

# Overview on anti-corruption rules and regulations in THE NETHERLANDS

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## I. What is the anti-corruption legal framework in your country (including brief overview on active / passive bribery, bribery of foreign officials, and commercial bribery)?

The Dutch legal framework on anti-corruption is laid down in the Dutch Criminal Code (DCC). Several types of corruption are distinguished, such as bribery of public officials and commercial bribery and active and passive bribery. Consequently, the DCC includes several sections on the different types of bribery, which can be categorized as follows:

- Active bribery of a public official: section 177 DCC – 178 DCC
- Passive bribery of a public official: section 363 DCC – 364 DCC
- Active and passive bribery of private persons: 328ter DCC

### I. Bribery of public officials

The legal framework lacks a clear definition of the term *public official*, however in established case law the term has proven to have quite a broad reach. According to the Dutch Supreme Court a public official is anyone who, under the supervision and responsibility of the government, has been appointed to a function which undeniably had a public character to carry out (a part of) the powers of the State or its agencies. To establish whether a person is a public official he or she must be appointed and employed by a competent body or its employer must perform government tasks and must be subjected to supervision and regulation by the government.

**Active bribery** of a public official according to section 177 DCC includes both offering a gift or service with the intention to consequently induce the public official to a certain act or omission (sub section 1) and offering a gift of service subsequently or as a result of a certain act or omission (sub section 2). Additionally, the section prohibits offering a gift or service to a person who will become a public official or has recently been one. Until the 1<sup>st</sup> of January 2015 separate provisions existed for the different situations whether or not the public official acted in breach of his official duty, this distinction however has been rescinded.

According to section 363 DCC **passive bribery** of a public official includes accepting a gift or service before or after the act or omission (subsections 1 and 2) as well as asking for a gift or service before or after the act or omission (subsection 3 and 4). Additionally it is important to note that for conviction of this type of bribery it is not needed that the intended act or omission has actually occurred. It is sufficient that the public official at the

time he accepted the gift, knew or reasonably suspected that the gift was done to induce him to act or refrain for acting in the future or in the past.

The DCC includes a separate provision for the active and passive bribery of national and international judges, laid down in sections 178 DCC (active) and 364 DCC (passive).

## II. Bribery of foreign officials

According to section 178a DCC persons in the public service of a foreign state or of an international (law) organization are also considered public officials, which means that the above-mentioned sections 177 and 363 DCC are equally applicable to foreign public officials. The Dutch law nor the Dutch case law provide a further explanation of the term 'foreign public official', however it is generally assumed that the same criteria apply as for the above mentioned domestic definition of public official. From the 1<sup>st</sup> of January 2015 onwards the scope of the anti-corruption legislation was expanded by also making it possible to apply the provisions to persons who bribe a Dutch public official abroad (section 4 subsection 9 DCC). The possible options of prosecution and jurisdiction will be discussed in the next chapter.

## III. Commercial bribery

Commercial bribery is laid down in section 328ter DCC. It includes passive (subsection 1) and active (subsection 2) bribery of persons who work in the commercial sector, defined as all persons who are not public officials, and is predominantly concerned with the integrity of the labor relationship. Passive bribery means that anyone is punishable who accepts or asks a gift, promise or service in breach of his duty as a consequence of an act or omission he has done or will do. The employee acts 'in breach of his duty' if he, in violation of the principle of good faith, remains silent about the gift or service to his employer (subsection 3). Active bribery means that anyone who offers or provides gifts, promises or services as a consequence of an act or omission that has or will be done, while he could reasonably assume the employee was in breach of his duty.

This means that other than the provisions on bribery of public officials, commercial bribery focuses on the *concealment* of the advantage to an employee's superior. If he however discusses the gift, promise or service with his employer he will not be punishable for commercial bribery. Please note that this form of bribery only applies to acts or omissions done in relation to the employee's occupational capacity.

## IV. Advantages

As mentioned the Dutch provisions use the terms 'gift', 'promise' and 'service' to describe the advantage for the recipient. Although the law doesn't provide a definition of these advantages a gift is generally defined as every transfer of something with value for its recipient, which can be material as well as immaterial. A promise must be understood as promising a gift, for example offering monetary advantages. When it comes to commercial bribery the law technically includes every type of gifts, however in practice business gifts of very low value are often permitted.

The DCC does not distinguish between bribes and facilitation payments. It is in general not allowed to provide a gift or promise to public officials. Also bribes do not have to be monetary, meaning that gifts and hospitality may be considered illegal depending on the intent and the benefit obtained. Whether something could be considered a bribe depends on all the facts and circumstances and needs to be determined on a case-by-case basis. The Political Parties Financing Act regulates contributions to political parties.

