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Review of implementation of the United Nations Convention against Corruption

Executive summary: Netherlands

Note by the Secretariat

The present conference room paper is made available to the Implementation Review Group in accordance with paragraph 36 of the terms of reference of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption (Conference of the States Parties resolution 3/1, annex). The summary contained herein corresponds to a country review conducted in the third year of the first review cycle.



II. Executive summary

The Netherlands

1. Introduction: Entry into force and applicability of the United Nations Convention against Corruption (UNCAC)

The UNCAC was signed by the Netherlands on 10 December 2003 and was proposed to the Parliament for tacit approval by the Minister of Foreign Affairs in September 2006.

After the Convention was tacitly approved, the document of acceptance was deposited with the Secretary-General of the United Nations on 31 October 2006. The application of the Convention was extended to the Caribbean part of the Netherlands as per 10 October 2010.

Article 94 of the Constitution states that provisions of international treaties override contradicting statutory law if those provisions are binding on all persons. Accordingly the UNCAC has become, with its publication, an integral part of Dutch domestic law, ranking above national legislation.

The Kingdom of the Netherlands previously consisted of three countries: the Netherlands in Europe, the Netherlands Antilles and Aruba. On 10 October 2010, the Netherlands Antilles was dissolved, and the Kingdom of the Netherlands now consists of four separate countries: the Netherlands (in Europe and the Caribbean), Aruba, Curaçao and Sint Maarten. The islands of Bonaire, Sint Eustatius and Saba have now become a part of the Netherlands as special municipalities. These special municipalities resemble other Dutch municipalities in most ways.

The Caribbean part - Bonaire, Sint Eustatius and Saba - of the Netherlands has its own Penal Code, which is closely related to the Dutch Penal Code to enable, as highlighted by the Dutch authorities, among other things the fulfilment of the requirements posed by international conventions on corruption. The scope of these conventions has automatically been extended to Bonaire, Saba and Sint Eustatius, since they became a part of the Netherlands.

Curaçao introduced a brand new Penal Code, which entered into force on 15 November 2011. As duly reported by the Dutch authorities, Aruba and Sint Maarten are also in the process of introducing a new Penal Code using the same model. However, while treaties and conventions may be concluded only by the Kingdom and not by its constituent parts, their applicability may be confined to one or more countries. The decision that a treaty or convention is applicable to one of the respective countries within the Kingdom is an autonomous affair of that specific country.

Bearing in mind the separate country status within the Kingdom of Netherlands of Curaçao, Sint Maarten and Aruba, the following findings of the review relate only to the implementation of the UNCAC in the Netherlands in Europe and the Caribbean part of the Kingdom (Bonaire, Sint Eustatius and Saba).

2. Chapter III: Criminalization and Law Enforcement

2.1. Observations on the implementation of the articles under review

Bribery and trading in influence (arts. 15, 16, 18 and 21)

Articles 177 to 178a PC establish as a criminal offence the active bribery of public officials. These provisions also cover persons whose appointment as public official is pending, as well as former public officials. Passive bribery of domestic public officials is covered by articles 362 to 364a PC.

The criminal provisions on active and passive bribery include the terms “gift”, “promise” and “provide or offer a service”. All gifts, including customary gifts of little value (for example representational gifts) potentially fall within the scope of the criminal provisions on bribery.

Article 84 PC does not give a definition of the term “public official”. In case law, the term “public official” is understood to include “anyone who has been appointed by the public authorities to a public position, in order to perform a part of the duties of the state and its bodies”. Moreover, “whether the person can also be classified as a public official in terms of employment law is irrelevant”. Instead, it matters that “the person has been appointed under the supervision and responsibility of the government to a position of which the public nature cannot be denied”.

It is not necessary for the briber to hand the gift or service to the public official directly. Intermediaries fall within the scope of the bribery provisions. The gift or service may also be intended for a third-party beneficiary.

The provisions on passive bribery include the element of “request” or “acceptance” of a gift, promise or service. It is irrelevant whether the public official accepted the gift or promise in his capacity of “public official”. Gifts accepted outside the public official’s activities also classify as “objects of bribery”.

It is not required that the public official is authorized to carry out an official act. It is only required that his/her functions enabled him/her to carry out the act. It is irrelevant whether the act or omission actually took place.

