

# ANTI-CORRUPTION REGULATION

## Netherlands



# Anti-Corruption Regulation

Consulting editors

**James G Tillen, Leah Moushey**

*Miller & Chevalier Chartered*

---

Quick reference guide enabling side-by-side comparison of local insights, including into relevant domestic and international law, agencies, enforcement and sanctions; recent landmark investigations and decisions; and other recent trends.

---

Generated 10 February 2022

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. © Copyright 2006 - 2022 Law Business Research

## Table of contents

### RELEVANT INTERNATIONAL AND DOMESTIC LAW

International anti-corruption conventions

Foreign and domestic bribery laws

Successor liability

Civil and criminal enforcement

Out-of-court disposal and leniency

### FOREIGN BRIBERY

Legal framework

Definition of a foreign public official

Gifts, travel and entertainment

Facilitating payments

Payments through intermediaries or third parties

Individual and corporate liability

Private commercial bribery

Defences

Agency enforcement

Patterns in enforcement

Prosecution of foreign companies

Sanctions

Recent decisions and investigations

### FINANCIAL RECORD-KEEPING AND REPORTING

Laws and regulations

Disclosure of violations or irregularities

Prosecution under financial record-keeping legislation

Sanctions for accounting violations

Tax-deductibility of domestic or foreign bribes

### DOMESTIC BRIBERY

Legal framework

Scope of prohibitions

Definition of a domestic public official

Gifts, travel and entertainment

**Facilitating payments**

**Public official participation in commercial activities**

**Payments through intermediaries or third parties**

**Individual and corporate liability**

**Private commercial bribery**

**Defences**

**Agency enforcement**

**Patterns in enforcement**

**Prosecution of foreign companies**

**Sanctions**

**Recent decisions and investigations**

**UPDATE AND TRENDS**

**Key developments of the past year**

**LAW STATED DATE**

**Correct on**

## Contributors

### Netherlands



**Enide Perez**  
perez@svs.law.  
*Sjöcrona Van Stigt*



**Floris Dudok van Heel**  
dudokvanheel@svs.law  
*Sjöcrona Van Stigt*

## RELEVANT INTERNATIONAL AND DOMESTIC LAW

### International anti-corruption conventions

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

The Netherlands is a signatory to the following anti-corruption conventions:

- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- the United Nations Convention Against Corruption (UNCAC);
- 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;
- the Council of Europe's Civil Law Convention against Corruption;
- the Council of Europe's Criminal Law Convention against Corruption; and
- the Statute of the Group of States Against Corruption (GRECO).

*Law stated - 12 January 2022*

### 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).

The elements of Dutch laws prohibiting bribery are the same for domestic and foreign bribery. The Dutch Criminal Code (DCC) addresses bribery of both Dutch and foreign public officials as an offence in articles 177 and 178a. Accepting a gift or promise is punishable under articles 363 and 364a of the DCC.

*Law stated - 12 January 2022*

### Successor liability

Can a successor entity be held liable for violations of foreign and domestic bribery laws by the target entity that occurred prior to the merger or acquisition?

Yes, a successor entity may be held criminally liable for acts of the target entity, if the successor entity is in fact (materially) a continuation of the target entity. Whether or not this is the case depends on several factors, such as the extent to which directors, location, activities, etc, have changed with the merger or acquisition (in case law, these factors are referred to as the 'social reality criteria').

*Law stated - 12 January 2022*

### Civil and criminal enforcement

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

Criminal enforcement of Dutch bribery laws gets covered by articles 177, 178 a , 363 and 364 a of the DCC. There is no civil enforcement of Dutch bribery laws. However, because bribery is considered an unlawful act, civil law provides the opportunity for individuals and companies having suffered damages as a result of bribery, to initiate civil action to obtain monetary compensation for the damages occurred.

*Law stated - 12 January 2022*

## Out-of-court disposal and leniency

Can enforcement matters involving foreign or domestic bribery be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial? Is there a mechanism for companies to disclose violations of domestic and foreign bribery laws in exchange for lesser penalties?

