



Anti-Corruption Regulation

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2011

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Contributing editor:

Homer E. Moyer Jr
Miller & Chevalier Chartered

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Subeditor

Davet Hyland

Editor-in-chief

Callum Campbell

Publisher

Richard Davey

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Netherlands

Enide Z Perez and Max JN Vermeij

Sjöcrona Van Stigt Advocaten

1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

The Netherlands is party to:

- the OECD Convention on combating bribery of foreign public officials in international business transactions (Paris, 17 December 1997);
- the United Nations Convention against Corruption (New York, 31 October 2003);
- the Criminal Law Convention on Corruption (Strasbourg, January 27th 1999) and its addition protocol (Strasbourg, 15 May 2003);
- the Civil Law Convention on Corruption (Strasbourg, 4 November 1999);
- the Statute of the Group of States against Corruption (GRECO) (Strasbourg, 5 May 1998); and
- the Convention drawn up on the basis of article K.3(2)(c) of the Treaty on European Union on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union (Brussels, 26 May 1997).

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

On the basis of the Dutch Criminal Code (DCC), articles 177, 177a and 178a, bribery of Dutch and foreign officials is an offence. Accepting a gift or promise is punishable under articles 362 up to and including 364a DCC.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

The elements of the law prohibiting bribery are the same for domestic and foreign bribery. Article 178a DCC states that articles 177 and 177a (regarding bribery of Dutch public officials) also apply to foreign public officials. The term ‘officials’ includes officials, employed in public service of a foreign country or of a public international organisation (ie, the United Nations).

Both, articles 177 and 177a DCC stipulate that it is punishable to make a gift or promise, or render a service to a public official with the aim of either inducing him to act (or to refrain from acting) in the course of his employment, or rewarding him for past acts (or omissions).

Article 177 DCC concerns acts or omissions in violation of the official’s duty, whereas article 177a DCC concerns acts or omissions

that may conform with (or at least are not in violation of) his duties. It is also punishable to bribe a person who is not yet appointed as a public official, but is expecting to be so, in case the appointment takes place as expected.

Jurisdiction exists over all Dutch and foreign persons and companies who commit these offences in the Netherlands.

The Netherlands is considered locus delicti when:

- the criminal behaviour has been committed in the Netherlands;
- the instrument used to commit the offence has its effect in the Netherlands (eg, with bribe-money sent from a foreign country, someone in the Netherlands is bribed) or;
- the consequence which completes the offence occurs in the Netherlands.

In case of a foreign co-perpetrator or accomplice to an offence committed in the Netherlands, Dutch criminal legislation is also applicable.

Jurisdiction of the Dutch court furthermore extends to:

- the bribing abroad of Dutch public officials, whether this is done by Dutch or foreign persons or companies, if the offence is also punishable under the law of the foreign country; and
- the bribing abroad of foreign public officials by Dutch persons or companies – again, provided that the offence is also punishable under the law of the foreign country.

4 Definition of a foreign public official

How does your law define a foreign public official?

Article 178a DCC defines this as a person exercising a public function for a foreign country or public international organisation. Rewarding a former public official is also punishable.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

It is prohibited to provide gifts to a foreign public official when this is done to induce him to act (or to refrain from acting) in the course of his employment, or to reward him for past acts (or omissions).

6 Facilitating payments

Do the laws and regulations permit facilitating or ‘grease’ payments?

Facilitating payments are considered bribery under Dutch law. But since facilitating payments fall besides the scope of the OECD Convention, which is implemented in the DCC, the Public Prosecutions Office will not prosecute facilitating payments.

Commenting on the anti-corruption articles in the course of the legislative process, the minister of justice refused to define ‘facilitation payments’, for example, by means of some monetary criterion. After questions were raised in Parliament on this specific subject, the minister conceded that ‘trivial’ payments would not lead to pros-

ecution. The minister invited the Public Prosecutions Office to issue guidelines on the subject. Prosecution guidelines have been issued by the Board of Procurators General (Public Prosecution Office) for both domestic bribery of public officials (see question 5) and foreign bribery of public officials. In the guideline concerning foreign bribery, the position is taken that the OECD Convention does not require the penalisation of facilitating payments, and that, accordingly, making such payments will not be prosecuted.

