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Group of States against corruption

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# First Evaluation Round

# Evaluation Report on the Netherlands

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## I. INTRODUCTION

1. The Netherlands was the thirty-first GRECO member to be examined in the First Evaluation Round. The GRECO Evaluation Team (hereafter, "GET") was composed of Mr Atle ROALDSØY, Senior Adviser, Police Department, Ministry of Justice (Norway, law enforcement expert); Mr Wolfgang SCHMID, Public Prosecutor in Baden-Wurttenberg (Germany, criminal justice expert) and Ms Mimoza KIKOVSKA, Head of Department for European Integration, Ministry of Justice ("The former Yugoslav Republic of Macedonia", general policy expert). This GET, accompanied by a member of the Council of Europe Secretariat, visited The Hague, Haarlem and Amsterdam from the 26th to 29th August 2002. Prior to the visit, the Dutch authorities provided experts with a comprehensive reply to the Evaluation questionnaire (document Greco Eval I (2002) 34E) as well as with copies of the relevant legislation.

2. The GET met with officials from the following Dutch institutions and Governmental organisations: the Department of Financial Economic Crimes of the Directorate General for Law Enforcement of the Ministry of Justice, the National Police Internal Investigation Department (*Rijksrecherche*), the Parliament, the Public Prosecution Service, the Council for the Judiciary, the Dutch Association of Judges, the National Ombudsman, the Ministry of the Interior and Kingdom Relations, the Court of Audit, the Ministry of Finance, the Tax and Customs Administration, the Fiscal Information and Investigation Service and Economic Investigation Agency (FIOD/ECD), the Ministry of Economic Affairs, the Protection Unit of the Dutch National Police Agency, the MOT (Office for the Disclosure of Unusual Transactions), BIBOB (Facilitation of judgements on integrity evaluations by government bodies), the Association of Netherlands Municipalities (VNG), the Integrity Bureau of the city of Amsterdam, the Police of Amsterdam Region.

3. Moreover, the GET met with representatives of the Confederation of Netherlands Industry and Employers (VNO-NCW), the forensic accountants, Transparency International and the Netherlands Association of Journalists (NVJ).

4. It is recalled that GRECO agreed, at its 2nd Plenary meeting (December 1999) that the 1st Evaluation round would run from 1 January 2000 to 31 December 2001[1], and that, in accordance with Article 10.3 of its Statute, the evaluation procedure would be based on the following provisions:

   - Guiding Principle 3 (hereafter "GPC 3": authorities in charge of preventing, investigating, prosecuting and adjudicating corruption offences: legal status, powers, means for gathering evidence, independence and autonomy);
   - Guiding Principle 7 (hereafter "GPC 7": specialised persons or bodies dealing with corruption, means at their disposal);
   - Guiding Principle 6 (hereafter, "GPC 6": immunities from investigation, prosecution or adjudication of corruption).

5. Following the meetings indicated in paragraphs 2 and 3 above, the GET experts submitted to the Secretariat their individual observations concerning each sector concerned and proposals for recommendations, on the basis of which the present report has been prepared. The principal objective of this report is to evaluate the measures adopted by the Dutch authorities, and wherever possible their effectiveness, in order to comply with the requirements deriving from GPCs 3, 6 and 7. The report will first describe the situation of corruption in the Netherlands, the

[1] At its 7th Plenary Meeting (December 2001) GRECO decided to extend the First Evaluation Round until 31 December 2002.

general anti-corruption policy, the institutions and authorities in charge of combating it -their functioning, structures, powers, expertise, means and specialisation- and the system of immunities. The second part contains a critical analysis of the situation described previously, assessing, in particular, whether the system in place in the Netherlands is fully compatible with the undertakings resulting from GPCs 3, 6 and 7. Finally, the report includes a list of recommendations made by GRECO to the Netherlands in order for this country to improve its level of compliance with the GPCs under consideration.

## II. GENERAL DESCRIPTION OF THE SITUATION

6. The Netherlands has a surface of 33,883 km² and a total population of about 16,000,000 inhabitants. It has a land border with Belgium and Germany and 451 Km of coastline on the North Sea. The Kingdom of the Netherlands (full conventional name) is a constitutional monarchy. The Head of State is the Monarch (currently Queen Beatrix). The States General (*Staten Generaal*) is made up of two chambers, the First Chamber (*Eerste Kamer*) composed of 75 members elected by the 12 provincial councils and the Second Chamber (*Tweede Kamer*) composed of 150 members directly elected by popular vote. Following Second Chamber elections, the Monarch usually appoints the leader of the majority party or leader of a majority coalition as Prime Minister. Following the proposal of the Prime Minister, the Royal Decree with which the other Ministers are appointed, is signed by both the Monarch and the Prime Minister.

7. For a relatively small country, the Netherlands has quite a large and powerful economy. It is the world's sixth largest exporting country (third-largest in the export of food), the sixth largest source of investment and its GDP is the 14th highest in the world. GDP per capita was 22,570 Euros in1998. According to the OECD Economic Survey of The Netherlands (January 2002), "After several years of rapid economic expansion (…), the performance of the Dutch economy has deteriorated markedly since early 2000. Real GDP growth is expected to fall to around 1,5% in 2001, compared with nearly 4% on average over the 1997-2000 period. (…) The slowdown of the economy is still not fully reflected in labour market conditions. Owing to strong job creation, the rate has fallen to around 2%. This is virtually the lowest rate in the OECD area and is well below the structural rate". And also "Rising employment, higher wages and lower taxes (…) underpinned strong demand for housing which saw prices continuing to rise by around 15 per cent in 2000".

### a. The phenomenon of corruption and its perception in the Netherlands

*i) Legal framework*

8. The Dutch Penal Code criminalises active and passive bribery of domestic public officials[2] (Articles 177, 177a, 362 and 363), active and passive bribery in the private sector (Article 328ter) and active bribery during elections (Article 126). Provisions on active and passive bribery also apply to national judges (Articles 178 and 364), former civil servants, foreign civil servants,

[2] Public officials, as referred to in the articles on corruption, are: Ministers (including the Prime Minister), under-secretaries, mayors, Royal Commissioners (of the provinces), aldermen (of the towns), members of the local council, members of the Parliament, members of the Provincial States and all other public officials/ civil servants. According to the Supreme Court public official is a person appointed by public authorities to a public office in order to fulfil functions of the State or of its bodies. The Supreme Court also extended this definition by ruling that someone is also considered to be a public official when s/he carries out her/his job under the supervision and responsibility of the government and whose work cannot be denied to be of public character in order to fulfil functions of the State and of its bodies. Article 84 of the Criminal Law extends the definition of a public official explicitly to all members elected through elections as directed by law, militaries, judges and arbitrators.

international civil servants and foreign judges and judges of international organisations (Articles 178a and 364a), future civil servants (Articles 177 and 177a). As regards sanctions, they vary from maximum imprisonment of 12 years for passive bribery of judges to a maximum of 2 years for passive bribery of civil servants acting "(…) not in violation of his duty (…)". Active bribery of public officials is punishable by 9 years at the most for judges, by 2 years for civil servants if the returned favour was not in violation of his/her duty. This sanction can be increased to a maximum of six years in case the offence is committed by a Minister, under-secretary, mayor or certain other political officials.[3] There are no specific provisions on trading in influence because the Netherlands made a reservation on this point in the OECD Convention.

9. According to Article 51 of the Penal Code, a legal person can be deemed punishable for bribery (and any other punishable crime). The rules that apply for legal persons are no different from those provided for natural persons when the Netherlands wants to exercise jurisdiction in connection with punishable crimes committed abroad (including bribery offences). This implies that Dutch criminal legislation *inter alia* applies to Dutch legal persons guilty of bribery offences committed abroad, in so far as these crimes are also punishable in the country where they were committed (nationality principle).

10. According to Article 160 of the Code of Criminal Procedure, all persons have a duty to report to a "criminal investigator" the "knowledge" of specific serious crimes. Corruption is not included[4]. Article 161 gives all persons the right to notify if they have "knowledge of an offence that has been committed". Article 162 determines that: "Public bodies and civil servants who have knowledge, in the execution of their duties, of a crime in which they are not charged with the investigation, must report this immediately, with delivery of the items regarding the crime, to the public prosecutor…" Article 162 directly covers Articles 362, 363, 364 and 364a of the Penal Code. Strictly speaking, it does not apply to Articles 177, 177a, 178 and 178a, since no reference is made to these articles in Article 162 of the Code of Criminal Procedure. It is however assumed ("Directive of the investigation and prosecution of corruption of officials" – see para. 44 and Appendix II) that bodies and officials which discover that someone has probably bribed a public official, "… will nevertheless be confronted fairly quickly with the obligation laid down in Article 162 if there are indications that the bribery was successful." In addition to that specific obligation, public officials are obliged to report suspicions of wrongdoing to their superior. Failure to comply with this provision is not subject to any criminal action. By order (under the Civil Servants Act) of 7 December 2000 the Ministry of the Interior and Kingdom Relations established a procedure for dealing with suspected abuse of central government officials. The order sets out in detail obligations and routines for reporting suspected abuse. Failure to report is considered to be a "neglect of duty" whereas disciplinary measures may be undertaken under the provisions of the Civil Servants Act. The reporting obligation relates to abuse based on reasonable grounds for suspicion of:

- a serious criminal offence,
- a gross breach of regulations or policy rules,
- misleading the criminal justice authorities,
- a serious risk to public health, public safety or the environment, or
- deliberate withholding of information relating to any of the above.

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[3] A set of the relevant legislation is included in Appendix I to this report.

[4] *Article 160 :* 1. Anyone who has knowledge of a crime as described in the articles 92-110 of the Penal Code, in Title VII of the Second Book of the Penal Code, as far as it concerns cases in which there is danger of life, or in the articles 287 until 294 and 296 of the Penal Code, must report this immediately to a criminal investigator; (...)

The order also sets out in detail the procedure to be followed and also establishes legal protection for the person who reports possible abuse in good faith. In addition to that, it contains provisions regulating the tasks of a special commission on integrity of the civil service. Both the commission and the Secretary Generals have (limited) powers to conduct investigations.[5] In case of collision between an internal and a criminal investigation the latter prevails. The Ministry of Social Affairs has asked the Joint Industrial Labour Council for an opinion on a model regulation on whistle-blowing in the private sector.

*ii) Preventive measures*

11. In the field of policy and legislation on integrity in the public sector, the Ministry of the Interior is the coordinating State institution: given the decentralised structure of the Dutch system, it establishes principles and guidelines for assistance to all governmental bodies.[6] Apart from the Civil Servants Act and a specific regulation establishing that judges and prosecutors have the obligation to report any additional functions[7], there are no other specific regulations established at national level (laws on (prevention of) corruption or on conflict of interests, for example). The Dutch authorities responsible for integrity issues adopt policies based on the consideration that established rules alone are not enough for promoting integrity in the administrative bodies. For that reason, in addition to the established measures on combating corruption, they also rely on other pragmatic aspects focusing notably on civil servants' consciousness on integrity problems. The main focus of current Dutch policy on integrity is that administrative bodies:

- be aware of the importance of integrity;
- promote awareness;
- identify vulnerable spots in their organisations;
- take measures to reduce risks;
- have the capacity and the will to cope with violations on integrity;
- keep integrity on the top of the agenda.

*iii) International framework*

12. The Netherlands ratified the Criminal Law Convention on Corruption on 11 April 2002. The Civil Law Convention has not yet been signed and ratified given the fact that the matter is still under consideration.

13. The Netherlands is party to several multilateral and bilateral international agreements concerning general mutual assistance in criminal matters. They all deal with judicial and police co-operation in criminal matters and not with corruption in particular. However, requests for mutual assistance concerning corruption can be made and executed on the basis of the existing treaties. The Netherlands is also party to the OECD Convention on combating bribery of foreign public officials in international business transactions and two EU Conventions on Bribery (the Convention on the fight against corruption involving officials of the European Communities or officials of member states of the European Union and the Protocol to the Convention on the protection of the European Communities, financial interests). Apart from the applicable treaties, Dutch legislation

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[5] The investigative powers of the Secretary General are the same as those of any other employer. As regards the commission, the order is not very precise about its investigative powers, but it provides, for example, that it can ask for information or (confidential) documents, or ask any question to civil servants.

[6] In addition, every governmental institution is also responsible for its own policies on integrity (for instance, the Ministry of Finance has developed a very extensive programme for the Customs).

[7] This information is available on Internet.

provides possibilities for assisting foreign countries in criminal matters. The Dutch Code of Criminal Procedure permits judicial authorities to respond to requests for mutual legal assistance in the broadest possible sense; a treaty is not required. This is different when the evidence sought can only be obtained using compulsive measures. Such requests require a treaty. No specific grounds exist for refusing assistance in corruption cases, other than the general legal grounds for refusal as stated in Dutch law and the bilateral and multilateral mutual legal assistance treaties. There are no specific statistics on mutual legal assistance in corruption matters.