Dutch criminal legislation does not obligate the Public Prosecution Service to investigate or prosecute every possible crime; the Public Prosecution Service has prosecutorial discretion in deciding whether or not to do so. Therefore, it is entirely up to the Public Prosecution Service to bring a case before the court or not to do so, for example because of lack of evidence, or to reach an out-of-court-settlement with the defendant.

There is no plea bargaining as such in Dutch criminal procedure. However, the defendant and the Public Prosecution Service may enter into negotiations to try to achieve an out-of-court-settlement. Based on article 74 of the DCC, this is possible for crimes with a maximum prison sentence not exceeding six years and for minor offences. An out-of-court-settlement usually involves the defendant paying a fine and – in the past few years – a press release with a statement of the facts. In the case of out-of-court settlements that require the defendant to pay a fine exceeding €200,000 or with a total value (consisting, besides a fine, of, for example, confiscated goods or payment to the state of unlawfully obtained gains) exceeding €1 million, a press release and a public statement of facts will always be published.

In the Netherlands, a defendant may request leniency on the ground that the defendant voluntarily disclosed violations or that he or she fully cooperated. As of 1 October 2020, the Public Prosecution Service's new policy rule regarding the investigation and prosecution of foreign bribery (Aanwijzing opsporing en vervolging buitenlandse corruptie) entered into force. This new instruction stipulates that voluntary disclosure of violations of anti-bribery rules will be taken into consideration by the Public Prosecution Service in the decision-making concerning prosecution of the offences. Specifications as to how voluntary disclosure will be taken into consideration are not given by the policy rule.

*Law stated - 12 January 2022*

## FOREIGN BRIBERY

### Legal framework

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

Article 178a of the Dutch Criminal Code (DCC) states that article 177 (regarding bribery of Dutch public officials) also applies to foreign public officials. The term 'official' includes officials employed in public service of a foreign country or of a public international organisation. Article 177 of the DCC stipulates that it is punishable to make a gift or promise, or render a service, to public officials with the intent of either inducing them to act (or refrain from acting) in the execution of their duties, or rewarding them for past acts (or omissions).

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.

*Law stated - 12 January 2022*

### **Definition of a foreign public official**

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

Article 178a paragraph 1 of the DCC stipulates that public officials are also persons exercising public functions for a foreign country or for a public international organisation. According to article 178a paragraph 2 in conjunction with article 177 paragraph 1 under 2 of the DCC, rewarding a former public official is also punishable.

Based on established case law, a person who has been appointed under governmental supervision to hold public office, and who performs (part of) the duties of the state and its agencies, can be considered a public official. Therefore, employees of foreign state-owned or state-controlled companies may in certain circumstances be qualified as foreign public officials. However, this depends to a large extent on the special circumstances of the case and can only be determined on a case-by-case basis.

*Law stated - 12 January 2022*

### **Gifts, travel and entertainment**

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

It is forbidden to provide any gifts (such as excursions, trips, meals or the prospect of such) to a foreign public official when this is done to induce the public officials to act (or to refrain from acting) in the execution of their duties, or to reward them for past acts (or omissions). The prohibition of article 177 of the DCC, regarding making gifts or promises or rendering services to a public official to that end, includes the restriction to provide foreign officials with gifts, travel expenses, meals or entertainment.

*Law stated - 12 January 2022*

### **Facilitating payments**

Do the laws and regulations permit facilitating or 'grease' payments to foreign officials?

Facilitating payments fall under the scope of the Dutch anti-bribery laws and are, therefore, forbidden. Since the entry into force of the Public Prosecution Service's policy rule regarding the investigation and prosecution of foreign bribery ( Aanwijzing opsporing en vervolging buitenlandse corruptie ) on 1 October 2020, the Public Prosecution Service no longer distinguishes between 'facilitation payments' and any other payments made to foreign officials for making the discretionary decision whether or not to prosecute.

*Law stated - 12 January 2022*

### **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 (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, can result in being held criminally liable as a co-perpetrator or as an accomplice. 'Knowing' also includes that the individual involved deliberately accepts the considerable chance of bribery of public officials taking place, and that he or she accepts this chance in the sense that he or she is prepared to put up with it.