## **II. Does this framework also cover extra-territorial corruption?**

With regard to extra-territorial corruption the regular rules of jurisdiction as laid down in section 4 of the Dutch Code of Criminal Procedure (DCCP), also apply to the provisions on bribery. The general principle is the requirement of double criminality, meaning the criminal acts must be qualified as an offence both under the Dutch law and the law of the state where the act was carried out. However in the case of extra-territorial corruption - in light of the earlier mentioned inclusion of foreign public officials in the legal framework - prosecution in the Netherlands of the following persons are possible under Dutch law:

- a Dutch public official who was bribed outside the Netherlands, section 6 subsection 1 DCC;
- a person in service of a Dutch-based international law organization who was bribed outside the Netherlands, section 6 subsection 2 DCC;
- every person that bribed a Dutch citizen or a Dutch public official outside the Netherlands, section 4 subsection 6 DCC;
- a Dutch person who bribes an (international) public official outside of the Netherlands, section 5 subsection 1 DCC;
- A Dutch public official or a person in service of a Dutch-based international law organization who violated section 177 DCC outside of the Netherlands, section 4 subsection 10 DCC.

## **III. Is there a concept of corporate criminal liability?**

The Dutch criminal law includes the possibility to prosecute legal / corporate entities. Whether or not a legal entity is criminal liable for a certain offence depends on the specific circumstances of the case. According to the Dutch Supreme court a few criteria that must be taken into account when determining a corporation's criminal liability. It must be taken into account whether the offence can be reasonably imputed to the legal entity, because it took place within the scope of the legal entity. This can be the case if:

- the act was committed by an employee of the corporation;
- the act was part of the 'regular business' of the corporation;
- the act was beneficial to the corporation;
- the course of action was at the 'disposal' of the corporation, and the corporation 'accepted' the act. 'Acceptance' includes the failure to take reasonable care to prevent the conduct from happening.

This account however is not exhaustive; other factors can also lead to criminal liability. The Dutch approach regarding corporate criminal liability can therefore be characterized as a rather 'open' one, assessing each time the particular circumstances of the case. In practice this means that criminal liability is quite easily assumed. Additionally, the (factual) directors of the corporation can be held individually criminally liable as well if they had a certain degree of awareness the act would take place and/ or did not prevent the act from taking place although they were able to prevent it.

## **IV. What are the penalties for legal entities (if applicable) and natural persons?**

The penalty for active as well as passive bribery of a public officials is a prison sentence of a maximum of 6 years and/or a fine of €78.000 for natural persons. For legal entities the fine can reach up to €810.000 or 10%

of their annual turnover. Additional penalties can consist of disqualification of the profession in which the person committed the crime, deprivation of certain rights, and/or confiscation of goods related to the crime. The punishment for the public officials who hold a special authority (e.g. a government minister or a mayor), is a maximum prison sentence of eight years. Bribery of judges can result in a maximum sentence of 9 years (subsection 1) or 12 years (subsection 2). It is also a crime for which pre-trial detention is possible.

The penalty for commercial bribery can reach up to a maximum of 4 years imprisonment. The fines are the same as the ones for bribery of a public official. Additional penalties can also exist of disqualification of the person's profession, deprivation of certain rights and besides that the judge can order that the judgment will be made public. Another measure that can be taken is the confiscation of the benefits that were illegally obtained.

#### **V. Which local authorities are competent for corruption investigations?**

Apart from investigations regarding high-ranking officials, judges and politicians who are investigated by an internal investigations department, the regular Dutch police force can investigate all corruption investigations. Also the Dutch Tax and Customs Administration has its own investigation team called the 'FIOD' (Fiscale Inlichtingen- en Opsporingsdienst). This team is specialized in tracing financial fraud and tax fraud and their tasks include investigation of signals of corruption. The police and FIOD coordinate their investigations with the local public prosecution office. However, the National Public Prosecutor on Corruption in Rotterdam has special expertise on bribery and therefor serves as a coordinator of bribery cases. He or she can lead bribery investigations if requested and can assist other public prosecutors in bribery cases. The public prosecutor decides whether or not to bring the case to court or, for instance, tries to settle the issue outside court.