Articles 178a and 364a PC ensure that public officials under the Dutch legislation are equated with “persons in the public service of a foreign state or of an international organization”.

New legislation is being prepared, proposing to criminalize active and passive bribery of a public official in articles 177 and 363 PC, irrespective of whether the public official was bribed to act (or not to act) in breach of his duties. The new law will increase the maximum penalty to imprisonment of six years.

Changes have been made to the text of the Instruction on Investigation and Prosecution of Foreign Corruption, emphasizing a more proactive approach when another country has already started a criminal investigation in a case where the Netherlands also has jurisdiction.

Active and passive bribery in the private sector have been criminalized in article 328ter PC. This provision concerns every form of bribery that does not involve a public official, without making a distinction by sectors of society (profit/non-profit).

Article 328ter PC does not explicitly restrict the criminalization of private sector bribery to acts committed “in the course of business activity”. The nature of the activities or the mandate is irrelevant; this may also involve non-commercial activities. This was considered by the reviewing experts as a good practice.

At the time of the country visit, new legislation was being prepared placing the central focus of article 328ter PC on conduct contrary to one’s duty on the part of an employee. With the draft bill, a higher maximum sentence for bribery in the private sector is being proposed (four years of imprisonment).

There are no specific provisions on trading in influence in the Dutch legislation. The review team took note of the argument that the criminalization of bribery in the PC provides enough possibility to prosecute the exercise of improper influence for obtaining an undue advantage. However, further to discussions during the country visit, the review team encouraged the national authorities to reconsider the establishment of the offence of trading in influence in the Dutch legislation.

Money-laundering, concealment (arts. 23 and 24)

The Netherlands has criminalized money-laundering through articles 420bis, 420ter and 420quater PC. The money-laundering offenses address all material elements of the offenses, as defined in article 23 of UNCAC.

The Netherlands follows a “threshold approach” in defining predicate offences for money-laundering purposes. Money-laundering is an autonomous offence under the Dutch legislation and may be prosecuted independently from the predicate offence.

At the time of the country visit, a new bill was being prepared aiming at expanding the possibilities to combat financial economic crime. This law proposal increases the maximum sanctions for different forms of money-laundering.

The acts described in article 24 of UNCAC (concealment) fall within the scope of articles 416 to 417bis (receipt of stolen property) and 420bis to 420quater (money-laundering) PC.

Embezzlement, abuse of functions and illicit enrichment (arts. 17, 19, 20 and 22)

The Dutch PC contains general provisions on embezzlement, theft and fraud, which can be committed by all persons (articles 310, 321, 326), as well as provisions on offences committed by a civil servant while in office (articles 359, 361, 365 and, indirectly, 227b).

The definition of the acts related to abuse of functions is already largely covered under the forms of bribery, as described above. Furthermore, under certain circumstances, the more general offences against property, embezzlement and theft also fall within the scope of article 19 of UNCAC.

Illicit enrichment is not criminalized in the Netherlands. Although the criminal behaviour underlying this offence can be prosecuted on the basis of the provisions on money-laundering, the reviewing experts recommended that the national authorities reconsider the establishment of the offence of illicit enrichment.

Obstruction of justice (art. 25)

The use of physical force, threats or intimidation to induce false testimony or to interfere in the giving of testimony or the production of evidence falls within the scope of articles 284 and 285a PC. The use of bribery means (promise, offering or giving of an undue advantage) for the same purposes is covered by article 178 PC (in relation to judges) and 207 in combination with article 47, paragraph 2, PC (solicitation of perjury).

Article 25(b) of UNCAC is implemented through articles 179 and 180 PC, which establish criminal responsibility for the acts of coercion and resistance.

Liability of legal persons (art. 26)

According to article 51 PC, a legal person can be deemed punishable for bribery (and any other punishable crime). According to the Supreme Court, the determining criterion for the attribution of a criminal offence to the legal person is whether the conduct took place or was carried out “in the spirit of the legal entity”.

Article 51, paragraph 2 PC specifies that criminal proceedings may be instituted simultaneously or separately against legal and natural persons, and that penalties may be imposed on either or both the legal and natural person.