As of 1 October 2020, the Public Prosecution Service's new policy rule regarding the investigation and prosecution of foreign bribery ( Aanwijzing opsporing en vervolging buitenlandse corruptie ) entered into force. In this instruction, a new 'factor influencing the prosecutor's decision whether or not to prosecute' was introduced: corruption being a 'structural part of the company's operational management'. Furthermore, the instruction explicitly stipulates that making use of intermediaries or third parties does not indemnify a company from violating anti-bribery rules.

*Law stated - 12 January 2022*

### Individual and corporate liability

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

Yes, on the basis of article 51 of the DCC both individuals and companies may be held liable for criminal offences, including bribery of a foreign official. Companies can be held liable if the relevant behaviour of individuals can reasonably be attributed to that company. Although it highly depends on the special circumstances of the case whether behaviour of an individual or individuals can be reasonably attributed to a company, an important factor is whether the relevant behaviour occurred or was performed 'in the sphere of' the company. The relevant behaviour can be regarded as behaviour that has occurred or was performed in the sphere of the company, if one or more of the following circumstances exist:

- the omission or act was committed by an individual who is employed by or works for the company;
- the behaviour was part of the company's normal course of business;
- the company benefited from that behaviour; and
- the behaviour was at the disposal of the company and the company accepted or tended to accept such or similar behaviour, which acceptance includes the failure to take reasonable care to prevent the behaviour from occurring.

Should a criminal act require that a party had criminal intent or acted with gross negligence, it is further required that this mental state also existed on the part of the company. In certain circumstances, the intent of individuals may be attributed to a company. It is not necessary, however, that the individuals themselves acted with intent or gross negligence, as this state of mind may also be derived from (for example) the company's policy or decisions.

*Law stated - 12 January 2022*

### Private commercial bribery

#### To what extent do your foreign anti-bribery laws also prohibit private commercial bribery?

Private commercial bribery is covered by article 328-ter of the DCC. The first paragraph of this article states that employees or agents who accept or solicit a gift, promise or service in connection with a past or future act or omission in the course of their employment or agency and in conflict with their duties, are punishable.

The second paragraph of article 328-ter of the 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 and in conflict with his or her duties.

The third paragraph of article 328-ter stipulates that acting in conflict with duties, as defined in paragraphs 1 and 2, in any case comprises hiding, accepting or soliciting the gift, promise or service by employees from their employer or principal.

With regard to foreign private commercial bribery, article 328-ter of the DCC applies, insofar as relevant, to any Dutch national who commits this offence abroad, if this is also punishable in the country where it was committed (article 7 of the DCC). There are no specific rules with regard to jurisdiction over private commercial bribery.

*Law stated - 12 January 2022*

## **Defences**

### **What defences and exemptions are available to those accused of foreign bribery violations?**

The Public Prosecution Service always has the burden of proof and the risk of not persuading the court of the defendant's guilt; it is not for the defendant to prove that he or she has not committed foreign bribery violations he or she is being accused of. The Public Prosecution Service has to prove every element of the crime. A court may only convict a suspect if the court is convinced of the suspect's guilt on the basis of legal evidence.

The first paragraph of article 177 of the DCC prohibits the bribery of foreign public officials, by offering a gift, promise or service to them either with the intention of inducing the officials to act (or refrain from acting) in the execution of their duties or as a result of such (refraining from) acting. This intention is for the Public Prosecution Service to prove: the burden of proof of the requisite intention lies with the Public Prosecution Service. The Public Prosecution Service must prove at least conditional intent. To prove conditional intent, it must be proven that the defendant knowingly and willingly accepted the considerable chance that the public official acted (or refrained from acting) as a result of the defendant's actions.

In order to conclude that charges of passive foreign bribery have been proven, as prohibited in article 363 in conjunction with article 364a of the DCC, the Public Prosecution Service must prove that the foreign public officials in question knew or reasonably should have suspected that a gift, promise or service was offered to them to induce them to act (or refrain from acting) in the execution of their duties. This also extends to attributable naivete: the public official must have been able to understand that a gift, promise or service was offered because that gift, promise or service could at any one time benefit the giver.