The guideline was issued in 2007 and will expire on 31 July 2011. In the course of this period, the OECD appears to have taken a somewhat less lenient stance towards facilitation payments. On 26 November 2009, the OECD Council adopted the recommendation that member countries should undertake to periodically review their policies and approach on small facilitation payments in order to effectively combat (or at least discourage) the phenomenon, given its corrosive effect on sustainable development and the rule of law. Whether or not this recommendation will be acted upon remains to be seen in the (expected) 2011 reissue of the foreign bribery guideline of the Board of Procurators General.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Using an intermediary or third party (being in close cooperation) to make illegal payments to foreign public officials, or knowing that an intermediary will provide money or other valuables to foreign public officials for your benefit, one can be held criminally liable as a co-perpetrator or as an accomplice. 'Knowing' also includes that one deliberately accepts the considerable chance of bribery of public officials taking place, and that one accepts this chance in that one is prepared to put up with it (*dolus eventualis*). If one fails to supervise or check the third party's activities one can be considered an accomplice if it can be proved that one was negligent with the intention to give the third party the opportunity to commit the offence. When this cannot be proved, one still has a duty of care. This is no legal obligation, but should be seen as a precaution building up a defence, in advance.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Yes, in principle both individuals and legal entities can be held criminally liable, either as perpetrators, co-perpetrators or accomplices. Corporate criminal liability presupposes an act or omission of an individual. This individual act or omission can lead to corporate criminal liability if a judge rules that it is 'reasonable' to attribute the behaviour to a corporate entity. The Dutch Supreme Court has ruled that, generally, an act that has been committed 'within arm's length' of a company, or 'within the setting' of a company, may be 'reasonably' attributed to this company.

After it has thus been established that a corporate entity has committed a criminal offence, certain natural persons within the corporation (other than the individual, material perpetrator), of whom it can be proven that they have 'directed' or 'ordered' the prohibited conduct, can be held criminally liable as well.

9 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

No, Dutch foreign bribery legislation is only criminally enforced. However, because bribery is considered an unlawful act, civil law provides the opportunity for persons who have suffered damage as a result of bribery to initiate an action in order to obtain full compensation for such damage.

10 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

The National Police Internal Investigations Department investigates foreign bribery cases. The National Public Prosecutions Office has appointed a special public prosecutor for this type of case. This national bribery prosecutor is responsible for the investigations carried out by the Internal Investigations department. Apart from the national bribery prosecutor, local public prosecutors can prosecute bribery cases which have been committed within the boundaries of their own district. In that case, the national bribery prosecutor can provide the necessary assistance.

11 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

There is no formal mechanism for lesser penalties in exchange for disclosure. Depending on the specifics of the case, the fact that voluntary disclosure has taken place can be adduced in defence against the sentence demanded by the prosecution and thus indirectly work as a leniency mechanism.

12 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

It is entirely up to the public prosecutor whether he brings a case before the court (prosecutorial discretion) or drop the case, for example, for lack of evidence, or enter into an out-of-court settlement with the defendant.

In case of an out-of-court settlement, which can be proposed either by the defendant or the public prosecutor, usually the defendant will pay a settlement sum. An additional condition can be that the defendant pays the proceeds of the bribe. When the settlement concerns an amount of over €50,000 and concerns a 'sensitive' or 'high profile' case, permission of the minister of justice is required to conclude an out-of-court settlement. If the defendant does not accept the offer, the case will be brought before the court.

The data on out-of-court settlements are registered in the criminal history record of the person or company concerned.

13 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

In 2006, the OECD reproved the Netherlands for not taking a sufficiently proactive approach to the investigation and prosecution of the offence of bribery of foreign public officials in international business transactions. According to the OECD, given the size of the Dutch economy and the level of international trade, more investigations of foreign bribery would be expected.

In October 2008, the OECD Working Group on Bribery reported that still no foreign bribery cases had been brought before the Dutch courts. Nevertheless, by 2008, the OECD reported that a number of out-of-court settlements had been reached, inter alia within the context of the Oil-for-Food investigations, and in other cases, feasibility investigations and preliminary investigations were under way.

In 2009 and following years, however, no cases involving bribery of foreign public officials in international business transactions were brought before the courts.

In October 2010, the National Public Prosecutors Office announced that it had six cases of foreign bribery under investigations. For obvious reasons, further details on these investigations were not disclosed.

14 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

Foreign companies can be prosecuted for bribing a public (Dutch or foreign) official in the Netherlands. They can also be prosecuted for bribing a Dutch public official in a foreign country, provided that bribery is also considered an offence in this country (principle of double criminality; see question 3).

15 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Bribing a foreign public official to act in violation of his duties (articles 177 and 178a DCC) is punishable with a maximum prison term of four years and/or a fine of €76,000 for natural persons and €760,000 for companies.

Bribing a public official to act in a way not in violation of his duties (articles 177a and 178a DCC) is a lesser offence and punishable with a maximum prison sentence of two years and/or a fine of €76,000 for natural persons and €760,000 (for corporations).