14. According to Dutch law, extradition is only possible on the basis of a treaty. The Netherlands will extradite its nationals in general, but only under the condition that the sentence (imposed by the requesting country) can be served in the Netherlands. This applies to all extradition cases, including corruption cases.

*iv) Money laundering*

15. Money laundering is established as a criminal offence in Dutch criminal legislation. It also gives effect to an "all-crimes" approach to the criminalisation of money laundering and introduces the concept of "self" or "own funds" laundering. Article 420 of the Penal Code establishes, *inter alia*, that a) hiding or camouflaging the source, place, the source of the transaction or transfer of a good, or hiding or camouflaging the owner or the holder, knowing that the good – immediately or more distantly – originates from crime; b) acquiring a good, holding, transferring, converting or using it, knowing that the good originates – immediately or more distantly – from crime is punishable by 4 years' imprisonment and a fine of 450,000 Euro. This sanction is increased to a maximum of 6 years in case the offence is committed "regularly" and reduced to 1 year when committed unintentionally. The MOT (*"Meldpunt Ongebruikelijke Transacties")* – Office for the Disclosure of Unusual Transactions – performs its tasks as central national institution responsible for the process of collecting, recording, processing and analysing information concerning not only suspicious transactions but also unusual transactions. It is an administrative Financial Intelligence Unit. The Disclosure of Unusual Transactions Act makes it mandatory for the following institutions/persons to report unusual transactions: banks, stockbrokers, casinos, money transfer companies, currency exchange offices, credit card companies, insurance intermediaries, life insurers and dealers in high value items (cars, art, ships, antique, jewellery, precious metal and stones). The GET was informed that the list of the obligated institutions is shortly to be extended to include, *inter alia*, lawyers, notaries, public accountants, real estate brokers and tax consultants. If unusual transactions appear to be suspicious, the MOT sends the reports to the police. In 2001, 76,000 unusual transactions (120,000 foreseen in 2002) were reported to the MOT. Of these 76,000 (or 120,000) the MOT reported 20,200 unusual transactions as suspicious transactions (20,700 in 2002) to the police.

*v) Statistics*

See table below.

## STATISTICS ON THE PROSECUTION OF CORRUPTION[8]

**Year of registration at the Public Prosecution Service[9]**

| Investigation services | Kind of offence | Decision of the public prosecutor | Decision of the judge | 1999 | 2000 | 2001 | 2002 |
|---|---|---|---|---|---|---|---|
| **FIOD / ECD** | Abuse of office[10] | Writ of summons | Punitive measures | | 3 | | |
| | Corruption | Writ of summons | Punitive measures | 6 | | | |
| | | | Open | 3 | | 4 | |
| | | Decisions not to prosecute | | 5 | | | |
| | | Transaction | | 1 | | | |
| | | Open | | | | | 4 |
| | **TOTAL** | | | **15** | **3** | **4** | **4** |
| ***Rijksrecherche*** | Abuse of Office | Writ of summons | Punitive measures | 6 | | 2 | |
| | | | Acquittal | | | 1 | 1 |
| | | Decision not to prosecute | | | 6 | | 2 |
| | Corruption | Writ of summons | Punitive measures | 9 | 1 | | 2 |
| | | | Open | 1 | 2 | 4 | 2 |
| | | Decision not to prosecute | | 3 | 12 | 2 | |
| | | Transaction | | 1 | 3 | | |
| | | Open | | | | 6 | |
| | **TOTAL** | | | **20** | **24** | **15** | **7** |
| **Remaining Investigation Services** | Abuse of Office | Writ of summons | Punitive measures | 2 | 6 | 1 | |
| | | | Open | | 1 | 3 | 2 |
| | | Decision not to prosecute | | 1 | | | |
| | | Transaction | | 1 | | | |
| | Corruption | Writ of summons | Punitive measures | 19 | 8 | 6 | |
| | | | Acquittal | | 9 | 2 | |
| | | | Open | | 7 | 10 | 4 |
| | | Decision not to prosecute | | 10 | 8 | 3 | 1 |
| | | Transaction | | 3 | 3 | 3 | 1 |
| | | Open | | 3 | | | 7 |
| | **TOTAL** | | | **39** | **42** | **28** | **15** |
| | **TOTAL ANNUALLY** | | | **74** | **69** | **47** | **26** |

16. Although not easily readable, the figures quoted above seem to be indicative of quite a low level of corruption in the Netherlands. They show that in 2001, 47 cases of corruption (and abuse of office) were transmitted to the Public Prosecution Service and 26 during the first half (25 June) of 2002. The common view of the Dutch authorities met by the GET is that corruption is not a major problem and that it is not a widespread phenomenon. According to the Corruption Perceptions Index for 2002, issued by Transparency International, the Netherlands was listed as number 7 with a score of 9 out of 10, occupying then a high position compared with other European Union member States (5th position after Finland, Denmark, Sweden and Luxembourg).

[8] Corruption includes articles 126, 177, 177a, 178, 178a, 328ter, 362, 363, 364 of the Penal Code.
[9] These statistics relate to cases that have been sent to the Public Prosecution Services for further investigation.
[10] Abuse of office concerns the articles 359, 360, 361 of the Penal Code.

17. According to the information provided to the GET by the Dutch authorities, the total number of cases investigated by the *Rijksrecherche* (Dutch National Police Internal Investigation Department) over the period 1999-2001 is 703[11], of which 264 were investigations on corruption[12]. Other investigative services investigated 33 cases – which were terminated with punitive measures. 20 cases regarding offences by public officials led to a penal judgement. The statistics do not indicate whether or not cases in the latter category are relevant in the context of corruption. They are not related to the relevant sections of the Penal Code and give no information about the nature of the punitive measures applied. Furthermore, no statistics are available on corruption cases registered by police or about the functions of persons involved. The statistics also show that 23 cases of corruption have been forwarded to the Public Prosecution Service from the FIOD-ECD since 1999. In 7 of these cases, punitive measures have been imposed; 11 cases are still open.

18. According to the Dutch authorities, there are no indications that connections between corruption and organized crime is a main issue. In particular, the Dutch criminal prosecution authorities believe that organised crime in conjunction with corruption is rare. This is corroborated by scientific research.[13]

19. Even though the common view of the Dutch authorities is that corruption is not a major problem, the perception of the threat represented by corruption has recently considerably increased because of some investigations/allegations concerning cases involving construction projects ("the Schiphol tunnel" or the new Amsterdam underground North-South line), where it is suspected that cost estimates have been inflated with a view to personal enrichment. In this connection, a representative of the Dutch chapter of Transparency International met by the GET said that corruption behaviour (linked notably to price arrangements in the attribution of public contracts) is a "normal way of life" in the construction sector and that the current position of the Netherlands does not correspond to the reality.

20. On 5 February 2002, the Dutch Parliament decided to set up a Parliamentary Fact-finding Committee on the Construction Industry as a result notably of some allegations on certain fraudulent activities supposed to have occurred in the construction field. Subsequently, the Committee decided to investigate the nature and the scope of the alleged irregularities and more particularly to examine all the relevant facts about the construction of the Schiphol railway tunnel, the appearance of duplicate bookkeeping and any other aspect related to integrity matters[14]. The GET was informed that on 12 December 2002, it presented its final report. The size and the seriousness of the irregularities revealed shocked the Committee: it concluded that the construction sector was on a large scale affected by practises contrary to the regulations on fair economic trade. Preliminary talks between companies aimed at reaching agreements on prices and market division and the duplicate bookkeeping practises showed that most of the big construction enterprises form structures which could lead to cartels. The Committee also concludes that there was no indication of any form of civil servants' structural corruption. Nevertheless, the Committee was concerned about the number of supposed integrity breaches

[11] These are internal statistics of the *Rijksrecherche*. They include all kind of offences committed by public officials, such as : theft and embezzlement, dealing drugs, violence, but also use of firearms on duty and investigations on death in prisons. Furthermore, they also include investigations of the Intelligence Unit (CIE) of the *Rijksrecherche*.

[12] The Dutch authorities informed the GET that these figures are not comparable whit those of the Public Prosecution Service since the *Rijksrecherche* takes into consideration a broader definition of corruption than that of the Criminal Law.

[13] For example the scientific report of Prof. Dr. C.J.CF Fijnaut, that was part of the Parliamentary Inquiry into organised crime.

[14] The GET was informed about the existence of this Committee during the visit.

by a small number of civil servants. Furthermore, it suspected that the relations between civil servants and construction builders are too close and that this can lead to collusion. Therefore, the regulations for civil servants and public procurement were sharpened.

## b. Bodies and institutions in charge of the fight against corruption

### b1. The Police

*i) Structure and organisation*

21. The formal structure of the Dutch police is regulated by the Police Act of 1993. The Dutch police is organized, under the supervision of the Ministry of the Interior and Kingdom Relations and the Ministry of Justice, in 25 regional forces and one national force, the KLPD (*Korps Landelijke Politiediensten* - National Police Services), which has various supporting divisions. The regional forces are divided into districts and units and are under the administrative management of the regional police force manager, the mayor ("Burgomaster") of the largest town in the region. In total, the Netherlands has about 45,000 police officers.

22. As the person responsible for allocating the budgetary resources over the different regional forces, the Minister of the Interior is directly involved in managing the police on a national level. In addition, s/he can ask the Queen to appoint or dismiss the chiefs of the regional police forces and their deputies[15] (the regional police force manager gives an opinion); s/he formulates rules regarding the administrative management of the regional police forces; s/he receives all relevant information from police administrators and mayors and can establish policies on regional police forces cooperation. S/he is also responsible for the training institutes of police officers. When these matters also concern the enforcement of criminal law, the Minister of Justice has to be consulted too. When enforcing criminal law (or performing tasks of the judiciary police), the police act under the supervision of the Public Prosecution Service. When enforcing activities of maintenance of public order and providing assistance, the police operate under the authority of the mayor of the largest city of the region. Therefore, the management of the police involves, on a regional level, three people: the head of the Public Prosecutor's Office, the chief of the regional police and the mayor. They meet (so-called triangle meetings) at least once a month and in many cases even once a week to discuss all questions related to the prevention and fight of local criminality and to improving local security.

23. In addition to the regional forces, the police have organised six so-called "Core teams" consisting of about 50 to 90 persons recruited from the regional police forces. The officers are assigned to the teams for a period of five years. These teams are designed to investigate cases concerning serious and organized crime in cooperation with the regional forces. They focus on investigative work and gathering information related to areas requiring special attention (type of offence/crime, geographic location, type of detective work, particular structure of the perpetrators). Another specialised unit (the National Investigation Team) pays special attention to financial and economic crime and international requests for mutual legal assistance. This team mainly holds expertise in financial and fiscal investigations and large-scale fraud cases. It is organized under the KLPD. The KLPD employs a staff of over 3500, and supplies the regional forces with specialised experts and other resources.

24. Other than these six core teams, the police force has seven special interregional fraud teams, composed of staff from the regions. These teams have nation-wide tasks on specific areas, such

[15] The chiefs of police of the regional forces are appointed by Royal Decree.

as bankruptcy fraud and insurance fraud. The teams and the Public Prosecution Service work closely together with the assistance of external financial experts (accountants and tax specialists).

*ii) Intelligence*

25. Two different services exist in order to support investigative operations at a regional level. The Criminal Intelligence Unit (CIE) that focuses on "soft" information deriving from the police own observations, interviews, interrogations etc., and the Identification Services (HKD) that collect and process "hard" information such as photographs of offenders and crimes, fingerprints and collections of tracks.

*iii) Internal Affairs*

26. Every police regional force has its own BIO (Internal Affairs Bureau). The tasks of the BIOs are threefold: prevention, investigation and counselling within the force. The size and composition of the bureaus vary from approximately fifteen full-time police officers to one permanent coordinator with a number of part-time investigators that can be called upon. The bureaus are organized directly under the chief of the regional police force. Their task is to conduct investigations (inquiries), disciplinary investigations and preliminary investigations (examination of the facts) within their own police force. The BIO's fulfil these tasks in close cooperation with the *Rijksrecherche*. In cases in which the investigation focuses on an investigation officer, in practice, the *Rijksrecherche* often cooperates with the BIO of the investigation service involved. In that case, this will be a *Rijksrecherche* investigation case.

*iv) Recruitment and Training*

27. The selection of police officers takes place at the National Police Selection and Training Institute (LSOP). Chiefs of police - and their deputies - of the regional police forces are appointed by Royal decree and other police officers by the mayor of the largest city of the region. The LSOP is also responsible for training police staff. Every year, about 30,000 police officers receive their training in the Dutch training centres. Training varies from basic training to more specific training for advanced specialists. The Dutch police training programme for 2002 is based on a quite flexible framework, which takes account of the differences between preliminary training and practical work experiences. A central focus is given to the development of individual professional competences. There are specific courses on corruption and corruption related issues and regular debates and practical training sessions on integrity are organised within the police forces.