*Law stated - 12 January 2022*

## **Agency enforcement**

### **What government agencies enforce the foreign bribery laws and regulations?**

The National Office for Serious Fraud, Environmental Crime and Asset Confiscation, part of the Public Prosecution Service, enforces Dutch foreign bribery laws. The public prosecutor of this office gives lead, to that end, to an investigation team of the Fiscal Intelligence and Investigation Division (FIOD) or a specialised fraud unit of the National Police Department.

*Law stated - 12 January 2022*

## Patterns in enforcement

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

As of 1 October 2020, the Public Prosecution Service's new policy rule regarding the investigation and prosecution of foreign bribery ( Aanwijzing opsporing en vervolging buitenlandse corruptie ) entered into force. Among other changes, with this new instruction no distinction is made between 'facilitation payments' and any other payments made to foreign officials. Furthermore, in this new instruction, a new 'factor influencing the prosecutor's decision whether or not to prosecute' was introduced: corruption being a 'structural part of the company's operational management'. Also, the instruction stipulates that making use of intermediaries or third parties does not indemnify a company from violating anti-bribery rules. Another noteworthy new aspect of the instruction is the remark that voluntary disclosure of violations of anti-bribery rules will be taken into consideration by the Public Prosecution Service in the decision-making concerning prosecution of the offences. Specifications as to how voluntary disclosure will be taken into consideration are not given by the policy rule, however.

*Law stated - 12 January 2022*

## Prosecution of foreign companies

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

Foreign companies can be prosecuted in the Netherlands for bribing a public foreign official if any part of the elements of the offence has been carried out in or from the Netherlands.

*Law stated - 12 January 2022*

## Sanctions

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

Bribery of a foreign public official (article 177 of the DCC) is punishable with imprisonment up to six years or a fine of up to €90,000, or both, for individuals. For companies, the maximum fine is €900,000. If a court considers this is not an appropriate punishment for a company, article 23 of the DCC provides for the opportunity to impose a fine of up to 10 per cent of the annual turnover of the legal entity.

In addition, the sentence for individuals can include prohibition from being a member of the civil service, serving as a member of the armed forces or working as a lawyer or a court-appointed administrator.

Accepting or soliciting by foreign public officials of a gift, promise or service, knowing or reasonably suspecting that the gift, promise or service is made to induce them to act or to refrain from acting (article 363 of the DCC in conjunction with article 364 a of the DCC) is also punishable with imprisonment up to six years or a fine of up to €90,000, or both.

*Law stated - 12 January 2022*

## Recent decisions and investigations

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

In April 2021, the Public Prosecution Service announced out-of-court-settlements with five subsidiaries of a Dutch company. A total settlement of approximately €42 million (composed of a €12 million fine and €30 million for confiscation of unlawfully obtained gains) was agreed upon for charges of foreign bribery, commercial bribery, the forging of documents and violation of international sanctions.

Part of the investigation concerned private commercial bribery of employees of client companies, who were paid commissions to ensure orders were awarded to subsidiaries of the company in the Middle East and Asia. Another part of the investigation revealed bribery of a member of the Iraqi Parliament, to whom funds were paid by another subsidiary of the company to get in contact with the Iraqi Minister for Oil, to solve a conflict with an Iraqi state oil company.

In this settlement, a discount of 25 per cent of the maximum fine was agreed upon as a reward for self-reporting the violations, and another discount of 25 per cent for fully cooperating with the criminal investigation. An important remark to these 'discounts' should be made, being that they only apply to the amount of the fine imposed. Often (as in this case as well) the fine only composes a minor part of the total settlement. Confiscation of unlawfully obtained gains, often the larger component of the total settlement, is not eligible for discounts of this kind. Furthermore, even though the discounts offered to the fines are substantial, still fines in the order as agreed in this settlement are not to be seen imposed by Dutch Courts.

*Law stated - 12 January 2022*

## FINANCIAL RECORD-KEEPING AND REPORTING

### 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 company to keep records of the assets and liabilities of the company and of everything regarding the activities of the company in accordance with the requirements arising from these activities. The company must store the books, documents and other data in such a way that at all times the rights and obligations of the company can be revealed.