#### **VI. Are there whistle-blower regulations?**

There are a few regulations on whistle-blowing in the Netherlands. Dutch law however provides some statutory policies for the public sector which are included in the 'reporting suspected abuse within central government' and 'police organization decree and in the public official regulations for defence staff and for staff of provincial authorities'. In the private sector the Dutch Corporate Governance Code provides for a whistle-blowing regulation, but this provision is only applicable to a limited number of corporations. Because of the criticized lack of whistle-blowing regulations in the Netherlands a new act has been proposed to set up a national institute for whistle-blowers (Huis voor Klokkeluiders). This proposal is at the moment of writing still pending. The proposal will be further discussed in February 2016. The Advice Centre for Whistleblowers (Adviespunt Klokkeluiders) was established in 2012, which is an independent organization that advises employees in the public and private sector on reporting concerns about wrongdoing. It serves as a temporary service until permanent legislation is in place.

#### **VII. Are there voluntary disclosure / self-reporting programmes and procedures?**

In the Netherlands the system of voluntary disclosure is predominantly focused on tax (fraud) cases. The Dutch Tax Code includes a provision that provides the taxpayer the opportunity to amend the tax return to the

correct information before the tax authorities become aware of the errors, in which case no penalty will be imposed or the penalty will be reduced.

### **VIII. What are the consequences for assessment of guilt or admission of wrongdoing for future business, work, permits e.a.?**

As mentioned above, additional penalties to a prison sentence or fine can consist of disqualification of the profession in which the person committed the crime and the judge can order that the judgment will be made public, which can have negative consequences for a corporation's reputation.

Another consequence after an assessment of guilt can be that a natural person or legal entity will not be able to receive a certificate of conduct (Verklaring Omtrent het Gedrag). This is a document by which the Dutch State Secretary of Security and Justice declares whether or not the applicant has been convicted of a criminal offence that is relevant to the performance of his or her duties. Furthermore the Advancement of Integrity Assessment by the Public Administration Law (Wet Bibob) makes it possible for the administrations to perform integrity screenings on legal entities for the purpose of assessment of permits, subsidies, contracts and real estate transactions. The assessment of guilt can have a negative effect for these procedures or the provisions of these certificates. Requests for residence permits can be rejected in case of an assessment of guilt.

### **IX. What are the latest developments in anti-corruption in your jurisdiction?**

In response to the recommendations done by the OECD Working Group on Bribery, the Dutch Criminal Code was amended in 2015. The amendments contained the repeal of section 177a, abolishing the distinction between bribes being paid to act (or not to act) in breach of duty and to act (or not act) without breach of duty. The maximum sentence for bribery was changed from 2 (old section 177a) and 4 (old section 177) years imprisonment to 6 years (new section 177). The maximum sentence for the active bribery of a judge in section 178 was changed from 6 to 9 years (subsection 1) and from 9 to 12 years (subsection 2). The bill has been adopted by Parliament on November 18, 2014 and entered into force on January 1, 2015.

The recommendations from the OECD that have not yet been (fully) implemented mostly regard to investigation and detection of foreign bribery, particularly the practical outline of raising awareness and providing training programs for law enforcement officials and reporting entities and related guidelines for the relevant agencies.

### **X. The Author**

Jurjan Geertsma's legal practice focuses expressly on disciplinary law, the law of sanctions and the reputational issues involved. He helps his clients to identify potential risks, jointly draws up an appropriate strategy and proactively and resolutely goes in search of solutions. He assists companies from a wide range of sectors (including the chemical, food and property sectors), financial institutions (such as trust offices) and professional practitioners (in e.g. the healthcare sector and the notarial and accountancy practices) who are faced with criminal accusations, administrative enforcement, and supervisory and disciplinary issues.

Jurjan is a member of the Dutch Association of Defence Counsel (NVSA) and of the European Criminal Bar Association (ECBA), where he forms part of the Anti-Corruption Working Group. He is also involved in the Corporate Responsibility & Anti-Corruption Commission of the International Chamber of Commerce (ICC). He is affiliated with the Amsterdam Disciplinary Appeals Tribunal as a Deputy Registrar. He teaches courses at institutions, for professional practitioners and for legal and compliance officers in the fields of the Money Laundering and Terrorist Financing Prevention Act (Wwft), international sanctions regulations and compliance, integrity, client confidentiality and lawyer-client privilege, and organises interrogation and search training sessions. Until early 2015 Jurjan worked as senior counsel in Boekel de Nerée's Fraud & Compliance practice group in Amsterdam.

Jurjan founded JahaeRaymakers in 2015 together with Han Jahae and Carel Raymakers, and is a partner in that firm.

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