At the time of the country visit, a new bill was being prepared, aimed at making the fines for legal persons more flexible, and therefore more proportionate, dissuasive and effective in practice.

Participation and attempt (art. 27)

Article 45 PC criminalizes the attempt to commit a criminal offence. Articles 47 and 48 PC further criminalize the procuring, assisting, solicitation or aiding and abetting of an offence and stipulate that such conduct may be subject to the same sanction as the main offence.

Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (arts. 30 and 37)

The applicable sanctions for the commission of UNCAC offences were found to be proportionate, dissuasive and effective. The review team also welcomed ongoing legislative initiatives aimed at further increasing the sanctions for concrete corruption-related offences.

According to article 42, paragraph 2 of the Constitution, the King enjoys immunity and therefore criminal proceedings cannot be brought against him. Article 71 of the Constitution states that members of the Parliament (Staten-General), Ministers, State Secretaries 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 Parliament or its committees or for anything that they submit to them in writing.

Apart from this non-liability immunity, politicians may be investigated, prosecuted and sentenced for any offence. Nonetheless, article 119 of the Constitution institutes a special procedure for the prosecution of certain offences by (former) members of Parliament, Ministers and State Secretaries.

The Supreme Court has confirmed in a number of decisions that the public prosecutor is not authorized to prosecute (former) Ministers and Members of Parliament on accounts of offences involving the abuse of their office. Only the Government (by a Royal Decree) and the Lower House of Parliament are authorized to order such a prosecution.

Prosecutions are conducted according to the principle of prosecutorial discretion. The process of out-of-court settlement is governed by article 74 PC, and involves, among other things, the payment of a sum of money by the defendant to the State in order to avoid criminal proceedings (“transaction”). Moreover, it can involve the payment of the estimated proceeds acquired from the criminal offence, as well as compensation for any damage caused. It is available in relation to “serious offences” excluding those for which the penalty of imprisonment is more than 6 years.

The Instruction on Large and Special Transactions contains rules for out-of-court settlements involving high amounts of money. Full immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence is not possible.

Protection of witnesses and reporting persons (arts. 32 and 33)

In the Dutch legal system the whole system of witness protection is legally constructed under one provision in the CCP and elaborated in various administrative orders, merely describing the procedure.

For public servants, there is a whistle-blower procedure by which a public servant can report suspected unethical conduct, as defined by the Central and Local Government Personnel Act. Discussions in Parliament on further action in this field, especially covering the private sector, are ongoing. The review team welcomed these developments and encouraged the national authorities to complete the process of enacting new legislation in this field.

Freezing, seizing and confiscation; bank secrecy (arts. 31 and 40)

In the Netherlands, there are two different schemes for confiscation, i.e. “ordinary” and special confiscation. Special confiscation consists of the imposition of an obligation on the person convicted of an offence to pay the state a sum in restitution of illicit earnings (article 36e, par. 1 PC).

The specialized office of the Public Prosecution Service (Criminal Assets Deprivation Bureau Public Prosecution Service) assists prosecutors with the (special) confiscation aspects of criminal prosecutions and is also responsible for the administration of seized or confiscated property.

A special criminal financial investigation (SFO) may be initiated when a preliminary investigation has shown the likelihood of illegally obtained profits or advantages amounting to at least 12,000 Euros, and where it is also expected that the profits or advantages obtained from the commission of the offence will exceed this amount.

Newly enacted revisions of the provisions on confiscation revolve around the following:

- Expansion of “ordinary” confiscation to ensure that “subsequent benefits” (benefits derived from offences which were invested or transferred into other objects) are subject to confiscation;
- Introduction of statutory presumptions of evidence in the “special confiscation” regime. If a person is convicted of a serious and potentially lucrative crime, all income this person enjoyed within a period of six years prior to the conviction and all expenditure during that period are deemed to have been originated from, or to be in connection with, the related offence. The presumptions can be refuted by the defendant on the balance of probabilities;
- Extension of “precautionary seizure/third-party precautionary seizure”. Assets that belong to a third party can be seized if there are indications that all, or part of, the objects came into the possession of the third party with the apparent intention of impeding or preventing confiscation. Hence, assets that were transferred to a third party prior to the commission of the offence, are also subject to seizure;
- Extension of the scope and use of financial investigation to enable its continuation until the confiscation order has become final. In case of non-payment of the confiscation order, an investigation may now be conducted into (the size of) the assets of the convicted person; and
- Enabling the imposition of precautionary seizure of the assets of the defendant on behalf of the victim.