*Law stated - 12 January 2022*

### Disclosure of violations or irregularities

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

According to article 161 of the Dutch Code of Criminal Procedure anyone who is aware of a criminal offence (also a company) is authorised to report these criminal acts. Companies, therefore, are entitled to disclose violations of anti-bribery laws. As a general rule, however, there is no obligation to report a crime to the police.

### **Prosecution under financial record-keeping legislation**

Are such laws used to prosecute domestic or foreign bribery?

Domestic and foreign bribery are criminal acts that are punishable and can be prosecuted on the basis of the relevant provisions in the DCC.

Law stated - 12 January 2022

### **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 minor economic offences, punishable on the basis of the Economic Offences Act with a maximum detention term of six months, community service and/or a maximum fine of €22,500 (or, in principle, €90,000 for a company).

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 not an 'accounting rule', strictly speaking, forgery may come into play in concealing bribery. Forgery is punishable with a maximum prison term of six years or a maximum fine of €90,000, or both. For companies, the maximum fine is €900,000. If a court considers this is not an appropriate punishment for a company, article 23 of the Dutch Criminal Code provides for the opportunity to impose a fine of up to 10 per cent of the annual turnover of the legal entity.

Law stated - 12 January 2022

### **Tax-deductibility of domestic or foreign bribes**

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

The deductibility of bribes is explicitly ruled out in article 3.14 of the Income Tax Act 2001, stipulating that costs connected with gifts, promises or services cannot be deducted in determining corporate profits, if it turns out that an offence as mentioned in articles 177, 178a or 328-ter (second paragraph) of the DCC is present.

Law stated - 12 January 2022

## **DOMESTIC BRIBERY**

### **Legal framework**

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

The elements of the law prohibiting bribery are the same for domestic and foreign bribery. Article 177 of the Dutch Criminal Code (DCC) stipulates that it is punishable to make a gift or promise, or render a service, to domestic public officials with the intent of either inducing the officials to act (or refrain from acting) in the execution of their duties, or rewarding them for past acts (or omissions).

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.

*Law stated - 12 January 2022*

### **Scope of prohibitions**

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

Yes. Paying a bribe is a form of active bribery done by the briber. The law prohibits this in article 177 of the DCC.

Also receiving a bribe is prohibited by Dutch law. Under article 363 of the DCC, it is punishable for public officials to accept a gift, promise or service, whilst knowing or reasonably suspecting that the gift, promise or service is made in order to induce them to act (or refrain from acting), or as a consequence of past acts or omissions. Public officials are also forbidden from soliciting gifts, promises or services to induce them to act (or refrain from acting).

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.

*Law stated - 12 January 2022*

### **Definition of a domestic public official**

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

There is no legal 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 to hold public office, and who performs (part of) the duties of the state and its agencies, can be considered a public official. Therefore, employees of foreign state-owned or state-controlled companies may in certain circumstances be qualified as foreign public officials. However, this depends to a large extent on the special circumstances of the case and can only be determined on a case-by-case basis.

Article 84 of the DCC adds that members of representative public bodies and members of the military are public officials as well.

*Law stated - 12 January 2022*

### **Gifts, 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 the receiving of such benefits?**

It is prohibited to provide gifts to domestic public officials when this is done to induce them to act (or to refrain from acting) in the execution of their duties, or to reward them for past acts (or omissions). This goes for the providing as well as for the receiving of such benefits. Both acts fall under the scope of the DCC, as far as the benefits are given or received to induce the domestic officials to act or to refrain from acting in the execution of their duties.

*Law stated - 12 January 2022*

### **Facilitating payments**

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

Facilitating payments are, as far as the law is concerned, on a par with regular bribes as regards prosecution and penalties. The domestic bribery laws do not distinguish between 'facilitation payments' and any other payment made to officials. Facilitating or 'grease' payments can therefore likewise be prosecuted and punished.

*Law stated - 12 January 2022*

### **Public official participation in commercial activities**

What are the restrictions on a domestic public official participating in commercial activities while in office?

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 that may reasonably be expected to negatively impact official duties are forbidden. State and provincial officials may not act as suppliers to, nor are 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 may not act as suppliers to, nor are 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.