In addition, the sentence can include the prohibition to be a member of the civil service, to serve as a member of the armed forces or to work as a lawyer or a court-appointed administrator.

16 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

See question 13.

Financial record keeping**17 Laws and regulations**

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

The Dutch Civil Code and the General State Taxes Act require (the board of directors of) a corporate entity to keep records of the corporation's financial position and of everything concerning the corporation's activities. The law does not contain detailed rules concerning record keeping, administration and internal controls: a corporation is free to adopt a system that best suits its needs (taking into consideration, for example, the size of the corporation), within the parameters established by sound accounting practice.

The Dutch Civil Code also stipulates that financial statements must be published on a yearly basis. The financial statements of larger corporations (above certain threshold criteria related to size, turnover and/or asset value) must be audited by an external auditor. The Dutch Corporate Governance Code (section V.1) contains certain best practice criteria for financial reporting.

18 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

A company (like any other natural or legal person) is entitled but not obligated to report criminal acts (including instances of bribery or associated accounting irregularities) to the authorities. The Accountants' Organizations Supervision Act requires auditors to report suspected frauds and accounting irregularities provided that the materiality criterion is met. However, under certain circumstances, if the corporation (alerted by the auditor) takes adequate counter and repair measures, the auditor may abstain from reporting. If the audit firm itself (or one or more of its employees) is involved in criminal acts that may undermine public trust in the audit firm or the finan-

cial markets, the firm must inform the Authority for the Financial Markets of such an incident.

19 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

Domestic and foreign bribery are criminal acts which are punishable in their own right, and can be prosecuted on the basis of the relevant provisions in the Dutch Criminal Code. It is of course possible that in bribery cases, financial record keeping provisions and/or the prohibition on forgery have also been violated. However, seldom, if ever, are such provisions used to the exclusion of the anti-bribery provisions to prosecute bribery.

20 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

The publication of inadequate financial statements and the failure to have the financial statements audited constitute summary (minor) economic offences, punishable on the basis of the Economic Offences Act with a maximum prison term of six months, community service and/or a maximum fine of €19,000 (or €76,000 for a legal person).

Failure to report an incident concerning involvement of an audit firm (or an employee thereof) to the Authority for the Financial Markets can result in an administrative fine for the audit firm.

Although the prohibition on forgery is strictly speaking not an 'accounting rule', forgery may of course come into play in concealing bribery. Forgery is punishable with a maximum prison term of six years, and/or a maximum fine of €76,000 (€760,000 for legal persons).

21 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

The deductibility of all types of bribes mentioned in the Dutch Criminal Code is explicitly ruled out in the Income Tax Act 2001, the provisions of which equally apply to the taxation of corporate profits.

Domestic bribery**22 Legal framework**

Describe the individual elements of the law prohibiting bribery of a domestic public official.

Bribery of a domestic public official is covered by articles 177 and 177a of the Dutch Criminal Code. The contents of these articles are described in the answer to question 3.

23 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Yes, both paying and receiving a bribe is forbidden.

Articles 177 and 177a DCC prohibit active bribery (paying) of a public official. Articles 362 and 363 DCC prohibit passive bribery (receiving) of a public official.

Both article 362 and 363 DCC stipulate that it is punishable for a public official to accept a gift, promise or service, whilst knowing or reasonably suspecting that the gift, etc, is made in order to induce him to act (or to omit acting), or as a consequence of past acts or omissions. Public officials are also forbidden to solicit gifts, promises or services.

Article 362 DCC concerns acts or omissions that may be in conformity with (or at least are not in violation of) the official's duties, whereas article 363 DCC concerns acts or omissions in violation of the official's duty.

A person who is not yet appointed as a public official but expects future appointment is punishable on the same basis as a regular public official, provided that the appointment indeed follows as expected.

24 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

There is no definition of the term 'public official' (as regards the anti-bribery provisions). Obviously, state, province and municipal employees are public officials. Based on established case law, a person who has been appointed under governmental supervision and responsibility to hold an employment with a public character, and who performs (part of) the duties of the state and its agencies, is also considered to be a public official. This would entail that, depending on circumstances, employees of companies that perform government tasks and are under government supervision and control are included in the definition. Article 84 of the Dutch Criminal Code adds that members of representative public bodies, judges and members of the military are public officials as well.

