors, however, cast some doubt on this assertion by indicating that although this would be true regarding identical elements in the provisions on public and private sector bribery (for example, the meaning of the concept 'gift'), it would perhaps not go as far as filling in elements of the offence which are not already included in the relevant provision. The Dutch authorities also indicated that particular forms of conduct – such as a request for a gift – would also be covered by the articles on participatory acts (articles 47 and 48 CC), for example as 'inciting someone to commit active bribery'.[24] As regards the absence of the term 'service' from article 328ter CC, the GET was informed that although the addition of 'service' was made to the provisions on bribery of public officials, this would not have been necessary on the basis of case law and therefore it would also not be necessary to include it in the provisions on private sector bribery. Nevertheless, the GET is of the opinion that the terminology currently used in article 328ter CC leaves significant room for improvement. In this context, the GET also took note of the number of references made to the complexity and the vagueness of this article, in particular as regards the meaning of the qualification "concealment of the gift or promise contrary to the requirements of

[22] Court of Appeal The Hague, 20 January 2006, 10/000013. The public official was someone with an important position in an agency (*Rijkswaterstaat)* of the Ministry of Transport and Water Management, who was authorised to conclude certain agreements with contractors. In the initial judgment of the District Court Rotterdam (16 December 2004, 10/000013), the court decided that the defendant should have understood that the gifts (various monetary amounts, payment of his marriage reception and his work jubilee reception by a construction firm) were provided to him to obtain a certain service in return. In this regard the District Court also considered that the circumstances in which the gifts had been provided pointed to attempts to hide the identity of the giver and/or the nature of the gifts. The Court of Appeal did not follow this line of reasoning and did not accept that the public official had acted 'contrary to his duties'.

[23] Supreme Court, 20 June 2006, LJN: AW3584.

[24] An offer of a gift could by analogy be prosecuted as 'inciting someone to commit passive bribery'.

good faith" and, although the GET appreciates that this was formulated in such a way to exclude gifts which would normally be exchanged within the context of legitimate business (and would thus not be contrary to good faith), it would agree with some of its interlocutors that this phrase might be unnecessarily vague. In short, the GET takes the view that any doubts as to the scope of the provision on private sector bribery and – more in particular – the extent to which certain conduct and key elements prescribed by Articles 7 and 8 of the Convention are covered by article 328ter CC, must be removed.Therefore, the GET recommends **to amend the provision on private sector bribery aligning it more closely to the provisions on public sector bribery, to ensure that it is fully in line with Articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173)**.

91. As regards trading in influence, the Netherlands has not established this conduct as an offence and has made a reservation in this respect (see paragraphs 60 and 61 above and Annex A below). Both in the replies to the questionnaire and in the interviews conducted on-site, the Dutch authorities maintained that certain forms of influence (whether financial or not) over decisions of public officials or politicians may be lawful and to regulate this matter would encroach upon legitimate lobbying and free speech. The authorities were furthermore of the opinion that the most reprehensible and significant part of the actions described in Article 12 of the Convention would already be covered by the Criminal Code, in the form of participation to bribery under articles 47 and 48 of the Criminal Code. The representative of civil society, on the other hand, was clearly in favour of the introduction of such an offence, although she did not provide the GET with examples of criminal conduct which could presently not be prosecuted in the absence of a provision on trading in influence in the Dutch Criminal Code. As regards the argument of the Dutch authorities that to regulate this issue would encroach upon legitimate lobbying and free speech, reference is made to the Explanatory Report to the Convention (paragraph 65) which states that "the acknowledged forms of lobbying do not fall under the notion of 'improper' influence which must contain a corrupt intent by the influence peddler". As the establishment of trading in influence as a criminal offence permits the authorities to reach the close circle of officials, or the political party to which they belong, and to tackle so-called 'background corruption', the GET recommends **to consider criminalising trading in influence in accordance with Article 12 of the Criminal Law Convention on Corruption (ETS 173) and thus withdrawing or not renewing the reservation relating to this article of the Convention.**