*Law stated - 12 January 2022*

### **Payments through intermediaries or third parties**

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

The elements of the law prohibiting bribery are the same for domestic and foreign bribery. Using an intermediary or third party (in close cooperation) to make illegal payments to a domestic public officials, or knowing that an intermediary will provide money or other valuables to domestic public officials for your benefit, can result in being held criminally liable as a co-perpetrator or as an accomplice. 'Knowing' also includes that the individual involved deliberately accepts the considerable chance of bribery of public officials taking place, and that he or she accepts this chance in the sense that he or she is prepared to put up with it.

*Law stated - 12 January 2022*

## Individual and corporate liability

### Can both individuals and companies be held liable for violating the domestic bribery rules?

The elements of the law prohibiting bribery are the same for domestic and foreign bribery. On the basis of article 51 of the DCC, both individuals and companies may be held liable for criminal offences, including violating the domestic bribery rules. Companies can be held liable if the relevant behaviour can reasonably be attributed to that legal entity.

*Law stated - 12 January 2022*

## Private commercial bribery

### To what extent does your country's domestic anti-bribery law also prohibit private commercial bribery?

The elements of the law prohibiting bribery are the same for domestic and foreign bribery. Private commercial bribery is covered by article 328-ter of the DCC. The first paragraph of this article states that employees or agents who accept or solicit a gift, promise or service in connection with a past or future act or omission in the course of their employment or agency and in conflict with their duties, are punishable.

The second paragraph of article 328-ter of the 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, and in conflict with his or her duties.

The third paragraph of article 328-ter stipulates that acting in conflict with duties, as defined in paragraphs 1 and 2, in any case comprises hiding accepting or soliciting the gift, promise or service by employees from their employer or principal.

*Law stated - 12 January 2022*

## Defences

### What defences and exemptions are available to those accused of domestic bribery violations?

The elements of the law prohibiting bribery are the same for domestic and foreign bribery.

The Public Prosecution Service always has the burden of proof and the risk of not persuading the court of the defendant's guilt; it is not for the defendant to prove that he or she has not committed domestic bribery violations he or she is being accused of. The Public Prosecution Service must prove every element of the crime. A court may only convict a suspect if the court is convinced of the suspect's guilt on the basis of legal evidence.

The first paragraph of article 177 of the DCC prohibits the bribery of public officials, by offering a gift, promise or service to them either with the intention of inducing the officials to act (or refrain from acting) in the execution of their duties or as a result of such (refraining from) acting. This intention is for the Public Prosecution Service to prove: the burden of proof of the requisite intention lies with the Public Prosecution Service. The Public Prosecution Service must prove at least conditional intent. In order to prove conditional intent it must be proven that the defendant knowingly and willingly accepted the considerable chance that the public official acted (or refrained from acting) as a result of the defendant's actions.

In order to conclude that charges of passive domestic bribery have been proven, as prohibited in article 363 of the DCC, the Public Prosecution Service must prove that the public officials in question knew or reasonably should have suspected that a gift, promise or service was offered to them in order to induce them to act (or refrain from acting) in the execution of their duties. This also extends to attributable naivete: the public official must have been able to understand that a gift, promise or service was offered because that gift, promise or service could at any one time benefit the giver.

*Law stated - 12 January 2022*

## Agency enforcement

### What government agencies enforce the domestic bribery laws and regulations?

The National Prosecutors' Office, part of the Public Prosecution Service, enforces Dutch domestic bribery laws. The public prosecutor of this office gives lead, to that end, to an investigation team of the Internal Investigations Department, an independent body within the Public Prosecution Service that investigates alleged cases of criminal conduct within the government.

*Law stated - 12 January 2022*

## Patterns in enforcement

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

Although the elements of Dutch law prohibiting bribery are the same for domestic and foreign bribery, the focus and main recent shifts in patterns of enforcement of these crimes regard foreign bribery. No noteworthy recent shifts can be mentioned regarding the patterns of enforcement of domestic bribery.

*Law stated - 12 January 2022*

## Prosecution of foreign companies

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

Foreign companies can be prosecuted for bribing a public (Dutch or foreign) official in the Netherlands. Jurisdiction exists over all Dutch and foreign companies that commit these offences (in part) in the Netherlands. The Netherlands can be considered *locus delicti* when:

- the elements of the offence have been carried out in the Netherlands;
- the instrument used to commit the offence has its effect in the Netherlands; or
- the end consequence of the offence occurs in the Netherlands.