25 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

Yes, but state and provincial officials are required to report sideline activities to their employer, in case these activities may affect their official duties. Secondary activities of high ranking officials are made public. Activities which may reasonably be expected to negatively impact official duties are forbidden. State and provincial officials are not allowed to act as suppliers to, nor allowed to tender for a commercial contract with, their employers. Certain designated state and provincial officials (whose positions may bring them into financial conflicts of interests) are required to report their financial interests, stockholdings and securities transactions.

For municipal officials, fewer restrictions apply. They are not allowed to act as suppliers to, nor allowed to tender for a commercial contract with, their municipal employer, and may also be restricted as to the supply to, and the participation in tenders for, third parties.

As for employees of state-owned or state-controlled enterprises, restrictions may vary and may be individually contracted.

26 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

In theory, public officials are not allowed to receive any gift (see question 5). Correspondingly, it is not allowed to provide any kind of gift to a public official. However, in practice, small gifts (eg, promotional items) are usually allowed. The anti-corruption guidelines regarding bribery of domestic public officials, issued by the Board of Procurators General (Public Prosecution Office) indicate a case-by-case approach. The criteria which are used to select cases for prosecution include:

- initiative (an official actively soliciting gifts is more likely to be prosecuted than a passively bribed official);
- value of the gift (no fixed threshold value is specified, and the guidelines admit that even the smallest of gifts may under certain circumstances be unacceptable);
- awareness (was the departmental or sectoral standard of 'acceptable' gifts made known?); and
- covertness (was the gift covertly given and accepted, did the official try to disguise the gift?).

27 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

The Dutch Criminal Code does not differentiate between permissible and non-permissible gifts and gratuities. However, on the level of the Public Prosecutions Office, guidance is issued (see question 26) on the basis of which the giving and receiving of insignificant gifts will not be prosecuted.

28 Private commercial bribery

Does your country also prohibit private commercial bribery?

Private commercial bribery is covered by article 328ter of the Dutch Criminal Code. The first section of this article states that an employee or agent who accepts or solicits a gift, promise or service, in connection with a past or future act or omission in the course of his employment or agency, and who hides accepting or soliciting this gift, etc, from his employer or principal, is punishable. The second section of article 328ter DCC concerns the active side of private commercial bribery. It is forbidden to offer a gift, promise or service to someone working as an employee or agent, in connection with a past or future act or omission in the course of this person's employment or agency, whilst reasonably suspecting that this person will hide the gift or promise from his employer or principal.

29 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

Actively bribing a public official for an act (or omission) in violation of his duty (article 177 DCC) is punishable with a maximum prison term of four years, and a maximum fine of (for private persons) €76,000 or (for corporations) €760,000.

Actively bribing a public official for an act (or omission) not in violation with his duty (article 177a DCC) is punishable with a maximum prison term of two years, and a maximum fine of (for private persons) €76,000 or (for corporations) €760,000 (see also question 15).

Accepting or soliciting a gift to act (or refrain from acting) in violation of one's official duties (article 363 DCC) entails a maximum prison term of four years, and a maximum fine of €76,000. Certain public officials (government ministers, secretaries of state, provincial governors, deputies, mayors, aldermen and members of public representative bodies) are punishable with (the same fine and) a maximum prison term of six years.

A public official who accepts or solicits a gift in connection with an act (or omission) not in violation of his official duty (article 362 DCC) is punishable with a maximum prison term of two years, and a maximum fine of €76,000. Certain public officials (government ministers, secretaries of state, provincial governors, deputies, mayors, aldermen and members of public representative bodies) are punishable with (the same fine and) a maximum prison term of four years.

Private commercial bribery (both the passive and the active variety) is punishable with a maximum prison term of two years, and a maximum fine of (for private persons) €76,000 or (for corporations) €760,000.

30 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

Facilitation payments are, as far as the law is concerned, on a par with regular bribes as regards prosecution and penalisation. In the prosecution guideline concerning foreign bribery, the position is taken that the OECD Treaty does not require the penalisation of facilitating payments, and that, accordingly, making such payments will not be prosecuted. Investigation as to whether payments are to

be considered facilitating payments can, however, be necessary. The guideline provides indicators to determine whether or not a payment is considered facilitating. These indicators include:

- the public official who was bribed was not bribed to act contrary to his duty;
- the gift is of low value;
- the official is low ranking;
- the gift was not covertly given and accepted; and
- and the transaction was initiated by the foreign public official.

31. Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

See question 13.

Sjöcrona Van Stigt Advocaten

Enide Z Perez
Max JN Vermeij

ep@svsadvocates.com
mv@svsadvocates.com

't Hoenstraat 5
2596 HX The Hague
The Netherlands

Tel: +31 70 346 74 72 / +31 6 22 79 53 66
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