92. The GET was pleased to note the broad provision on territorial jurisdiction in the Netherlands by application of the principle of ubiquity as well as article 6 CC which establishes jurisdiction over passive public sector bribery committed by Dutch public officials (not necessarily being Dutch nationals) abroad. However, the GET found the other provisions on jurisdiction rather complicated. The same can be said of the reservation the Netherlands has made to the Convention, which took the GET some time to untangle, but which was regarded by the authorities met on-site to be more of a clarification than a reservation. Whereas – as already indicated above – the Netherlands has jurisdiction as regards passive bribery by Dutch *public officials* abroad, the reservation establishes that Dutch jurisdiction over active and passive bribery offences committed by Dutch *citizens* abroad is subject to dual criminality. The GET received assurances that the dual criminality requirement was interpreted broadly, whereby courts would look at whether the nature of the behaviour in question was criminal in the Netherlands rather than whether it would be formulated in exactly the same manner in the foreign jurisdiction. This was illustrated by an appeal case[25] where a Dutch national committed private sector bribery in the United Kingdom. The Court deemed the dual criminality requirement met, even though English law does not formulate the offence in exactly the same manner (under

[25] Court of Appeal Amsterdam, 4 April 2004, LJN: AF6890.

English law there is, for example, no requirement of a lack of "good faith"). Whilst the Court's decision thus points towards compliance with the Convention (and indeed the Convention was referred to by the Court), the GET did query that if the behaviour occurred in a country not party to the Convention where private sector bribery is criminalised but as a very different offence (e.g. anti-trust etc.), the Court would not have reached a different decision. In the absence of any case-law as regards the establishment of jurisdiction over active and passive bribery committed by Dutch nationals and active bribery committed by Dutch public officials in countries not party to the Convention and in light of the fact that the GET was not provided with any justification why a dual criminality requirement would need to be maintained for these corruption offences, the GET recommends **to consider abolishing the dual criminality requirement for corruption offences committed abroad and thus withdrawing or not renewing the reservation made to Article 17 of the Criminal Law Convention on Corruption (ETS 173).**

93. As regards sanctions, in comparison to many other GRECO member states, the level of sanctions for certain bribery offences appears to be rather low (one year for private sector bribery, two years for public sector bribery not involving a breach of duty), even when taking into account that the courts can impose a fine in addition to a term of imprisonment (see paragraph 35 above) as well as 'ordinary confiscation'. As expected, the sanctions are even lower in practice, upon taking mitigating circumstances[26] into account. More importantly, however, is that the sanctions for corruption offences cannot in all cases be said to be of a relatively equal level to that of other comparable offences under Dutch Criminal Law. For example, the maximum sanction for embezzlement (article 321 CC) is three years' imprisonment, for fraud (article 326 CC) four years' imprisonment and for embezzlement of funds while holding a public office (article 359 CC) six years' imprisonment. The GET has doubts as to whether the existing sanctions for private sector bribery are dissuasive enough to meet the requirements of the Convention and would also find it advisable if due consideration is given to raising the level of sanctions for public sector bribery not involving a breach of duty, to bring it more in line with the sanctions for other (comparable) offences. In this regard, the GET also wishes to stress that corruption does not only represent a mere economic offence, but "threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice", as outlined in the preamble to the Convention. Therefore the GET recommends **to increase the sanctions for private sector bribery (article 328ter of the Criminal Code) and to consider increasing the sanctions for public sector bribery not involving a breach of duty (articles 177a and 362, paragraph 1, of the Criminal Code), ensuring that the sanctions for these offences are effective, proportionate and dissuasive in practice, as required by Article 19 of the Criminal Law Convention on Corruption (ETS 173).**

94. Finally, the GET took note of the declaration of the Netherlands contained in the instrument of its acceptance of the Convention and the Additional Protocol in which the territorial application of the Convention and its Additional Protocol is restricted to the Kingdom of the Netherlands in Europe: the Convention and Additional Protocol thus do not apply to the Netherlands Antilles and Aruba. Article 34 of the Convention explicitly allows states to specify the territory to which the Convention shall apply. Nevertheless, the GET was not made aware of the reasons why the Netherlands Antilles and Aruba had not acceded to the Convention and the Additional Protocol. The GET merely notes that the Civil Law Convention on Corruption (ETS 174), which was