*Law stated - 12 January 2022*

## Sanctions

## What are the sanctions for individuals and companies that violate the domestic bribery rules?

Actively bribing a public official (article 177 of the DCC) is punishable with a maximum prison term of six years or a fine of up to €90,000, or both, for individuals. For companies, the maximum fine is €900,000. If a court considers this is not an appropriate punishment for a company, article 23 of the DCC provides for the opportunity to impose a fine of up to 10 per cent of the annual turnover of the legal entity.

In addition, the sentence for individuals can include prohibition from being a member of the civil service, serving as a member of the armed forces or working as a lawyer or a court-appointed administrator.

Accepting or soliciting by public officials of a gift, promise or service, knowing or reasonably suspecting that the gift, promise or service is made in order to induce them to act or to refrain from acting (article 363 of the DCC) is also punishable with imprisonment up to six years or a fine of up to €90,000, or both. 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 eight years.

*Law stated - 12 January 2022*

## Recent decisions and investigations

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

In October 2021, the Limburg District Court convicted a former Police official for violation of domestic bribery laws. The official received money in return for disclosing confidential Police documents and was sentenced, on charges of violating article 363 of the DCC, to a prison sentence of 10 months (ECLI:NL:RBLIM:2021:7970).

In 2020, the Hague Court of Appeal convicted a public official working in the Rotterdam harbour for passive domestic bribery. The official received large amounts of money for letting pass containers with drugs through border control unseen and was sentenced to 14 years imprisonment for, among other facts, passive domestic bribery (ECLI:NL:GHDHA:2020:919). Two other suspects involved were convicted of prison sentences of four years (ECLI:NL:GHDHA:2020:917) and 10 years (ECLI:NL:GHDHA:2020:918) for, among other facts, actively bribing the public official.

*Law stated - 12 January 2022*

## UPDATE AND TRENDS

### Key developments of the past year

Please highlight any recent significant events or trends related to your national anti-corruption laws.

As of 1 October 2020, the Public Prosecution Service's new policy rule regarding the investigation and prosecution of foreign bribery ( Aanwijzing opsporing en vervolging buitenlandse corruptie ) entered into force. Among other changes, with this new instruction no distinction is made between 'facilitation payments' and any other payments made to

foreign officials. Furthermore, in this new instruction, a new 'factor influencing the prosecutor's decision whether or not to prosecute' was introduced: corruption being a 'structural part of the company's operational management'. Also, the instruction stipulates that making use of intermediaries or third parties does not indemnify a company from violating anti-bribery rules. Another noteworthy new aspect of the instruction is the remark that voluntary disclosure of violations of anti-bribery rules will be taken into consideration by the Public Prosecution Service in the decision-making concerning prosecution of the offences. Specifications as to how voluntary disclosure will be taken into consideration are not given by the policy rule, however.

*Law stated - 12 January 2022*

## LAW STATED DATE

### Correct on

Give the date on which the information above is accurate.

12 January 2022.

*Law stated - 12 January 2022*

## Jurisdictions

	<b>Australia</b>	Holding Redlich
	<b>China</b>	Herbert Smith Freehills LLP
	<b>France</b>	Bougartchev Moyne Associés AARPI
	<b>Greece</b>	ANAGNOSTOPOULOS
	<b>Hong Kong</b>	Herbert Smith Freehills LLP
	<b>Israel</b>	Herzog Fox & Neeman
	<b>Italy</b>	Studio Legale Pisano
	<b>Japan</b>	Anderson Mori and Tomotsune
	<b>Netherlands</b>	Sjöcrona Van Stigt
	<b>Russia</b>	Noerr PartGmbH
	<b>Singapore</b>	Norton Rose Fulbright
	<b>Sweden</b>	NORDIA LAW
	<b>Switzerland</b>	Schellenberg Wittmer
	<b>Ukraine</b>	GOLAW
	<b>United Kingdom</b>	White & Case LLP
	<b>USA</b>	Miller & Chevalier Chartered