*v) The National Public Prosecutor for corruption and the Rijksrecherche (Dutch National Police Internal Investigation Department)*

28. In 2000, the Ministry of Justice created a National Public Prosecutor for corruption and the *Rijksrecherche*. The National Office of the Public Prosecutions Service appointed, within the National Organised Crime Prosecution Unit, a Public Prosecutor as national corruption officer as of 1 December 2000. S/he has no more powers than any other Public Prosecutor. S/he directs investigations of corruption of foreign public officials and can advise, assist or direct national corruption investigations. Furthermore s/he is responsible for the coordination and control of the Criminal Intelligence Unit (CIE) of the *Rijksrecherche* and s/he works very closely with the *Rijksrecherche*. The *Rijksrecherche* is a Special Investigation Service of the Dutch police, under the authority of the Board of Procurators General and "is responsible for investigating cases of

corruption involving police officials (usually senior officials), members of the judiciary and prominent office-holders". Besides the task of investigating public officials, it also has been given the (new) task of investigating (legal) persons suspected of corrupting a foreign public official. It has a staff of 90 people who get special training in this specific field of investigation. Its operational activities depend upon a decision made by the "*Rijksrecherche* Coordination Committee" (RCC), which consists of the Chair of the Board of Prosecutors General, the Chief Public Prosecutor of the National Office of the Public Prosecutions Service and the director of the *Rijksrecherche*. The National Public Prosecutor for the *Rijksrecherche* and corruption is the secretary of this committee. Administratively the *Rijksrecherche* is under the Public Prosecutions Department. The budget for 2002 is approximately seven million Euros.

29. The Board of Prosecutors General has established the general criteria that the Coordination Committee should retain when deciding whether or not the *Rijksrecherche* should conduct its operational activities in a concrete case:

- investigations related to officials who work for the government;
- investigations on an offence that may have been committed and which could reasonably be expected to affect the integrity of or the way in which government functions;
- when an impartial investigation on officials' behaviour is required and when any risk of partiality needs to be avoided.

These criteria apply cumulatively and the *Rijksrecherche* can start its investigative work only if the three criteria apply. The Coordinating Committee always takes into account whether any other investigative body (for example one of the regular police forces or a BIO) can carry out an (impartial) investigation.

30. The *Rijksrecherche* is involved in the investigation of about 75 corruption cases per year. About 40% of these cases concern police officers. Cases of corruption perpetrated by investigating officials, officials working for the PPS, officials working at a place charged with the dispensation of justice and political and administrative office-holders are carried out by the *Rijksrecherche*, others by the local police. In some investigations local police assists the *Rijksrecherche*. Corruption investigations are led by local prosecutors. However, the National Public Prosecutor for corruption does take on some cases himself. The Intelligence Unit of the *Rijksrecherche* is composed of six persons and is under the authority of the National Public Prosecutor for corruption. They are in close contact with intelligence units of local police forces.

*vi) FIOD/ECD (Fiscal Intelligence and Investigation Service/Economic Investigation Service)*

31. The FIOD/ECD is a special unit of the Tax Authoritiesand is a Special Investigation Service. The FIOD/ECD is under the Ministry of Finance – Tax and Customs Administration. The Tax and Customs Administration consists of more than 30,000 people. Its main tasks are:

- to investigate fiscal, financial, economic fraud and customs fraud;
- to trace, collect, process and provide information concerning tax and customs;`
- to contribute to the prevention of/and fight against organised crime.

The FIOD/ECD employs about 1100 officers. They concentrate their investigative activities notably on the following areas: integrity in the financial markets, fight against money laundering, VAT fraud, drug trafficking and misuse of beneficial ownership. In addition to a responsibility for tracing corruption "in society", they are also responsible for internal investigations within the tax

and customs authorities. The FIOD/ECD has six regional branches that all perform investigations, investigating of information/facts and have specialised account teams. In addition to conducting their own investigations, the FIOD/ECD also provides assistance to the police and prosecution service, notably when financial expertise is needed in order to gather, check, process and analyse (financial) information. They have general investigative powers within their own territory of work and act under the authority of the Public Prosecution.

32. As mentioned before, the FIOD/ECD also conducts integrity investigations into tax officials for integrity breaches. On average (over the last four years) the integrity investigations have resulted in approximately 35 reports per year, which includes: disciplinary actions, examination of the facts and criminal investigations. One or two cases of corruption per year are revealed, so that corruption is not perceived to be a big problem within the Service.

*vii) Special Investigative means*

33. Since the act governing special investigative means (*BOB Act*) came into force, a large number of special investigative means have been regulated in the Code of Criminal Procedure. The rule for all these powers is that their use must be in the interest of the investigation and a Public Prosecutor must give an order to apply a particular measure. They can almost always be used within the framework of corruption investigations. No firm limits have been laid down for the duration of these measures. In practice, however, they are usually recommended for a period of four weeks and around the time that the order is coming to an end, an assessment of the situation and as to whether the order can be extended is made.

34. The following special investigation means can be used during an investigation on corruption:

1. systematic observation (art. 126g): this measure can be used for investigating any crime, against both suspects and non-suspects;
2. infiltration (art. 126h): this method can be used when serious crimes[16] are suspected and crimes are considered a serious violation of the legal order; use of suspected persons for the purpose of infiltration and entrapment measures are not allowed;
3. pseudo-purchase or pretending to provide a service (art. 126i): this method can be used when serious crimes are suspected;
4. systematically obtaining information (art. 126j): this method can be used for investigating any crime;
5. entering a closed place (art. 126k): this method can be used when more serious crimes are suspected;
6. direct monitoring (art. 126l): see infiltration. In this case, the Public Prosecutor can only issue an order after having obtained authorisation from the examining magistrate. Direct monitoring of private premises is generally not possible in cases of corruption (except in cases of judges who have been bribed), because monitoring may only take place in investigations of crimes for which a prison sentence of 8 years or more is provided;
7. telephone tapping (art. 126m): see infiltration. Here also the Public Prosecutor can only give the order after obtaining authorisation from the examining magistrate;
8. telephone print (art. 126n): can be used in cases of catching someone red-handed or in a case of a crime that permits pre-trial detention.

[16] These are cases where pre-trial detention is allowed.

The law also permits the deployment of a citizen for the benefit of systematically obtaining information, for the infiltration of citizens and citizens making pseudo-purchases or pretending to provide a service (126v up to and including 126z).

*viii) Witness protection*

35. There is no specific witness protection programme in relation to corruption cases. Persons who play a role in criminal investigations can be subject to protective measures prior to, during and after a criminal procedure. The measures cover a wide range of possibilities, which makes it possible to create specific circumstances for every case, including corruption cases.

36. A special witness programme was designed in 1995, following a report from a special working group. Responsible for the implementation of the programme is the Witness Protection Department, organised under the Dutch National Police Agency (KLPD). The department is staffed with specially trained personnel. A public prosecutor is specifically charged with nationwide authority over the department and its activities. Since 1994, the Dutch authorities have been working specifically with the development and implementation of the witness protection programme. The measures that can be taken within the framework of this programme are very varied and range from a witness "going into hiding" in a safe place for a short time, to moving the witness and his family to a different country, and change of identity.

**b2. The Public Prosecution Service**

*i) General organisation*

37. The Minister of Justice is politically responsible for the Public Prosecution Service (hereafter «PPS»). The PPS consists of (art. 134 Judicial Organisation Act):

    - the Board of Procurators General and its Office
    - the district Public Prosecutors Offices
    - the National Office of the Public Prosecution Service
    - The Public Prosecutors Offices at the Courts of Appeal.

    The PPS is headed by a Board of Procurators General (hereafter the "BPG"), which consists of three to five members. All of them must be lawyers. The BPG takes its decisions collegially and the chair has a special position, having the casting vote when the Board cannot reach a decision. The chair is appointed separately by Royal Decree for a term of 3 years. The BPG determines policies with regard to investigations and prosecutions. It also supervises the National Public Prosecutor for Corruption and the *Rijksrecherche* (see above).

38. The BPG may give instructions to the chief public prosecutor of the district Public Prosecutors Offices concerning their tasks and powers in relation to the administration of criminal justice and other statutory powers, i.e. supervision of police. Such an instruction may be of a general criminal policy nature or concerning an individual criminal case. Prosecutors are legally bound by these instructions.

39. Article 124 of the Judicial Organisation Act provides that the Public Prosecution Service is responsible for the criminal enforcement of the legal system and for other tasks as established by law. According to article 127 of the Judicial Organisation Act, the Minister of Justice is empowered to give general or specific instructions on the exercise of the PPS's tasks and

powers. Those instructions, which have to be issued in written form and after consultation with the BPG, can also relate to investigation and prosecution of individual cases. Prosecutors are required to follow these instructions. A ministerial instruction not to investigate or not to prosecute a criminal offence has to be sent to Parliament together with the BPG's opinion. According to the information gathered by the GET, there have been no cases where the Minister of Justice has used it since 1998[17]. In most cases, consultations with the BPG produce the result that it is the Board that will issue such an instruction. Only in cases where the Board disagrees with the Minister's opinion, s/he will use this right. The Dutch authorities consider that these specific guarantees prevent undesirable political influence.

*ii) Regional structure*

40. The BPG is responsible for 19 regional departments. There is a Public Prosecutor's Office in every town which is the seat of a court. A Chief Public Prosecutor, who is responsible for ensuring that the policy of the PPS is implemented in his or her district, heads it. The public prosecutors' offices have some 2,000 staff, 500 of which are public prosecutors. The latter are assisted by administrative personnel, junior clerks of the Public Prosecution and accounting specialists. The five courts of appeal are each assigned their own Public Prosecutor's Office. There is also a "prosecution office" at the Supreme Court. The Procurator General and his or her staff at the Supreme Court are - like judges - independent and appointed for life.

41. At the regional public prosecutors' offices there are currently seven centres with experts for certain types of fraud related crime, for example in Haarlem for economic crime and public health crime and in Rotterdam for fraud causing damage to the European Union and for combating crime in connection with animal feed. Furthermore, there is a National Office of the Public Prosecution Service in Rotterdam, for the prosecution of serious international organised crime.

*iii) Nomination, career and disciplinary procedures*

42. Judges as well as the Procurator General at the Supreme Court of the Netherlands are appointed for life. Procedures for appointments of those officers establish precise requirements for position and qualities of the person to be appointed. Advices submitted by the boards of the courts are sent to the Minister of Justice who forms its opinion upon the candidates' consistency and motivation. Candidates for appointment as chairperson of a board of the court will be invited for a personal interview with the Minister of Justice. Before entering the judiciary as a 'student' (a "*RAIO*" in Dutch), it is also possible to enter it as an outsider having at least 6 years of working experience in a relevant sector, for instance as a lawyer. Judicial officers appointed for life can only be dismissed at their request by Royal decree, except for some disciplinary cases provided in the Legal Status of Judicial Officers Act. Members of the Board of Procurators General, the Solicitors General at the Public Prosecutors Offices at the Courts of Appeal and the public prosecutors at the district Public Prosecutors Offices and the National Office of the Public Prosecution Service are appointed by Royal Decree. The procedure for these appointments is comprehensively described in the "Guidelines for the procedures for appointments at the Public Prosecution Service".

43. The salaries of prosecutors, judges and other judicial officers are defined in 12 categories (article 7 of the Legal Status of Judicial Officers Act). Prosecutors and judges "of the same level" receive

[17] There are no statistics before that year since this became compulsory only after the new Judicial Organisation Act came into force in 1999. Before 1999, the Minister of Justice used this power a few times, for example in a case concerning euthanasia.

the same salary. For instance: the Vice-President of the Supreme Court and the Prosecutor General at the Supreme Court have both a Category 1 salary, a judge and a Public Prosecutor a Category 9 salary.

*iv) Functions and tasks*

44. The tasks of the public prosecutors' offices (as defined in article 124 of the Judicial Organisation Act) include responsibility for police work in criminal investigation proceedings. According to Article 149 of the Code of Criminal Procedure ("investigations, preliminary inquiries"), the public prosecutor institutes an investigation after being informed of a criminal offence, provided the case is within his or her jurisdiction, and is responsible both for that investigation and the police work involved. The police are required to refer cases involving specific types of offence to the public prosecutor, who decides whether to institute investigations or exercise his or her discretionary prosecution powers. Although there are currently no firm rules in the Netherlands for deciding in what cases a criminal offence must be prosecuted, a Directive of the BPG «on the investigation and prosecution of corruption of officials» was adopted on 8 October 2002 and came into force on 15 November 2002[18]. The Directive lists an extensive number of factors on which Public Prosecutors should found their decision whether or not to prosecute a case. However, no absolute model was developed in order to avoid unjust results. The listed factors are helpful: they describe numerous circumstances "that must be taken into account in determining whether it is appropriate to prosecute cases of corruption that in themselves constitute criminal offences". The circumstances are taken from real life situations. Nevertheless, every public prosecutor is empowered to decide whether the case s/he is dealing with will be prosecuted, but before a public prosecutor decides not to pursue the prosecution in a sensitive case, the course of action is discussed with his or her superiors. As this Directive had entered into force quite recently, the GET was not in a position to assess whether Public Prosecutors use this list appropriately.