[26] Mitigating circumstances taken into consideration by the court are not only that the person concerned would be a first time offender, but also that the offence had been committed a long time ago, the public body for which the offender worked did not seem to regard the promulgation and strengthening of ethical standards a matter of priority (cf. District Court Utrecht, 22 November 2005, LJN: AU6581), the offender had to give up his position/status as a public official (cf. District Court Rotterdam, 15 December 2004, 10/000130-02), the case had generated a large amount of publicity and/or disciplinary sanctions had already been imposed on the offender (cf. District Court Roermond, 14 April 2004, LJN AO 7566).

recently ratified by the Netherlands, is also applicable to the Netherlands Antilles (but not Aruba) and that other Council of Europe Conventions, such as the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS 141), apply to both the Netherlands Antilles and Aruba. In view of this, and also considering the priorities formulated by the current Dutch government to work together with Aruba, Curacao, Sint Maarten, Bonaire, Sint Eustatius and Saba on an administration that is efficient, transparent and upright and the process of political reform currently underway in the Kingdom, the GET would find it advisable that efforts are made to ensure that the legal provisions on corruption in all countries of the Kingdom of the Netherlands comply with the requirements of the Convention and the Additional Protocol. Therefore, the GET recommends **to give high priority, in the process of political reform currently underway in the Kingdom of the Netherlands, to bringing the legislation of all countries of the Kingdom into line with the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191).**

IV. CONCLUSIONS

95. Overall, the Dutch legal framework for the criminalisation of corruption complies with the standards of the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191). It is clear that the relevant provisions on public sector bribery (articles 177, 177a, 362 and 363 of the Criminal Code) cover the different types of corrupt behaviour laid down in the Convention and the Additional Protocol, the required categories of functions, material and immaterial advantages, direct and indirect bribery, as well as third party beneficiaries. With the 2001 amendments to the Criminal Code a particularly strong feature was included in the provisions on passive public sector bribery with the words "reasonably suspecting", which ensure that a public official can also be held liable if it can be established that s/he should have understood that s/he received an advantage to do or omit to do something in return. In turn, the legal provisions seem to be broadly interpreted by prosecutors and judges alike and the case-law built up underscores the broad scope of the provisions under evaluation.

96. Nevertheless, a limited number of issues were identified, which would warrant further attention. This concerns, in particular, the provision on private sector bribery in article 328ter of the Criminal Code, which would benefit from amendments, ensuring that it is fully in line with the requirements of Articles 7 and 8 of the Convention and to avoid any confusion in practice as to the extent to which certain corrupt conduct is covered by this article. Furthermore, as regards public sector bribery, the Netherlands is urged to analyse whether there is a need, for the sake of legal certainty, to clarify the term 'public official' as used in articles 177, 177a, 362 and 363 of the Criminal Code. Moreover, the Netherlands is called upon to reconsider its position concerning the reservations it has made to Articles 12 and 17 of the Convention, concerning trading in influence and jurisdiction respectively. The Netherlands is also asked to increase the sanctions for private sector bribery and to consider increasing the sanctions for public sector bribery not involving a breach of duty to ensure that these are effective, proportionate and dissuasive in practice. Finally, in light of the importance of a congruent fight against corruption across the Kingdom of the Netherlands, attention is drawn to the need to give high priority to bringing the legislation of all countries of the Kingdom into line with the Convention and the Additional Protocol in the process of political reform currently underway.