The national authorities confirmed that bank secrecy does not pose difficulties in corruption-related investigations. In view of the threshold of four years of imprisonment foreseen in the legislation for certain offences under investigation as a prerequisite to collect and submit bank information, the reviewing experts encouraged the national authorities to complete the process of enacting a bill that increases the maximum sanctions for bribery in the public and private sectors.

Statute of limitations; criminal record (arts. 29 and 41)

Pursuant to article 70 PC, the statute of limitations period is calculated on the basis of the maximum sentence for the offence and varies from three to twenty years. Crimes carrying a sentence of life imprisonment do not have a statute of limitations.

At the time of the country visit, new legislation was being prepared aiming at increasing the maximum sentences for certain criminal offences, such as bribery and money-laundering, and, thus, extending the period of limitations.

Recidivism is regarded as a general ground for an increase in penalty, also taking into account previous convictions in a foreign jurisdiction. The Netherlands is also party to the European Criminal Records Information System (ECRIS).

Jurisdiction (art. 42)

Article 2 PC provides for jurisdiction on the basis of the principle of territoriality. The principle of territoriality is given a wide scope in the Dutch legislation. If a part

of the criminal offence is fulfilled in the Netherlands, the Netherlands will have — jointly — jurisdiction pursuant to the principle of territoriality.

Article 4 PC establishes jurisdiction on the basis of the passive personality principle, subject to the requirement of double criminality. Under article 5 PC, the Dutch criminal law extends to any Dutch person who commits a crime abroad (active personality principle), subject to the requirement of double criminality.

Article 6 PC provides for jurisdiction with regard to public office offences committed by Dutch public officials outside the Netherlands (article 6, subparagraph 1 PC). The term “public office offences” applies to the criminal provisions on passive bribery of public officials. Double criminality is not required in this case.

Consequences of acts of corruption; compensation for damage (arts. 34 and 35)

The Dutch legislation incorporates various means of contesting agreements that have involved corruption. This type of legal act may be void, on the grounds of incompatibility with public morality or public order or on the ground of vitiated consent.

The Public Procurement Act has established the mandatory exclusion of tenderers convicted of corruption and financial crime offences. The winning tenderers must also submit a “certificate of good conduct”, which is issued by the Ministry of Justice and Security.

The Dutch legislation also provides for the possibility for injured parties to have their claim for the compensation of damage included in the criminal proceedings.

Specialized authorities and inter-agency coordination (arts. 36, 38 and 39)

Various investigative authorities in the Netherlands are responsible for detecting corruption offences and can carry out investigations: the police, the National Police Internal Investigations Department (NPIID) and the Fiscal Intelligence and Investigation Service (FIOD). The NPIID is a Special Investigation Service and has the same investigative powers as the regular police.

In 2000, the Ministry of Justice created a National public prosecutor for executing and coordinating of (possible) criminal prosecutions on corruption offences.

Cooperation and consultation between investigative authorities and other government organizations is given shape by means of different obligations and structures.

Under the responsibility of the Ministry of Security and Justice, a multidisciplinary anti-corruption task force has been set up, the “Platform on Fighting Corruption”, bringing together representatives from the government, scientific area, private area and civil society.

The Dutch authorities have also collaborated with the private sector to promote company internal controls, ethics and compliance programmes.

2.2. Successes and good practices

Overall, the following successes and good practices in implementing Chapter III of the Convention are highlighted:

- The involvement of a large number of law enforcement agencies in investigations of money-laundering and the relatively high number of prosecutions and convictions for money-laundering and other offences.
- The coherent legal framework on freezing, seizure and confiscation of proceeds of crime.
- The fact that the nature of the activities is not a constituent element of the provision criminalizing bribery in the private sector and, thus, non-commercial activities may also be covered.
- The existence of courts and judicial authorities which are specialized in fraud and financial crime, especially in view of the challenges involved in successfully prosecuting complex fraud and financial crime in many jurisdictions where judges are unfamiliar with the intricacies and technical details of these crimes.
- The possibility of pre-trial voluntary asset forfeiture: While not a formal procedure, the reviewers praised the Dutch authorities for the national experiences in some high-profile corruption cases of offering defendants the option of voluntary pre-trial asset forfeiture, which can then be taken into account at sentencing. It should be noted that this approach is in many ways desirable from victims' perspectives, as it means they can receive compensation immediately instead of waiting for the conclusion of the trial (which may take years).