45. When some important measures need to be taken during criminal proceedings, such as arrests, property searches and telephone tapping, the public prosecutor is obliged to obtain a decision from the investigating judge.

*v) Prosecution*

46. In the Netherlands, prosecutions are discretionary. Prosecutions are conducted according to the principle of expediency or advisability (*opportuniteitsbeginsel*). Article 167 of the Dutch Code of Criminal Procedure allows the public prosecutor to discontinue proceedings in the public interest[19]. The Public Prosecutor has discretionary powers to dismiss cases. S/he has also the power to settle cases outside court by use of a "conditional waiver" or "transaction". A "conditional waiver" is given when the prosecutor believes that an alternative to a criminal trial is preferable. Such a waiver could, for instance, be conditional on alcohol or drug treatment, community service, or restitution to the victim. This measure is not provided by law, but it has been accepted in practice for a long time. It is applied only in the rare case where the measures under article 74 (see below) are considered too restrictive. "Transaction", is governed by article 74 of the Penal Code, and essentially involves the payment of a sum of money by the defendant to avoid criminal proceedings. It can also involve the renunciation of title to or surrender of objects that have been seized and are subject to forfeiture and confiscation, or payment of their assessed value.

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[18] A copy of this Directive, which was provided to the GET after the visit, appears in Appendix II

[19] Section 167 of the Code of Criminal Procedure states: "The public prosecutor shall decide to prosecute when prosecution seems to be necessary on the basis of the results of the investigation. Proceedings can be dropped on the grounds of public interest"

Moreover, it can involve the payment of the estimated gains acquired from the criminal offence, as well as compensation for any damage caused. Pursuant to article 74.1, it is available in relation to "serious offences" excluding those for which the penalty of imprisonment is more than 6 years. The right to prosecute lapses once the conditions set in a particular case have been met. According to Article 12 of the Code of Criminal Procedure, an interested party can appeal against the public prosecutor's decision not to prosecute. If the prosecutor does decide to pursue prosecution, the defendant has the right to raise his objections before court. This procedure is governed by articles 262 and 250 of the Code of Criminal Procedure. The court will take a decision before the trial starts. When the defendant's objections are sustained by the court, the trial will not take place and prosecution will stop. This means that the decision to prosecute or not to prosecute can be controlled by a court. Furthermore, there is the control within the prosecution office: because the decision whether or not to waiver prosecution in sensitive and/or complex cases will always be discussed with the superiors of the prosecutor involved, with the BPG (and sometimes even with the Department of Justice).

47. The GET was informed that the principle of discretionary prosecution is very often applied to cases involving relatively petty offences, such as shoplifting or minor damage to property. This principle has been applied in the past to terminate investigations of offences - including cases of corruption. This has been done, for example, in cases involving the awarding of public contracts. In this case a transaction-procedure was followed. The decision to follow this procedure was based on the estimation that a trial before court would lead to the same result in terms of punishment (fee) level. The senior staff of the BPG or the Ministry of Justice at least in important cases, carefully monitor the application of the principle of discretionary prosecution.

48. The Directive of the BPG «on the investigation and prosecution of corruption of officials» (see more details in para. 44 and Appendix II) leaves quite a broad autonomy to the public prosecutors in the decision-making process. In addition to the Directive, there is also a set of policy rules for the PPS ("Guidelines for the handling of sensitive cases") that came into force on 15 June 2001. According to these Guidelines, the public prosecutor cannot take his/her decision completely autonomously. The term "sensitive cases" is to be understood to relate to those that attract or may attract a great deal of social or political interest. No definition is provided but a number of characteristics are listed. A sensitive case may accordingly be one that causes considerable disquiet either nationally or locally, or one that becomes public for political or legal reasons.

49. In these cases, there is a strict obligation to submit reports not only to superior departments within the public prosecution services but also to the Ministry of Justice. Indications are also given as to how to deal with these cases. For example, they must be handled with great care and the superior must monitor progress made and compliance with the requirement to submit reports. When crucial decisions are to be taken, it must always be possible to consult the Chief Public Prosecutor. Crucial decisions relate, for example, to the question of whether or not to prosecute or to the size of a fine to be imposed. The decision on whether to conduct investigations in a corruption case is therefore taken under the supervision of the head of the public prosecution services.

*vi) Training*

50. Since a few years, training programmes have been developed for the police and public prosecutors to make them specialists in the field of economic crime and other related offences, including corruption offences. These programmes focus on different aspects of financial research, confiscation and freezing of criminal assets and specific forms of economic and financial crime.

Training programmes are available at 4 different levels, varying from basic level to academic level.

### b3. The courts

51. In the Netherlands, there are 19 District Courts, 5 Courts of Appeal and the Supreme Court.[20] Besides these, there is a Central Board of Appeal and Trade and an Industry Appeals Tribunal.[21] The Courts of Appeal and the Supreme Court each have a prosecutor general's office attached to them. The judiciary largely manages its own work. To this end, a Council for the Judiciary has been established (and started working on 1st January 2002) consisting of three judges and two representatives of the business sector. The Ministry of Justice and the Government appoint them for a six years' term.

52. The Council for the Judiciary is informed of financial requirements and submits a budget proposal for the courts to the Minister of Justice. This is then forwarded to Parliament for decision. The Council is also responsible for selecting judges. As a rule, the Minister of Justice accepts the proposals made. Judges are appointed for life by the Crown and retire at the age of 70. The Council for the Judiciary has no disciplinary powers. However, it ensures that the rules relating to the courts are complied with and supervises events in the courtroom and the development of the courts. It also promotes the further modernisation of the judicial system. The GET was told that no political influence has ever been used on judges.

53. There are no specialised courts for dealing with economic crime, but there is one for cases involving competition law. However, the courts choose an informal way to become specialised. There is no objective business allocation schedule that lays down from the outset that certain judges are responsible for dealing with specific cases. According to the Code of Criminal Procedure, minor cases are distributed to individual judges, and panels of three judges deal with more serious cases. The question of experience naturally plays a certain role here. Each of the 19 District Courts has investigating judges who deliver the decisions requested by the Public Prosecutor's Office (see above).

54. The Council of Judiciary informed the GET that judges are constantly trained, both during their job and at the SSR (the training and education institute for judges and public prosecutors). The GET was also told that judges are not particularly well trained in the area of economic crime. The SSR educates people who will become judges and prosecutors, but also give courses and training for judges and prosecutors to keep their skills up to date and train them according to the newest jurisprudence, laws etc. Without being complete, the following courses in economic crime can be mentioned: (basic) courses financial investigation, banking education, fiscal and customs fraud, insurance fraud, Internet and telecom fraud, economic criminal law, organised crime, etc.

### b4. Criminal investigation in preliminary procedure

55. The criminal procedure initiates with the pre-trial investigation carried out by the police as there exists a reasonable suspicion of a criminal offence (article 132a of the Criminal Procedure Act).

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[20] The Supreme Court does not examine the facts but only reviews the lawfulness of proceedings and judgments of the lower courts. Exceptionally the Supreme Court acts as a jurisdiction of first and last instance when members of Parliament, Ministers and Under-Secretaries of State have to be tried "on account of a serious offence involving abuse of office" (Article 119 of the Constitution).

[21] The Central Board of Appeal is the appeal court on civil servants' labour disputes. The Trade and Industry Appeals Tribunal is responsible for all disputes concerning organs like the Socio-Economic Council, product boards, Chambers of Commerce, etc.

The purpose of the pre-trial investigation is to gather information on the offence and the suspect. At the end of its investigation, the police prepare a written record containing the allegations regarding the suspect and other persons and other relevant findings. The police records may be used as evidence by the court. When the police investigation is terminated, the records are forwarded to the prosecutor for a decision on prosecution.

56. If police investigation cannot be finalised because some further specific investigative activities need to be undertaken, the public prosecutor may request the investigative judge to open judicial preliminary investigations. S/he can notably order a witness to make a deposition, allow the use of some special investigative means (telephone taping, interception of mail) and order psychiatric examination of the suspect.

57. When the police investigation or the judicial investigation is ended, the prosecutor has to decide whether s/he can prosecute the case. The Public Prosecutor may decide not to prosecute when 1) prosecution would probably not lead to a conviction because of lack of evidence or for procedural/technical reasons, and 2) owing to general policy reasons (see also paragraph 48).

**b5. Other bodies and institutions**

58. There are other authorities in the Netherlands, which, although not directly involved in the criminal law area, play an important role in the prevention and disclosure of corruption. In this regard, it is essential to refer to (although this list is not exhaustive) the Ombudsman, the Netherlands Court of Audit, the MOT (see paragraph 15), the BIBOB (Facilitation of judgements on integrity evaluations by government bodies), the AIVD (the former BVD) and the Integrity Bureau of the City of Amsterdam.

*i) The National Ombudsman*

59. The National Ombudsman (hereafter the "NO") Act came into force on 1 January 1982. As from 25 March 1999, the NO's office has been enshrined in the Constitution and the new Article 78a places the NO in Chapter 4 which deals with the High Councils of State, together with the Council of State and the Netherlands Court of Audit, which are also independent bodies. The first paragraph of Article 78a reads as follows: *"The National Ombudsman shall investigate, on request or of his own account, actions taken by central government administrative authorities and other administrative authorities designated by or pursuant to Act of Parliament."*

60. The NO is appointed, for six years renewable, by the Parliament upon a recommendation by a committee composed of the Vice-President of the Council of State, the President of the Supreme Court and the President of the Netherlands Court of Audit. S/he may be dismissed by the Parliament only on the grounds laid down in the Act, which are similar to those applying to members of the judiciary. One of the grounds for dismissal is if the NO *"in the opinion of the House of Representatives of the States General, has as a result of his acts or omissions, seriously undermined the confidence placed in him."*. At the time of the visit, about 115 staff were employed at the NO Office. The office is composed of 4 investigation departments: 1 responsible for examining the petitions with regard to competence and admissibility before the NO decides whether or not to investigate the case. The three other departments deal essentially with investigations of public bodies and officials that fall within his or her sphere of competence.

61. There are two ways that can lead to a NO's investigation:

- a petition: *« Any person has the right to request the Ombudsman in writing to investigate the way in which an administrative authority has acted towards a natural person or legal entity in a particular matter, unless more than a year has elapsed since the action in question»* or

- on its own initiative.

When investigations are terminated, the NO prepares a report which could include a decision. These are not legally enforceable: it is up to the administrative authority to decide what action, if any, should be taken in the light of the report and, in particular, the decision. However, the NO's reports sometimes contain a recommendation in which s/he explicitly advises an administrative authority to act in a certain way. These recommendations are not binding, but as they are always brought to the attention of the petitions commission of Parliament they have substantial influence.

*ii) The Netherlands Court of Audit*

62. The Netherlands Court of Audit (hereafter "NCA") is an independent body, consisting of a board, which is made up of a President and two members, appointed for life. It employs about 320 staff and produces 60 reports per year. The NCA is the Supreme Audit Institution for State Government in the Netherlands. It derives its statutory base from the Constitution, which stipulates that the Court examines revenues and expenditures of Ministries and, more generally, whether Dutch public funds are collected and spent properly and effectively.[22] The NCA does not have any competence or power to investigate cases of corruption as defined in criminal law. Potential criminal cases discovered through the audits are brought to the notice of the responsible management of that organisation, in order to enable them to hand over the case to the proper investigating authorities. Only if they fail to do so, the NCA itself brings the case to the Public Prosecution Service.

63. As regards the fight against corruption, the NCA focuses on preventive measures. These include regularity audits and examination of the orderliness and auditability of financial management on an annual basis and audits of a specific nature, such as: the performance of vital institutions, auditing integrity policies and responding to requests from the Dutch Parliament. In December 2000 the NCA published an audit report concerning "Investigation and prosecution on fraud". The aim of the report was to clarify central government knowledge of the outcome of investigations on fraud (tax evasion, social insurance fraud, fraud in connection with tender procedures) and revealed that in most cases no prosecutions were carried out. Although the policy of the NCA is that potential criminal cases shall be reported to the responsible management (who has to report to the police then), the GET was informed that in practice this never occurs. Very exceptionally the NCA gets a direct request for information from the Public Prosecution Service. In those cases the NCA will assist the PPS.

64. Representatives of the NCA reported to the GET that a certain number of cases with "strong and big irregularities [concerning above all clear fraud offences] had been discovered". The Minister for Education, Culture and Science and the NCA were asked by Parliament to audit some alleged irregularities. Certain Dutch institutions for Higher Education were eg suspected of having enlisted a bigger number of students in order to receive more state funds.