97. In view of the above, GRECO addresses the following recommendations to the Netherlands:

i. **to analyse if there is a need, for the sake of legal certainty, to clarify which functions are covered by the notion of 'public official' in articles 177, 177a, 362 and 363 of the Criminal Code** (paragraph 87);

ii. **to amend the provision on private sector bribery aligning it more closely to the provisions on public sector bribery, to ensure that it is fully in line with Articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173)** (paragraph 90);

iii. **to consider criminalising trading in influence in accordance with Article 12 of the Criminal Law Convention on Corruption (ETS 173) and thus withdrawing or not renewing the reservation relating to this article of the Convention** (paragraph 91);

iv. **to consider abolishing the dual criminality requirement for corruption offences committed abroad and thus withdrawing or not renewing the reservation made to Article 17 of the Criminal Law Convention on Corruption (ETS 173)** (paragraph 92);

v. **to increase the sanctions for private sector bribery (article 328ter of the Criminal Code) and to consider increasing the sanctions for public sector bribery not involving a breach of duty (articles 177a and 362, paragraph 1, of the Criminal Code), ensuring that the sanctions for these offences are effective, proportionate and dissuasive in practice, as required by Article 19 of the Criminal Law Convention on Corruption (ETS 173)** (paragraph 93);

vi. **to give high priority, in the process of political reform currently underway in the Kingdom of the Netherlands, to bringing the legislation of all countries of the Kingdom into line with the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191)** (paragraph 94).

98. In conformity with Rule 30.2 of the Rules of Procedure, GRECO invites the authorities of the Netherlands to present a report on the implementation of the abovementioned recommendations by 31 December 2009.

99. Finally, GRECO invites the authorities of the Netherlands to authorise, as soon as possible, the publication of the report, to translate the report into the national language and to make this translation public.

Annex A
Reservations of the Netherlands to the Criminal Law Convention on Corruption (ETS 173)

In accordance with Article 37, paragraph 1, the Netherlands will not fulfil the obligation under Article 12.

In accordance with Article 37, paragraph 2, and with regard to Article 17, paragraph 1, the Netherlands may exercise jurisdiction in the following cases:

a. in respect of a criminal offence that is committed in whole or in part on the Dutch territory;

b.

- over both Dutch nationals and Dutch public officials in respect of offences established in accordance with Article 2 and in respect of offences established in accordance with Articles 4 to 6 and Articles 9 to 11 in conjunction with Article 2, where these constitute criminal offences under the law of the country in which they were committed;
- over Dutch public officials and also over Dutch nationals who are not Dutch public officials in respect of offences established in accordance with Articles 4 to 6 and 9 to 11 in conjunction with Article 3, where these constitute criminal offences under the law of the country in which they were committed;
- over Dutch nationals in respect of offences established in accordance with Articles 7, 8, 13 and 14, where these constitute criminal offences under the law of the country in which they were committed;

c. over Dutch nationals involved in an offence that constitutes a criminal offence under the law of the country in which it was committed.

The Kingdom of the Netherlands accepts the Convention for the Kingdom in Europe.

Annex B
Reservations of the Netherlands to the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191)

In conformity with the provisions of Article 10, paragraph 1, and Article 9, paragraph 2, of the Additional Protocol to the Criminal Law Convention on Corruption, the Kingdom of the Netherlands declares that it accepts the said Protocol for the Kingdom in Europe, subject to the following reservations made by the Kingdom of the Netherlands when depositing its instrument of acceptance of the Convention:

In accordance with Article 37, paragraph 2, and with regard to Article 17, paragraph 1, the Netherlands may exercise jurisdiction in the following cases:

a. in respect of a criminal offence that is committed in whole or in part on the Dutch territory;

b.

- over both Dutch nationals and Dutch public officials in respect of offences established in accordance with Article 2 and in respect of offences established in accordance with Articles 4 to 6 and Articles 9 to 11 in conjunction with Article 2, where these constitute criminal offences under the law of the country in which they were committed;
- over Dutch public officials and also over Dutch nationals who are not Dutch public officials in respect of offences established in accordance with Articles 4 to 6 and 9 to 11 in conjunction with Article 3, where these constitute criminal offences under the law of the country in which they were committed;
- over Dutch nationals in respect of offences established in accordance with Articles 7, 8, 13 and 14, where these constitute criminal offences under the law of the country in which they were committed;

c. over Dutch nationals involved in an offence that constitutes a criminal offence under the law of the country in which it was committed.

In accordance with Article 37, paragraph 1, the Netherlands will not fulfil the obligation under Article 12.