2.3. Challenges in implementation, where applicable

While noting Netherlands' advanced anti-corruption legal system, the reviewers identified some challenges in implementation and/or grounds for further improvement and made the following remarks to be taken into account for action or consideration by the competent national authorities (depending on the mandatory or optional nature of the relevant UNCAC requirements):

- Reconsider the establishment of the offence of trading in influence;
- Reconsider the establishment of the offence of illicit enrichment;
- Praising the national authorities for the initiative to start preparing a new bill that increases the maximum sanctions for bribery in the public sector (article 177a PC) and in the private sector (article 328ter PC), encourage them to complete the process of enacting the bill in order to increase the possibilities for the collection and submission of bank information for domestic investigations (which require a threshold of four years of imprisonment of the criminal offence under investigation);
- Complete the process of enacting new legislation in the field of protection of reporting persons; and
- Praising the national authorities for the initiative to start preparing a new bill on the sanctions against legal persons, encourage them to continue efforts to

make the fines against legal persons more flexible, and therefore more proportionate, dissuasive and effective in practice.

3. Chapter IV: International cooperation

3.1. Observations on the implementation of the articles under review

*Extradition; transfer of sentenced persons; transfer of criminal proceedings
(arts. 44, 45 and 47)*

A two-tier system on extradition has been put in place in the Netherlands. With regard to other Member States of the European Union, the surrender of fugitives is carried out in line with the requirements of the European Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States of the European Union. The Framework Decision was domesticated through the Surrender Act. With regard to other countries, the Extradition Act is applicable.

The Netherlands makes extradition conditional on the existence of a treaty and considers the UNCAC as a legal basis for extradition. So far no extradition cases based solely on the UNCAC have been assessed by a court in the Netherlands.

Although trading in influence and illicit enrichment have not as such been implemented in the Dutch legal system, the underlying behaviour of these offences can in practice be covered by offences as attempt to bribery and negligent money-laundering. The fact that the Netherlands has a flexible approach on the issue of double criminality and has criminalized as “equivalent conduct offences” UNCAC offences would seem to reduce any concerns on requirements for double criminality.

The grounds for refusal of extradition requests are set out in the Extradition Act and the Surrender Act. Extradition cannot be refused on the ground that the offence involves fiscal matters.

Netherlands’ ability to extradite its own nationals was favourably noted. Such extradition is allowed only for the purpose of prosecution, under the guarantee that if the extradited Dutch national was to be sentenced to imprisonment in the requesting State, he/she would be allowed to serve the sentence in the Netherlands. In practice, where a request for extradition is refused on the ground of nationality, the Dutch authorities normally forward the case to the prosecution authorities without delay, in application of the principle “*aut dedere aut judicare*”.

The length of extradition proceedings invariably depends on whether the person appeals against the decision of the court and/or the Minister of Security and Justice. Simplified extradition procedures are in place. The EAW process has contributed to substantially shortening the period needed for the surrender of a fugitive to another EU Member State.

In the case of refusal of extradition requested for the purpose of enforcement of a sentence, the sentence can be taken over by the Netherlands.

The Netherlands is bound by regional instruments on extradition and multilateral instruments providing a basis for extradition. Bilateral extradition treaties with 18 countries and territories were also reported.

The Dutch legislation of the Enforcement of Criminal Judgments (Transfer) Act and the Judgments in Criminal Matters (Mutual Recognition and Enforcement) Act govern the transfer of prisoners into and out of the Netherlands. The Netherlands has concluded four bilateral treaties on transfer of prisoners and is a party to relevant regional instruments.

If extradition is refused on the ground of nationality, the Netherlands can generally take over the proceedings from the requesting State.