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[22] Local authorities are not included in the list of agencies submitted to the Court of Audit' auditing activities. They have their own internal auditing bodies, above all the big cities.

*iii) The BIBOB (Facilitation of judgements on integrity evaluations by government bodies)*

65. In 1999, the Ministries of the Interior and Justice introduced the "BIBOB" bill (Facilitation of judgements on integrity evaluations by government bodies). This bill responded to the results of the fact-finding committee ("Van Traa") which, in 1996, investigated the scope and influence of organised crime in the Netherlands. Among other findings, the committee came to the conclusion that criminal organisations often rely on public services to carry out their illegal activities. In 1996, legislation did not provide government bodies with effective legal grounds to reject or refuse licenses and subsidies in order to prevent criminal activities. Furthermore, public administration had limited access to resources of judicial, financial and police information. As a result, government bodies could grant licenses and subsidies to persons and organisations whose "honourable" intentions could be questioned. The purpose of BIBOB is to facilitate government bodies in protecting their own integrity by increasing the access, via BIBOB, to judicial, financial and police information and providing new grounds to reject or refuse licenses or subsidies.

66. The BIBOB law provides for the setting up of a central BIBOB Office within the Ministry of Justice. The purpose of this office is to support authorised local authorities in enforcing the BIBOB law. By order of these local authorities, the BIBOB Office investigates the integrity of applicants for licenses and subsidies. In order to do this, the BIBOB Office has numerous sources of judicial, financial and police information. As a result of its investigation, the BIBOB Office assesses the risks and likelihood that the applicant will abuse the required facility. These findings will be formulated in a written advice for the local authority. In this advice, the BIBOB Office indicates the severity of the situation: the threat for abuse is very serious, serious or not serious. The local authority is responsible for its own decision, it can decide not to follow the BIBOB advice.

67. The BIBOB bill does not include the possibility to refuse public tenders. In this respect, public bodies are bound by the European Standards on tenders. However, on the basis of a BIBOB opinion, public bodies can substantiate the enforcement of grounds for refusal. Before applying this new legal instrument, public bodies should first use other available means they already have concerning the sources of information and grounds for refusal or rejection. These instruments enable them to make a thorough decision whether to grant or refuse a license. Only when these existing means have proven their insufficiency, the application of BIBOB is justified.

*iv) Public Procurement*

68. As a general rule, the Netherlands is bound by the European Directives on the coordination of public procurement procedures. The Ministry of Economic Affairs is the authority responsible for the implementation of the EU directives. In particular, within the Directorate General for Competition and Energy, six policy advisors work on public procurement implementation policies. An Interdepartmental Body for European Procurement regulations (*Interdepartementaal Overleg Europese Aanbestedingsvoorschriften, IOEA)* composed of representatives of all ministries and of municipalities and regions, provides *ex officio* interpretations of the European Directives. These interpretations are not binding for the courts. The IOEA has published some brochures containing information on how to apply the Directives.

69. The Dutch relevant legislation states that all public procurements above the European thresholds should be conducted according to the European public procurement directives. Both the Civil courts and arbitration can settle disputes in these fields. There is no further public procurement legislation, since the European legislation is sufficient. Three Ministries (Spatial Planning, Agriculture and Defence) have issued a regulation, based on the EU directives but more detailed,

which is binding for the public procurement procedures of their ministries. Also cities like Amsterdam and Rotterdam have made additional rules for public procurement.

*v) National Security Service (AIVD)*

70. The task of the National Security Service (AIVD, the former BVD) is to protect national security. This also covers taking security measures for the protection of the democratic legal order. The AIVD is also involved in promoting integrity within public administration. The powers are anchored in the Intelligence and Security Services Act (Wiv) and the Security Investigations Act (Wvo).

*vi) The Integrity Bureau of the City of Amsterdam*

71. The city of Amsterdam employs 20,000 civil servants for a population of about 800,000. Following the Parliamentary investigation Committee's results on organised crime and methods of detection, the City Council of Amsterdam has developed quite a wide range of plans and actions aimed at better preventing and fighting corruption within the municipality. A three-year research programme was run from 1997 to 2001 in order to identify the most vulnerable persons and fields. The main risk areas were identified in the procurement field and at managerial level. It was also decided to create the Integrity Bureau whose main aim is to develop and monitor the municipal integrity policy. To date, a public prosecutor (seconded temporarily from the PPS, but without the powers of a public prosecutor) appointed for three years by the Central Public Prosecutors Office manages the Bureau and 15 other people work in it. The main activities of the Bureau are:

   - prevention (charting risks and vulnerabilities, providing assistance by means of risk-analyses and preventive investigations);
   - compliance (internal investigations on suspicions of breach of integrity: during these investigations the Bureau can use those investigative powers that belong to the employer of the civil servant investigated). The Bureau has established an agreement with the PPS so that when it appears that a criminal offence has been committed (and not only an administrative one), the record must be transmitted to the prosecution authorities;
   - awareness (providing some training courses – "dilemma-training sessions" – to all civil servants and managers. A code of conduct for all civil servants of the City of Amsterdam is the core written document upon which the courses are based.

   The Bureau also organises the activities of the Central Registration Office for fraud and corruption, where all the integrity related situations are registered, and the Report Desk for breaches of integrity which was expressly set up for those who suspect a case of fraud or corruption to have occurred in the administration or who wish to report an integrity-related problem.

### c. Immunities from investigation, prosecution and adjudication for corruption offences

72. Article 42, second section, of the Dutch Constitution, lays down that "the King is immune". This means that the King enjoys complete immunity and therefore proceedings cannot be brought against him for any crime whatsoever.

73. Article 71 of the Constitution states: "Members of the states General, Ministers, Under-Secretaries of State and other persons taking part in the deliberations may not be prosecuted or otherwise held liable in law for anything they say during the meetings of the States General or of its committees or for anything that they submit to them in writing". This form of immunity ("non-

liability") relates to prosecution for deeds in the exercise of the above-mentioned persons' functions.

74. Apart from the non-liability immunity, the Dutch Constitution recognises, as a general rule, the possibility that political officials may be investigated, prosecuted and arrested as any other citizen. Nonetheless, Article 119 institutes an exception: "Members of the States General, Ministers, Under-Secretaries of State shall be tried before the Supreme Court on account of a serious offence involving abuse of office, during and after their period in office. The instruction to prosecute shall be issued by Royal Decree or by decision of the Second Chamber". The decision to prosecute the persons mentioned in Article 119 for serious offences involving abuse of office remains thus entirely in the hands of political bodies: the government ("by Royal decree") or the Parliament ("by decision of the Second Chamber"). The expression "Serious offences involving abuse of office" refers notably to Title XXVIII of the Penal Code and includes also passive bribe of domestic public officials (Articles 362 and 363 – see appendix I).

75. According to the information provided to the GET by the Dutch authorities, Article 119 was established for two main reasons: 1) to set up a special procedure aiming at providing political officials with protection against prosecution "for rash reasons" and 2) to guarantee that a prosecution (against a political official) deemed necessary would certainly be initiated.

76. The government and the Second Chamber are only entitled to instruct the prosecution of the persons mentioned in Article 119. This means that the Public Prosecutor cannot in any case initiate prosecutions. The Second Chamber starts the prosecution upon a proposal made by five members submitted in writing and stating reasons. If the Chamber decides to accept the proposal, it establishes a committee of inquiry to which the provisions of the Parliamentary Inquiries Act (*Wet op de Parlementaire Enquête*) apply. This committee reports to the Chamber which renders a decision within three months from the submission of the complaint. According to Article 18 of the Ministerial Responsibility Act, the Chamber examines "the offences concerned against the law, fairness, morality and the national interest". Where it decides to prosecute, it "specifies precisely, in the decision, the facts on which the charge is based and instructs the prosecutor general at the Supreme Court to prosecute, transmitting, within three days, the decision including the charge and the documents collected" (Article 18 second paragraph of the Ministerial Responsibility Act).

77. When it is the government which initiates the prosecution, the provisions of the Ministerial Responsibility Act do not apply: the government has a general power under Art. 5 of the Judicial Organisation Act to instruct the prosecution. However, this provision expressly requires that the decision to prosecute specifies precisely on which facts the charge is based. A copy of the decision is issued to both Chambers of the States General. The prosecutor general at the Supreme Court must comply with the instruction to prosecute without delay (Art. 5 first paragraph, Art. 18 second paragraph Ministerial Responsibility Act). The case is tried before the Supreme Court that has thus exclusive competence as regards cases contemplated in Article 119 of the Constitution as jurisdiction of first and last instance (no appeal is afforded against the Supreme Court's judgements).

78. The GET was informed that such a procedure had never taken place.

## III. ANALYSIS

### a. General policy on corruption

79. The concept of maintaining a high degree of integrity within the public sector has been – and still is – a focal point of general Dutch policy. The GET welcomes the comprehensive efforts that the Dutch central authorities are making for promoting integrity and ethics in the public sector: over the last past years, they have been formulating and implementing quite comprehensive policies to make and keep public authority staff aware of the necessity for strong integrity and good ethics in the public sector. The GET was very much impressed by the clear and seemingly well-communicated stance of the Dutch authorities on this matter. However, the phenomenon of corruption as such seems to have been given limited attention. Some of the representatives met by the GET during the evaluation visit, suggested that corruption was probably more widespread than recognised by central authorities. In addition, the GET noted that even the Parliamentary Committee on the Construction Industry (see paragraph 20) recognised in its final report that despite the quite significant number of initiatives taken over the last few years in the field of integrity, the problem still exists. It also warned that the government should further concentrate its efforts so that "integrity shall not only be professed, but also experienced": it stated that combating corruption had to become a matter of culture and not only of rules. **Therefore, the GET recommended that the Dutch authorities responsible for formulating anti-corruption policies should adopt a more pro-active approach towards the phenomenon of corruption in order to combat it more efficiently.**

### b. Statistics

80. As pointed out in the descriptive part of the present report (paragraph 17), the statistics only concern cases sent to the Public Prosecution Service: there are no statistics available on corruption cases registered and dismissed by the police. More detailed statistics would give the authorities a better basis for assessing the threat that corruption poses to Dutch society, thereby enhancing the possibility to implement counter-measures. Any attempt to evaluate the effectiveness of the response of the law-enforcement and criminal justice system to the threat of corruption, presupposes the existence of detailed statistics concerning crime detection, prosecution and punishment analysed against the baseline of an accurate intelligence picture. **Therefore, the GET recommended the development of more detailed statistics, targeted research and analysis, in order to measure more clearly the extent of the corruption phenomenon in the country.**

### c. Legislation

*i) General considerations*

81. Although co-ordinated criminalisation of national and international corruption (Guiding Principle 2) is not part of this evaluation, the GET nonetheless examined closely the legal framework within which the Dutch authorities realise their anti-corruption policies, insofar as this is directly linked to the scope of the standards set out in Guiding Principles 3, 6 and 7. As a first general remark, the GET noted that in the Netherlands there is no Law on conflict of interests or a Law on (Prevention of) Corruption. Nevertheless, the GET noted that in the Law on Civil Servants there are some provisions related to the conflict of interests and the proposed amendments to this law will soon introduce an obligation for each State institution to adopt its own Code of Conduct (although most

of them already have one) as an instrument to prevent corruption. At the time of the visit, the Law on Civil Servants already regulated, *inter alia*:

- limited obligations to report additional jobs;
- registration of those jobs;
- prohibition of additional jobs which could be a "risk" for the proper functioning of the public service.

82. As already pointed out in the descriptive part of the present report (paragraph 8 to 14), Dutch legislation provides a comprehensive set of provisions with regard to active and passive bribery. It makes a distinction between an act and failure to act whilst in office, that is in breach of the official duty, and an act or failure to act in the absence of any breach of the official duty. The distinction is important for the weight of the maximum punishment that can be imposed. Provisions on active and passive bribery are not restricted only to national civil servants. They also apply to former and future civil servants, international and foreign civil servants, national, international and foreign judges, and to the national, international and foreign members of parliament and politicians. Besides punishments with respect to the bribery of public officials, Dutch legislation deems active and passive bribery in the private sector punishable. Finally, active and passive bribery during elections has also been made punishable. In the GET's view the criminal law dimension of the Dutch anti-corruption system is broad based and generally sound.

*ii) Whistle blowing regulation*

83. As mentioned above in paragraph 10, the GET noticed that the whistle blowing regulation is dealt with by Article 162 of the code of criminal procedure and by the "order establishing the procedure to be followed in dealing with a suspected abuse" (hereafter the "order"). The GET considered that there exists some discrepancies between Article 162 that obliges public bodies and civil servants to immediately report knowledge of crimes related to the execution of their duties to the Prosecution Service and the procedure set up by the "order" which prescribes public officials' obligation to report suspected abuse and that internal investigations shall be initiated if there is a suspicion of abuse. The new procedure prescribed by the "order" gives the understanding that Article 162 is put out of force as far as public officials in central government are concerned. According to the "order", these officials are obliged to report to a line manager, a confidential advisor, or, if s/he is dissatisfied with their handling of the information, to the commission on integrity in Civil Service. The "order" does not contain any provisions on when and how the Prosecution Service should be notified. In the GET's opinion, there might be a risk that the "order" puts a potential criminal investigation in danger both with regard to when the information is conveyed and the possibility of weakening evidence through the internal investigations.

84. The GET was informed that failure to comply with the "order" was punishable. Nevertheless, it is not clear to the GET if that means criminal or administrative sanctions. If criminal sanctions apply a reference to the relevant section in the Civil Servants Act or to the relevant provisions of Penal Code should be made. On the other hand, failure to comply with Article 162 of the Code of Criminal Procedure is not subject to penal sanctions. In the view of the GET, this situation creates uncertainty. Furthermore, the fact that the "order" only applies to central government officials, suggests that different standards apply to personnel in this sector to those in other (semi) public entities and the municipalities. In the GET's opinion, this is an unfortunate situation. Procedures for dealing with suspected abuse should, to the largest extent possible, be uniform for the central, regional and municipal level authorities. **Therefore, the GET recommended to consider applying whistle blowing regulations for all public sector entities (at central, regional, and**

**municipal level) in order to harmonise regulation in this field and avoid setting double standards. It furthermore recommended to consider the legal situation with regard to the relation between Article 162 of the Code of Criminal Procedure and the order of 7 December 2000.**

## d. Investigation, prosecution and adjudication of corruption cases

*i) The police*

85. Within the police force, integrity issues have high priority. The Internal Investigation Bureaus (BIO - *Bureau Interne Onderzoeken*) conduct investigations on internal breaches of integrity, including corruption cases. In general, the GET is of the impression that the system of BIOs is well founded and works satisfactorily. However, the GET was advised that there were differences between the regions with regard to the effectiveness of the bureaus. After having met with representatives from the Internal Investigation Bureau of the Amsterdam-Amstelland police (hereafter the "Bureau") it seemed to the GET that the situation in other regional BIOs could be improved. The "Bureau" conveyed a clear strategy and professional attitude that might serve as an example for other regional bureaus, both with respect to the preventive and repressive side of their work. It must be noted though, that the number of corruption cases investigated by the "Bureau" were limited. On the other hand, there were a significant number of cases concerning leaking of information, which by their nature indicate that corruption is involved. The GET noted with satisfaction that budgetary limits are almost never set for BIO investigations.

86. In general, the GET's impression is that the Dutch police force is well organized, although the structure seems a bit complicated. As regards the phenomenon of economic crimes and corruption, the Dutch authorities as well as the police forces themselves have acknowledged the need for a multidisciplinary approach and the use of specialised units.

87. Representatives from the private sector indicated that there was some scepticism toward the ability of the police and Prosecution Service in handling economic crime (and corruption) cases. The GET had the impression that this lack of trust was to some extent the reason for an increased use of forensic accountants. The GET recognises that forensic accounting is a useful tool for the private sector. It is however worrying if the use of this expertise leads to a practise where possible corruption cases are solved internally, without involving the police. It was acknowledged by representatives of the police and the Prosecution Service that too little focus had been put on building relations with the private sector. The GET is of course fully aware that there are limitations on the police's resources in this field. However there seems to be a potential for improvement in this regard. The GET was informed of recent initiatives towards the private sector in one of the largest regional forces (Amsterdam-Amstelland), by designing earmarked and specially qualified personnel to the task of cooperating and improving the relationship with the private sector.

88. Even though corruption in the private sector is not the object of this evaluation, in the GET's opinion, weak relations, lack of communication and trust between private sector and the police might also seriously hamper the possibilities of revealing corruption involving public officials. The hidden nature of corruption strongly suggests that the ability to discover such cases is strongly dependent on sources of intelligence inside the private sector. In addition to that, the FIOD-ECD (the Fiscal Information and Investigation Service and Economic Investigation Agency), which cooperates extensively with the police, also seems to be giving limited attention to the detection of corruption. **Therefore, the GET recommended that the Public Prosecution Service, police**

**forces, the *Rijksrecherche* and the FIOD-ECD, develop a strategy to establish a fluid channel of communication with the private sector.**

*ii) The Public Prosecution Service*

89. The number of public prosecutors dealing with corruption appears to be too low. Although junior clerks support public prosecutors, it is questionable whether they can work successfully in the difficult areas of economic crime and related offences, including corruption. During the visit, doubts were repeatedly expressed about whether the Public Prosecution Service has sufficient trained public prosecutors and whether they spend long enough at their job since they move frequently to another office after about three years, although this is not mandatory. In the GET's opinion, under these circumstances it is very difficult to combat corruption effectively. Representatives of the Public Prosecution Service repeatedly confirmed to the GET the fact that it is often hard to obtain evidence in corruption and corruption related offences. This should be taken into account in the training and equipping of the law enforcement agencies. Moreover, the opinion, which the GET also heard expressed, that training is unnecessary because corruption is not a major problem in the Netherlands, is a dangerous one: the GET considers that this is a risky assumption because corruption only comes to light when well-trained personnel are employed to uncover it. The GET was also told that the knowledge and specific training of the police and public prosecutors with regard to the legal bases and practice of public procurement should be improved. Several representatives of the criminal prosecution authorities believed that it was hard to recognise manipulation (such as collusion between competitors) when tenders are submitted. In the GET's opinion, such manipulation causes citizens, who have to pay a higher price than they would if there was genuine competition, considerable harm. In order to detect corruption offences it is therefore necessary for those handling investigations to have a full knowledge of the tendering procedure. **Therefore, the GET recommended that the police and public prosecutions services working in the anti-corruption field receive regular specific anti-corruption in-service training and that the number of staff increased. It also recommended to intensify the initial and in-service training of police officers, public prosecutors and judges with regard to the legal bases and practice of public procurement in order to improve their knowledge in this area.**

90. In the GET's opinion, the procedural provisions governing the obligation to prosecute offences are unclear owing to the general nature of the rules (principle of expediency, general public interest, freedom to determine policy), according to which a public prosecutor can discontinue or must hold an investigation. There is no obligation to prosecute. The application of the principle of discretionary prosecution can ease the workload of the police and Public Prosecution Service because they do not have to go into every case. This applies in particular when it is not necessary to investigate and prosecute the many minor infractions committed. However, the danger that minor cases may conceal serious crimes that can only be identified after a considerable amount of investigative work cannot be dismissed out of hand. The GET considers that it is often impossible to see whether a minor case is precisely that or in fact only the "tip of the iceberg", i.e. a serious case of corruption that is not yet apparent as such and, owing to this incorrect assessment and the authorities' broad discretionary powers, is not investigated. For that reason, the GET estimates that discontinuing a large number of investigations without further examination will prevent corruption from being uncovered.

91. Moreover, the GET noticed that in the Netherlands there is the danger that investigations of corruption and corruption related offences could be discontinued when a great deal of time or money to find evidence is required. In the GET's view, this is a very real danger because it is

difficult to prove corruption. Furthermore, on 15 November 2002 the Directive of the BPG " on investigation and prosecution of corruption of officials" came into force. The factors listed in this directive may be helpful in the decision on whether to prosecute or not. However, every public prosecutor has to make his/her own decision in most of the cases. Only if s/he considers a case as "sensitive", s/he has to report it to his/her superior. If s/he doesn't consider the case to be a sensitive one, s/he can take the decision that s/he personally considers the right one. **Therefore, especially in the light of the most helpful comprehensive guidance given in the new Directive "on the investigation and prosecution of corruption of officials", the GET recommends that the Public Prosecution Service ensures in practice that investigations are pursued as fully as possible to enable the prosecution authorities to take an appropriate and fully informed decision on whether to initiate or continue a prosecution.**

*iii) The courts*

92. The GET considers that the fact that there are no specialised courts for dealing with cases of economic crime in the Netherlands (paragraph 53) could be an obstacle to effective successful judiciary policy in the fight against that special form of crime, which can often include some aspects related to corruption offences. In the GET's view, it is probably hard for the judges, who regularly change their functions, to have to keep familiarising themselves with the complexities of economic criminal law, including in the field of corruption. If it takes a long time to prepare a trial and the subsequent proceedings themselves are long, there is a danger that the case may only end with a light sentence being imposed because the offence was committed too far back. This would mean that prosecutions are not very effective. **For that reason, the GET recommended to consider the possibility to create (only within the major district courts) specialised panels of judges who should be available to preside over the most complex and serious cases related to economic crime offences.**

## e. Public procurement

93. Public procurement, and particularly the construction sector, is one of the most vulnerable areas to corruption in the Netherlands. The efforts to curb fraud in connection with invitations to tender do not appear to be particularly intensive. The GET had the impression that people do not regard this type of fraud as particularly dangerous. Rather, it considered that the items for which tenders are invited become more expensive than would be the case under market conditions because there is no market that would allow a market price to be fixed. In this context, the GET observed that it is important that the PPS, and public officials in general, should be made aware of the problem of corruption in public procurement.

## f. Immunities

94. The Dutch Constitution provides for certain immunities for specific categories of persons (members of the Parliament, Ministers, Under-Secretaries of State) by virtue of the office they hold, but these immunities ("non-liability") are strictly circumscribed. As already indicated in the descriptive part of the present report (para. 75), they are exclusively designated to prevent interference with the exercise of those persons' duties.

95. As regards « inviolability » (« immunity from arrest »), the GET noted with satisfaction that in the Dutch legal system the general rule is that MPs, Ministers and any other political officials suspected of having committed a criminal offence do not benefit from immunity and can be prosecuted, arrested or detained like any other citizen.

96. On the other hand, the GET noted that members of Parliament, Ministers and Under-Secretaries of State are tried before the Supreme Court for "serious offences involving abuse of office", including passive corruption, only following a decision either of Parliament or of government to that effect (paragraphs 76-81). Moreover, only upon a proposal made by at least 5 MPs' or by the government, a prosecution against those persons can be initiated. In the GET's opinion, this implied that bringing charges of abuse of office and passive corruption against a MP's or a member of the government would be an extremely difficult task. Depriving the prosecutor of the power to request the opening of an inquiry could be an obstacle for the proper functioning of the criminal justice system. Besides, the Parliament and the government, by definition political bodies, could be influenced in their work by political considerations. Accordingly, the GET observed that the Netherlands should consider the possibility of excluding acts of abuse of office (and in particular passive corruption) from the scope of the procedure reserved for persons indicated in Article 119 of the Constitution or alternatively simplifying this procedure, facilitating the course of criminal justice. When making this observation, the GET took into account the fact that there were no indications that the system described above would have prevented any political officials from being investigated or charged with corruption offences.

## IV. <u>CONCLUSIONS</u>

97. The Netherlands appears to belong to the group of those GRECO members that are least affected by corruption. According to the more recent official statistics, only few cases of corruption have been detected over the last past years. There is a general perception among the representatives of the Dutch State authorities that corruption is not a major problem in the country. And the perception of the danger represented by corruption has even increased in the Dutch civil society because of some recent cases/allegations involving corruption and/or corruption related offences.

98. In view of the above, GRECO addressed the following recommendations to the Netherlands:

i. **that the authorities responsible for formulating anti-corruption policies adopt a more pro-active approach towards the phenomenon of corruption in order to combat it more efficiently**;

ii. **develop more detailed statistics, targeted research and analysis, in order to measure more clearly the extent of the corruption phenomenon in the country**;

iii. **consider applying whistle blowing regulations for all public sector entities (at central, regional, and municipal level) in order to harmonise regulation in this field and avoid setting double standards; and to consider the legal situation with regard to relation between Article 162 of the Code of Criminal Procedure and the order of 7 December 2000**;

iv. **that the Public Prosecution Service, police forces, the *Rijksrecherche* and the FIOD-ECD, develop a strategy to establish a fluid channel of communication with the private sector**;

v. **that the police and public prosecutions services working in the anti-corruption field receive regular specific anti-corruption in-service training and that the number of staff be increased. It also recommended to intensify the initial and in-service**

**training of police officers and public prosecutors with regard to the legal bases and practice of public procurement and to improve their knowledge in this area;**

vi. **that, especially in the light of the most helpful comprehensive guidance given in the new Directive "on the investigation and prosecution of corruption of officials", the Public Prosecution Service ensures in practice that investigations are pursued as fully as possible to enable the prosecution authorities to take an appropriate and fully informed decision on whether to initiate or continue a prosecution;**

vii. **to consider the possibility to create - within the major district courts - specialised panels of judges who should be available to preside over the most complex and serious cases related to economic crime offences.**

99. Moreover, GRECO invites the authorities of the Netherlands to take account of the observations made by the experts in the analytical part of this report.

100. Finally in conformity with article 30.2 of the Rules of Procedure, GRECO invites the authorities of the Netherlands to present a report on the implementation of the above-mentioned recommendations before 30 September 2004.