Mutual legal assistance (art. 46)

The Netherlands does not have in place overarching legislation for the provision of MLA, but may grant such assistance directly based on the CPC. The CPC permits judicial authorities to respond to MLA requests in the broadest possible sense. Without a treaty, cooperation is still possible albeit more limited, as it cannot involve coercive measures. The same rule applies in case of reciprocity.

The Netherlands requires dual criminality for certain types of legal assistance involving coercive measures, and for the execution of foreign verdicts. Mutual legal assistance for non-coercive measures can be afforded in the absence of dual criminality.

Article 552l CPC sets out the grounds for refusal of MLA requests. The fiscal nature of the offence is not a ground for refusal of MLA requests.

Bank secrecy is not a ground for refusal of MLA requests (see, however, above the pertinent recommendation of the review team).

The Netherlands has designated as a central authority for MLA requests the Department on International Legal Cooperation on Criminal Matters (AIRS) of the Ministry of Security and Justice.

The execution of MLA requests can be carried out in accordance with the procedure specified in the request, as long as this does not conflict with the Dutch legislation.

The Netherlands is bound by regional instruments on MLA (or with provisions on MLA). Bilateral treaties on MLA with 21 countries and territories were also reported.

Law enforcement cooperation; joint investigations; special investigative techniques (arts. 48, 49 and 50)

Law enforcement authorities engage in broad, consistent and effective cooperation with international counterparts to combat transnational crime, including UNCAC offences.

The Proceeds of Crime Bureau operating within the Public Prosecution Service serves as the Dutch centre of expertise and national office dealing with assistance in respect of the confiscation of the proceeds of crime. Liaison officers are stationed in countries that maintain considerable criminal contact with the Netherlands or countries with a different legal system.

The Netherlands is a full member of Interpol and exchanges relevant information with National Central Bureaus (NCBs) of other connected countries via the secured I 24/7 network. Through the National Unit, the Netherlands makes use

of the secured mail system SIENA (Secure Information Exchange Network Application) in order to exchange relevant information with both the EU partners as with Europol.

Investigating authorities in the Netherlands make use of the mechanism of joint investigation teams (JITs), in particular with civil law jurisdictions in Europe.

A large number of special investigative means have been regulated in the CPC, including infiltration, telephone and e-mail tapping, systematic observation, covert surveillance and controlled deliveries. All special investigative techniques are admitted in corruption-cases. The evidence derived from the use of such techniques is admissible in court proceedings.

Although a treaty basis is required for the deployment of special investigative techniques, this criterion is applied with enough flexibility to provide the assistance requested.

3.2. Successes and good practices

Overall, the following points are regarded as successes and good practices in the framework of implementing Chapter IV of the UNCAC:

- The establishment of a comprehensive legal framework on international cooperation in criminal matters which encompasses all forms of international cooperation;
- The fact that the Netherlands handles a high volume of MLA and international cooperation requests with an impressive level of execution. The efficient operations of the Netherlands in this sphere are carried out both by regular law enforcement authorities, but also through the effective use of specialized agencies, to deal with requests involving particularly complex and serious offences, including offences covered by the Convention. The effective use of this unique organizational structure merits recognition as a success and good practice under the Convention;
- The flexible interpretation of the double criminality requirement based on the underlying conduct of the offence.

3.3. Challenges in implementation, where applicable

The following points are brought to the attention of the Dutch authorities for their action or consideration (depending on the mandatory or optional nature of the relevant UNCAC requirements) with a view to enhancing international cooperation to combat offences covered by UNCAC:

- Praising the national authorities for the initiative to start preparing a new bill that increases the maximum sanctions for bribery in the public sector (article 177a PC) and in the private sector (article 328ter PC), encourage them to complete the process of enacting the bill in order to increase the possibilities for obtaining and providing bank information and evidence under mutual legal assistance (which requires a threshold of four years of imprisonment of the criminal offence under investigation);
- Continue efforts to put in place and render fully operational an information system compiling in a systematic manner information on extradition and

mutual legal assistance cases, with a view to facilitating the monitoring of such cases and assessing in a more efficient manner the effectiveness of implementation of international cooperation arrangements; in doing so, devote more human resources and make a greater effort to maintain statistics regarding compliance with chapter IV of the UNCAC.