## APPENDIX I

## LEGAL PROVISIONS ON CORRUPTION

**Article 126**

1. A person who, on the occasion of an election duly called under the law, bribes another person by means of gifts or promises, in order to cause him either to refrain from exercising his or another person's suffrage or to cause him to exercise that right in a particular way, is liable to a term of imprisonment of not more than six months or a fine of the third category.

2. The punishment in section 1 is also applicable to a voter or a proxy who allows himself to be bribed to so do by gifts or promises.
[7-21-1928]

**Article 177**

**Offences against public authority (Bribery of officials)**

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

   1st. whoever makes a gift or a promise to a civil servant or provides or offers him a service with a view to getting him to carry out or fail to carry out a service in violation of his duty;
   2nd. whoever makes a gift or promise to a civil servant or provides or offers him a service in response to or in connection with a service, past or present, that the official carried out or failed to carry out in violation of his duty;

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

3. Removal of the rights stated in article 28, first para., under 1st, 2nd and 4th can be pronounced (Sr 84, 328ter, 362v.)

(13-12-2000, Law Gazette 616, effective date 01-02-2001/parliamentary document 26469).

**Article 177a**

**Bribery not in violation of official duty**

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

   1st. whoever makes a gift or a promise to a civil servant or who provides or offers him a service with a view to getting him to carry out or fait to carry out a service that is not in violation of is duty;

2nd. whoever makes a gift or a promise to a civil servant or who provides or offers him a service in response to or in connection with a service, past or present, the official carried out or failed to carry out, without this being in violation of his duty.

2. The same punishment will apply to anyone who commits an offence as descried in the first paragraph, under 1st, against a person who has prospects of an appointment as a civil servant, if the appointment as a civil servant is followed.

3. Removal of the rights stated in article 28, first para., under 1st, 2nd and 4th, can be pronounced.

(13-12-2000, Law Gazette 616, effective date 01-02-2001/parliamentary document 26469).

**Article 178**

**Bribery of a judge**

1. Whoever makes a gift or a promise to a judge or provides or offers him a gift with a view to exerting influence on his decision in a case that is subject to his judgement will be punished with a prison sentence of at the most six years or a fine in the fourth category.

2. If the gift or promise is made or the service is provided or offered with a view to obtaining a conviction in a case, the guilty person will be punished with a prison sentence of at the most nine years or a fine in the fifth category.

3. Removal of the rights stated in article 28, first para., under 1st, 2nd and 4th can be pronounced. (Sr 84, section 2, 126, 364; RO 11, 24, 29)

(13-12-2000. Law Gazette 616, effective date 01-02-2001/parliamentary document 26469)

**Article 178a**

**Extended definition of a civil servant**

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 equivalent with civil servants.

2. With regard to articles 177, first section, under 2nd and 177a, first section, under 2nd former civil servants are equivalent to civil servants.

3. With regard to article 178, judges in a foreign state or an organisation governed by international law are equivalent to judges.

(13-12-2000, Law Gazette 616, effective date 01-02-2001/parliamentary document 26469)

**Article 328ter**

1. A person who, in a capacity other than that of a public servant, either in the service of his employer or acting as an agent, accepts a gift or promise in relation to something he has

done or has refrained from doing or will do or will refrain from doing in the service of his employer or in the exercise of his mandate, and who, in violation if the requirements of good faith, conceals the acceptance of the gift or promise from his employer or principal, is liable to a term of imprisonment of not more than one year or a fine of the fifth category.

2. The punishment in section 1 is also applicable to a person who makes a gift or a promise to another person who, in a capacity other than that of public servant, is employed or who 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 employment or in the exercise of his mandate, the gift or promise being of such nature or made under such circumstances that he might reasonably assume that the latter, in violation of the requirements of good faith, will not disclose the gift or promise to his employer or principal.

**Article 362**

1. Punishment in the form of a prison sentence of not more than two years or a fine in the fifth category will be imposed on the civil servant:

   1º who accepts a gift, promise or service, knowing that it is made to him in order to induce him to act or to refrain from acting in the execution of his duties, in a manner not contrary to the requirements of his office;
   2º who accepts a gift, promise or service, knowing that it is made to him as a result or as a consequence of something he has done or has refrained from doing, in the execution of his duties, past or present, in a manner not contrary to the requirements of his office;
   3º who asks for a gift, promise or service, in order to act or to refrain from acting in the execution of his duties, in a manner not contrary to the requirements of his office;
   4º who asks for a gift, promise ore service, as a result or as a consequence of something he has done or has refrained from doing, in the execution of his duties, past or present, in a manner not contrary to the requirements of his office.

2. The same punishment will apply to anyone who has the prospects of an appointment as a civil servant, if the appointment as a civil servant is followed, commits an offence as described in the first paragraph, under 1º and 3º.

3. A person who commits a offence as described in the first paragraph in one's capacity as minister, state secretary, royal commissioner, member of the provincial executive, mayor, aldermen or member of a public representative body, is liable to a term of imprisonment of not more than four years or a fine of the fifth category.

(13-12-2000, Law Gazette 616, effective date 01-02-2001/parliamentary document 26469).

**Article 363**

1. Punishment in the form of a prison sentence of not more than four years or a fine in the fifth category will be imposed on the civil servant:

   1º who accepts a gift, promise or service, knowing that it is made to him in order to induce him to act or to refrain from acting in the execution of his duties, in a manner contrary to the requirements of his office;

2º who accepts a gift, promise or service, knowing that it is made to him as a result or as a consequence of something he has done or has refrained from doing, in the execution of his duties, past or present, in a manner contrary to the requirements of his office;

3º who asks for a gift, promise or service, in order to act or to refrain from acting in the execution of his duties, in a manner contrary to the requirements of his office;

4º who asks for a gift, promise ore service, as a result or as a consequence of something he has done or has refrained from doing, in the execution of his duties, past or present, in a manner contrary to the requirements of his office.

2. The same punishment will apply to anyone who has the prospects of an appointment as a civil servant, if the appointment as a civil servant is followed, commits an offence as described in the first paragraph, under 1º and 3º.

3. A person who commits a offence as described in the first paragraph in one's capacity as minister, state secretary, royal commissioner, member of the provincial executive, mayor, aldermen or member of a public representative body, is liable to a term of imprisonment of not more than six years or a fine of the fifth category.

(13-12-2000, Law Gazette 616, effective date 01-02-2001/parliamentary document 26469).

**Article 364**

1. exercise influence on the decision in a case that is before him for judgement, is liable to a term of imprisonment of not more than nine years or a fine of the fifth category.

2. A judge who asks a gift, promise or service, in order to exercise influence on the decision in a case that is before him for judgement, is liable to a term of imprisonment of not more than nine years or a fine of the fifth category.

3. Where a judge, aware of the fact that it is made to obtain a conviction in a criminal case, accepts such gift, promise or service, he is liable to a term of imprisonment of not more than twelve years or a fine of the fifth category.

4. Where a judge, in order to obtain a conviction in a criminal case, asks such gift, promise or service, he is liable to a term of imprisonment of not more than twelve years or a fine of the fifth category.

(13-12-2000, Law Gazette 616, effective date 01-02-2001/parliamentary document 26469).

**Article 364a**

1. With regard to articles 362 and 363, persons working in the public service of a foreign state or an organisation governed by international law are equivalent with civil servants.

2. With regard to articles 362, first section, under 2º and 4º, and article 363, first section, under 2º and 4º, former civil servants are equivalent to civil servants.

3. With regard to article 364, judges in a foreign state or an organisation governed by international law are equivalent to judges.

(13-12-2000, Law Gazette 616, effective date 01-02-2001/parliamentary document 26469).

## APPENDIX II

## DIRECTIVE ON THE INVESTIGATION AND PROSECUTION OF CORRUPTION OF OFFICIALS

| | |
|---|---|
| **Category:** | investigation, prosecution |
| **Nature:** | directive, as defined in section 130, subsection 4, of the Judiciary (Organisation) Act |
| **Sender:** | Board of Procurators General |
| **Addressee:** | Chief Public Prosecutors, Director of the National Police Internal Investigations Department |
| **Registration number:** | 2002A009 |
| **Adopted:** | 8 October 2002 |
| **Entry into force:** | 15 November 2002 |
| **Duration of validity:** | 15 November 2006 |
| **Statutory provisions:** | articles 177, 177a, 178, 178a, 362, 363, 364 and 364a of the Criminal Code, and article 162 of the Code of Criminal Procedure |

### BACKGROUND

Articles 177, 177a and 178 of the Criminal Code make it a criminal offence to bribe public servants and members of the judiciary, while articles 362, 363 and 364 render public servants and judges who have taken bribes criminally liable.[23]

Since 1 February 2001[24] legislation in the field of bribery and corruption of public officials has been radically amended. The most important changes are:

* heavier sentences: in some cases to a level that makes pre-trial detention possible, increasing the range of coercive measures and investigative powers available;
* broader definitions of offences: provision of services has been introduced as a means of bribery, and it is no longer necessary for the public official to know what the purpose of the gift is in order to be criminally liable (reasonable suspicion is sufficient); accepting a gift subsequent to a specific action is now also an offence, even if the official has not acted in breach of his duty;
* wider Dutch jurisdiction over corruption taking place outside the Netherlands; anyone who bribes a Dutch public official abroad may be prosecuted in the Netherlands; the same applies to a Dutch national who bribes a foreign official abroad.

The Explanatory Memorandum accompanying the amendments (House of Representatives, 1998-1999, 26469, no. 3, pp. 1-3) gave three reasons for the changes. First, they were prompted by the growing concern to safeguard integrity in the public service. Second, the existing criminal law instruments had proved insufficient. And finally, a number of international agreements had been concluded with a view to combating fraud and corruption (the Convention on the protection of the European Communities' financial interests concluded at Brussels on 26 July 1995 (Netherlands Treaty Series 1995, 289), the first Protocol to this Convention of 27 September 1996 (Netherlands Treaty Series 1996, 330) and the OECD Convention on combating bribery of foreign public officials in international business transactions concluded at Paris on 17 December 1997 (Netherlands Treaty Series 1998, 54). The aim of all these instruments is to harmonise the legislation of the contracting parties. The OECD Convention tackles the problem from the perspective of international trade. Its preamble states explicitly that in the context of

[23] Article 328ter of the Criminal Code makes bribery and corruption of persons other than public servants a criminal offence and is not the object of this Directive.
[24] Act of 13 December 2000, Bulletin of Acts and Decrees 616.

trade, bribery is a widespread phenomenon that undermines good governance and economic development and distorts international competitive conditions.

The new criminal law instruments have broad application. Anyone who makes a gift to an official[25] and any official who accepts a gift may fall within the scope of the criminal law.[26] No criterion is laid down for distinguishing between gifts that would lead to a prosecution and those that would not. The Minister of Justice has left such matters to the Public Prosecution Service, which has to apply the discretionary principle and/or provide direction by 'announcing guidelines that are easier to modify in line with constantly changing social circumstances than the law' (House of Representatives, 1998-1999, 26469, no. 3, pp. 4-5). In this context the Minister also held that a statutory distinction between gifts liable to prosecution and those that are not might have the undesirable effect, in situations where the advantage was relatively small, of excluding from the scope of the criminal law actions by an official that should unquestionably be considered unacceptable (House of Representatives 1999-2000, 26469, no. 5, p. 6).

The present directive lists a number of factors on which to base a decision on whether to prosecute a case or not. Other factors besides the value of the gift play a role in this decision.

This directive also aims to take advantage of the scope offered by the OECD Convention to keep what are termed 'facilitating payments' outside the scope of the criminal law provisions.[27] These are small payments made not in order to obtain an improper commercial or other advantage, but to encourage government officials in some countries to perform their duties. According to the letter of the law, in the Netherlands facilitating payments do fall within the scope of legislation on bribery, since – for the reasons given above – the legislature has chosen not to specify grounds on which the legitimacy of a gift or promise can be determined. Nevertheless, the present directive aims to keep such payments outside the investigative and prosecution framework in order to prevent Dutch practice diverging from that in other countries party to the OECD Convention. In other words, applying the discretionary principle will ensure that there is a level playing field for Dutch companies operating abroad in relation to companies from other OECD countries.

**SUMMARY**

This directive indicates the factors that must be taken into account in determining whether it is appropriate to prosecute cases of corruption that in themselves constitute criminal offences. Of course, these factors are also relevant to assessing the expediency of investigative activities preceding prosecution. The directive relates both to the briber (individuals and companies) and the person bribed (officials). It distinguishes between cases of corruption in this country and those committed outside the Netherlands.

**INVESTIGATION**

The investigation of official corruption is directed both at the briber and the official bribed. Depending on the information available, the investigation may be directed against both parties from the start, or may begin with one of the two. In cases of bribery occurring abroad, investigating officers will have to be aware that it will not, as a rule, be possible to prosecute in this country a foreign official who accepted a bribe outside the Netherlands. In such cases therefore, the efforts of the Dutch investigative agencies

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[25] In this directive the term 'make a gift' also includes making a promise or providing a service.
[26] Provided the gift concerned is made in order to induce the official – in breach of his duty or otherwise – to act or refrain from acting in the discharge of his responsibilities or if the official concerned knows or might reasonably suspect that the gift is being made for that purpose.
[27] See footnote 9, OECD Convention

will concentrate primarily on the role of bribers who can be prosecuted here, while the counterpart agency in the other country will be responsible for dealing with foreign officials. The existing rules governing international legal assistance apply to cooperation between the two investigative agencies.

### Investigating domestic corruption

Investigating cases of corruption of officials is the primary, though not exclusive, domain of the National Police Internal Investigations Department. On the basis of the Directive on the Tasks and Deployment of the National Police Internal Investigations Department[28] the Department will virtually by definition be responsible for investigating cases of corruption involving police officials (usually senior officials), members of the judiciary and prominent office-holders.[29] In such cases the deployment of the Department is appropriate, since the involvement of a regional force could easily lead to questions concerning the impartiality of the investigation. And it is precisely in the area of official corruption that such questions must be avoided. What is more, a combination of expertise is desirable in such matters. In other cases of corruption of officials, the regular police are competent to carry out the investigation provided there is a degree of distance. (An example would be a municipal official bribed by a demolition company in order to obtain an environmental licence in breach of environmental legislation). Ultimately it is the National Police Internal Investigations Department Coordination Committee (CCR) that decides whether the Department is to be called in or not.

### Investigating corruption outside the Netherlands

Until 31 January 2001, the Netherlands had only limited jurisdiction with regard to cases of corruption of officials taking place abroad.[30] The amendment that entered into force on 1 February 2001 considerably extended Dutch jurisdiction over such cases. Since that date, the following persons may be prosecuted in the Netherlands:

* a Dutch official who accepts a bribe outside the Netherlands (see article 6 (1) of the Criminal Code; this has not been amended in substance);
* a person accepting a bribe in another country who is employed by an organisation constituted under international law that is established in the Netherlands (see article 6 (2) of the Criminal Code);
* anyone who bribes a Dutch official outside the Netherlands (provided bribery is an offence under local law; see article 4 (10) of the Criminal Code);
* a Dutch national who bribes an official – whether foreign or Dutch[31] – outside the Netherlands (provided bribery is an offence under local law; see article 5, paragraph 1 (2) of the Criminal Code);

Since 11 July 2001[32] this list has been extended to include the following:

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[28] Directive of 8 January 2002, registration no. 2002A001.

[29] Although the National Police Internal Investigations Department in principle investigates cases involving government officials, its investigations will not of course be limited to the official who has allegedly accepted a bribe but will extend to the briber, even though in most cases this will not be an official.

[30] Only a *Dutch* official suspected of accepting a bribe abroad could be prosecuted in the Netherlands under article 6 of the Criminal Code. The foreign national who had bribed the official could not be prosecuted in this country. If the briber also had Dutch nationality, he/it could of course be prosecuted here if bribery was also an offence under local law (article 5 Criminal Code).

[31] Before 1 February 2002 Dutch criminal law provisions applied only to officials in the service of the State of the Netherlands. Articles 178a and 364a of the Criminal Code now state explicitly that – put briefly – 'officials' also means foreign officials.

[32] Act of 22 June 2001, Bulletin of Acts and Decrees 315.

* any Dutch official or person employed by an organisation constituted under international law that is established in the Netherlands who acts in breach of article 177 or 177a of the Criminal Code in another country (provided bribery is an offence under local law; see article 4 (11) of the Criminal Code).[33]

A foreign official who accepts a bribe from a Dutch national in another country cannot be prosecuted in the Netherlands (unless the official is employed by an organisation constituted under international law that is established in the Netherlands).

Investigative agencies other than the National Police Internal Investigations Department (and in addition to a foreign investigative agency) may be charged with the investigation of bribery occurring abroad, just as in domestic cases. For instance, if a case of bribery is discovered during an ongoing criminal investigation with international elements (such as an investigation into the affairs of a Dutch national suspected of exporting ecstasy who has bribed a Czech customs official) it may be appropriate for the investigating team concerned to include the bribery in its remit. But a case of corruption outside the Netherlands may come to light without any investigation being under way (if, for example, a Dutch company bribes a foreign official in order to clinch a big business deal). In such a case, the CCR is likely to entrust the case to the National Police Internal Investigations Department, even though the subject of the investigation is not a Dutch official, but a Dutch national or company. The Directive referred to above also gives the Department a prominent role in this type of case on account of its expertise in this field.

## PROSECUTION

As noted above, the criminal law provides no criteria for distinguishing between gifts that will and will not lead to prosecution. Nor does it allow any scope for the facilitating payments referred to by the OECD Convention. This directive addresses both these issues.

### Prosecution of domestic corruption

Various factors play a role in deciding whether it is expedient to prosecute the briber or the person bribed. It would be quite possible to design a model assigning scores on the basis of the presence or absence of certain factors, with the total score determining whether or not to prosecute. From the point of view of legal certainty this is an attractive proposition. Nevertheless, this course has not been followed because such a model (which would be fairly absolute) could lead to decisions and standardised supporting arguments that would not do justice to the case at hand. For example, a gift which in itself is relatively trifling (and which would therefore receive a low score in the model) may induce an official to perform an action that according to prevailing social norms should in fact be considered a criminal offence.[34] The prosecution of corruption of officials by its very nature calls for a tailor-made approach, and the following factors, at least, must be borne in mind:

* who takes the initiative: although the law makes no distinction between an official who solicits a gift and an official who is offered one, prosecution would seem more appropriate in the first case than the second;
* the value of the gift: neither the legislation nor this directive give an absolute limit expressed in euros, first because repeatedly giving or accepting gifts to the value of, say, €45, could lead to

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[33] This provision is only of relevance to Dutch officials who do not possess Dutch nationality; article 5, paragraph 1 (2) provides for jurisdiction over Dutch nationals.

[34] This objection could of course be countered by regarding the model merely as a guideline in deciding whether or not to prosecute, but then the legal certainty argument loses its force.

prosecution, and second because a relatively trifling one-off payment could lead to action by the official that the public would regard as meriting prosecution;

* the degree of social acceptance: members of the public consider it perfectly acceptable, for instance, for officials to receive presents on the occasion of a number of years in service or on retirement. The value of such presents is of course relevant (see above). Although perhaps less acceptable or usual, a municipal official who is given a Christmas hamper by a supplier or business connection of the municipality is also unlikely to be prosecuted;
* incompatibility with a prevailing code of conduct: many organisations have a policy on integrity or a code of conduct. Whether an action is in breach of such a code is relevant to the question of prosecution;
* the degree to which the official could have known that he was breaking the rules: it makes a difference if direct superiors knew what their officials were doing and did not call them to account, or, worse, if they actually encouraged the actions in question;
* the secrecy surrounding the gift: was the gift given and accepted in secrecy? Did the official report the gift to his superior?[35]
* the beneficiary of the gift: is the gift intended to benefit the official alone (e.g. a holiday trip) or does it benefit others (sums transferred to the account of a charitable organisation)?
* the intention behind the gift: is it purely a question of business relations (a business lunch) or is there criminal intent (a bribe). In other words, is the gift 'simply' intended to 'oil' a relationship, or to buy the official off?
* if the gift is a one-off: was the giving or accepting of gifts a solitary incident or was it more systematic?
* the nature of the relationship: is the relationship personal or business? A certain reciprocity may be relevant here (the briber may sometimes be on the receiving end);
* the capacity in which the official receives the gift and the relevance of that capacity to the giver: in which capacity does a mayor who is also the chairman of the tennis club accept a gift from a contractor in connection with renovating the club canteen? Does the contractor offer the gift precisely because he is dealing with the mayor?
* the position of the bribed official: this refers to rank (seniority; heavier penalties are imposed on holders of legislative, administrative and executive office), relationship with colleagues (does the official act as mentor to younger colleagues?) and to the nature of the job (does the official have access to confidential information, does he have substantial discretionary powers?)
* the action taken by the official: did the official 'merely' give the briber priority when processing his application for a licence, with the result – in the case of complicated licences – that other applicants had to wait longer, or did he give the briber a licence that he was not entitled to?
* the financial position of the briber: is this a market leader or multinational, or is it a relatively small entrepreneur trying to keep his head above water by bribing the official to pass orders his way?
* the impact on legitimate markets: does the bribery lead, directly or indirectly, to financial advantages varying from more efficient management to unfair competition?
* the impact on the government agency: is this an isolated incident or does the bribery in question tarnish the image of the agency or indeed public service as a whole?
* the scope for measures other than prosecution: has the competent authority already taken disciplinary measures against the official concerned and would the public view this as sufficient?

Whether prosecution is appropriate will ultimately be determined on the basis of this list of factors (which is not exhaustive).

[35] In cases of bribery not involving officials, failing to report the gift to one's employer is a constituent part of the definition of the offence (see article 328ter of the Code of Criminal Procedure)

**Prosecution of corruption outside the Netherlands**

People in the Netherlands (and in other Western countries) have a low tolerance threshold when it comes to bribery. 'Facilitating payments' are not acceptable: Dutch government officials are expected to fulfil their responsibilities and should not require payment – however small – to encourage them to do their job. Certain other countries take a different view. The OECD Convention allows companies to make small payments in such countries provided the aim is not to obtain an improper business or other advantage. In order to be able to operate on an equal footing with companies from other OECD countries, Dutch businesses have to enjoy the same freedom. However, the playing field is not entirely level. Local custom is not the only criterion in such a situation: Dutch nationals may be expected to respect Dutch norms and values even when abroad. Consequently, any assessment of the actions of Dutch companies outside the Netherlands will take into account the factors listed above. Some of them, however (such as the value of the gift and the degree of social acceptance) cannot be seen in isolation from customs in the country where the bribery takes place.

In addition to the factors listed above, there are at least two more factors that are specific to the situation in a non-Western country:

* scope for avoiding the gift: a Dutch entrepreneur whose trucks carrying perishable goods are repeatedly stopped at the border need not avoid paying a 'small sweetener' or forbid his employees to do so if it is the only way to ensure that his goods are not held up for hours or even days;
* the consequences for a foreign official: in deciding whether or not to prosecute, account may be taken of action (or inaction) on the part of the foreign police and justice authorities against the foreign official.

Finally, companies operating abroad should be under no misapprehension that simply using the services of a local agent, representative or consultant confers immunity from prosecution. Dutch nationals operating outside the Netherlands are obliged to seek accurate information about the rules applying abroad. Their sources of information must also be impeccable: they should only act on the recommendations of a person or body whose authority is such that their advice may reasonably be deemed to be sound.[36]

**CONCLUSION**

Obligation to report (article 162 Code of Criminal Procedure)
In carrying out their duties, public bodies and officials may become aware of offences whose investigation does not fall within their competence. Some of these they are obliged to report. This special reporting obligation is regulated in article 162 of the Code of Criminal Procedure.[37] The obligation to report applies to offences involving corruption as defined in articles 362, 363, 364 and 364a of the Criminal Code (see article 162, paragraph 1 (a) of the Code of Criminal Procedure). Strictly speaking, it does not apply to corruption as defined in articles 177, 177a, 178 and 178a of the Criminal Code since article 162 does not refer to these articles. In practice, a body or official that discovers that someone has probably bribed an official will nevertheless be confronted fairly quickly with the obligation laid down in article 162 if there are indications that the bribery was successful. Whether or not the body or official knows which specific official was involved would appear to be irrelevant to article 162 of the Code of Criminal Procedure. In some cases there will be an obligation pursuant to article 162,

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[36] Entirely in line with Dutch case law on excusable mistakes of law.
[37] In addition to this special reporting obligation, there is also the more general obligation resting on every individual to report offences relating to state security, offences against the person and rape (see article 160 of the Code of Criminal Procedure).

paragraph 1 (c), which states that corruption must be reported if the offence concerned involves a breach or unlawful use of a regulation that the body or official is responsible for implementing or supervising compliance with.[38]

### The national public prosecutor responsible for corruption cases

There is a designated national public prosecutor responsible for corruption cases at the National Public Prosecutors' Office in Rotterdam. He has specialist knowledge in the field of investigating and prosecuting corruption, and ensures that this knowledge is accessible to other members of the Public Prosecution Service. He assists local public prosecutors in corruption cases, either at their request or on his own initiative. Where appropriate he also heads investigations in this field.

In addition, the designated public prosecutor plays an initiating role in developing or amending legislation and relevant policy. He also plays a coordinating role in tackling corruption cases outside the Netherlands involving Dutch legal or natural persons.

## TRANSITIONAL RULES

The policy rules contained in this directive are valid as from its entry into force.

[38] Failure to meet the obligation to report is not however a criminal offence.