



NEDERLANDSE VERENIGING VOOR RECHTSVERGELIJKING  
NETHERLANDS COMPARATIVE LAW ASSOCIATION

## **Study on Innovation of Legal Means for Eliminating Corruption in the Public Service in the Netherlands**

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### **Introduction**

This report is about avoiding and punishing corruption in the public service in the Netherlands. We are looking for the way public law (especially national penal and administrative law and including the influence of international law on these fields of national law) is dealing with this issue. In the instruction paper, recognizing that the situation of corruption will be significantly different, the general approach seemed to be: 1) finding the problems in the jurisdictions and looking for the definition of (for instance) the Public Service, 2) explaining in what ways rules tend to safeguard the institutions in question from potential corruption, 3) explaining in what ways the integrity of individual transactions is protected, 4) describing the investigative institutions, the procedures and the penalties.

In the Netherlands the developments differ a bit from the description in the instruction paper as the general approach. Firstly, until now there has not been much clarity in law and policy about the definitions of the terms corruption, fraud, integrity and good governance; often there are 'misty' discussions between the Government and Parliament in which the Judiciary plays a rather marginal role. The Fourth Power Institutions<sup>1</sup> (National Ombudsman, the Court of Audit and the Council of State) are more important in that discussion. Secondly, the main problems of corruption were not primarily 'discovered' by the Judiciary but by Parliament that created special investigation commissions to work on special corruption cases, supported by the Fourth Power Institutions. Thirdly, based on an international report in the context of the Council of Europe a discussion started on the extent and the nature of corruption at the national level in the Netherlands. Fourthly, in that discussion in essence only the penal repressive approach to corruption was discussed and there was no real discussion about the preventive and repressive aspects of the administrative law

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<sup>1</sup> Addink 2005a, p. 251-284.

approach. With this report we also want to stimulate national and international legal discussion on corruption in the Netherlands.

## **1. Context: Problems and Definitions**

### *1.1. Problems*

#### 1.1.1. The Development of Conceptions of Corruption in the Netherlands

For a long time the general opinion in the Netherlands was that corruption is far removed from the (legal) reality in our country. It was a problem that existed in countries in Africa, Asia or in South America, but not in Europe and especially not in the Netherlands. Research reports indicate that there is quite a low level of corruption in the Netherlands. Even a rather recent report<sup>2</sup> showed that only 47 cases of corruption (and abuse of office) were transmitted to the Public Prosecution Service in 2001 and 26 during the first half (25 June) of 2002. According to the Corruption Perceptions Index for 2002, issued by Transparency International, the Netherlands was listed at number 7 with a score of 9 out of 10, occupying a high position compared with other European Union member States (5th position after Finland, Denmark, Sweden and Luxembourg). In 2004 the Netherlands' position in the Corruption Perceptions Index was the 10<sup>th</sup> place with a score of 8.7 out of ten.<sup>3</sup> Based on this information the view of the Dutch authorities was that corruption is not a major problem and not a widespread phenomenon.

This general opinion concerning corruption has changed, however. Nowadays corruption in the public service in the Netherlands is a hot issue. Not because of the amount of cases, but more because of the far-reaching character of corruption cases. These cases have been exposed by recent investigations by the Dutch Parliament. In the process of obtaining more transparency with respect to corruption there was also a crucial role for the press. Several cases in the press show that corruption occurs in all branches of the public government: the police, public works, government buildings, public housing and other fields of spending government money. We are now realizing that inaccurate definitions of corruption have been used. The approach to corruption was adopted from one side only (penal and repressive) and therefore the perspective which existed was too narrow. Besides, the Dutch legal system is influenced by the developments in the internationalization of the administrative law on corruption, by the implementation of regional (European) and international law and by comparing administrative law in other countries. From an academic legal perspective a distinction can be made between the narrow penal law approach and the broader approach, which also includes the public administration and the administrative law approach.

Corruption is an issue with a legal history, but for too long only the narrow penal law approach has been adopted. It is also important to realize that the forms of corruption have developed in a broader perspective in the sense that different types of corruption occur. These developments have made it necessary to look in a critical way at the traditional legal norms in which corruption was repressively punished and by penal law only. Two developments can be distinguished. Firstly, attention is not only given to the repressive approach to corruption, but also to ideas which have been developed in relation to the preventive approach to corruption. New legal norms have

<sup>2</sup> First Evaluation Round. Evaluation Report on the Netherlands. Adopted by Greco, Strasbourg, 24-28 March 2003.

<sup>3</sup> Transparency International, Corruption Perceptions: 2002 Index and 2004 Index.

been created for civil servants as well as politicians to safeguard and guarantee correct public service. Secondly, there is not only the development of new penal law but also of new administrative law and including internationalisation aspects based on the relevant influences of European and international law on national law.

### 1.1.2. The Role of Investigations by the Dutch Parliament

The national opinion concerning corruption has changed, among other things because of the role of Parliament. Several extensive investigations commissioned by the Dutch Parliament took place in the years 2002-2005. The greatest scandal of recent years has been the so-called public building fraud. In a television programme a whistle-blower revealed information about corrupt practices in the field of government construction and public road projects. On 5 February 2002, Parliament decided to set up a Parliamentary Fact-finding Committee on the Construction Industry. The Committee concluded that irregular underhanded tenders, in which decision-making civil servants and politicians are influenced by gifts in any form, were usual practices.

Subsequently, the Committee decided to investigate the nature and the scope of the alleged irregularities and more particularly to examine all the relevant facts about the construction of the Schiphol railway tunnel. The size and the seriousness of the irregularities revealed shocked the Committee: it concluded that the construction sector was affected on a large scale by practices which are contrary to the regulations on fair economic trade. Preliminary talks between companies aimed at reaching agreements on prices and market division and duplicate bookkeeping practices showed that most of the big construction enterprises make up structures which could lead to cartels. Because of a violation of competition regulations, construction companies were fined by the Netherlands Competition Authority (NMa). Finally, some local government authorities commenced tort actions. They argued that because of cartel agreements the government had paid too much for public works and they claimed damages. The final decision of the highest judicial authority is not yet known.

However, the Committee concluded that there was no indication of any form of civil servants' structural corruption. Nevertheless, the Committee was concerned about the number of supposed breaches of integrity by a small number of civil servants. Furthermore, it suspected that the relations between civil servants and construction companies are too close and that this can lead to collusion. Therefore, the regulations for civil servants and public procurement were sharpened.

### 1.1.3. The critical GRECO Report on Corruption (policy) in the Netherlands

The Compliance Report on the Netherlands within the framework of GRECO<sup>4</sup> of March 18, 2005, which was related to the report from the Dutch government within the framework of the First Evaluation Round<sup>5 6</sup> is very important. It includes the

<sup>4</sup> GRECO: Groupe d'Etats contre le corruption; Group of States against corruption.

<sup>5</sup> First Evaluation Round. Compliance Report on the Netherlands. Adopted by GRECO at its 22<sup>nd</sup> Plenary Meeting (Strasbourg, 14-18 March 2005) Greco RC-I (2004) 13E, Strasbourg, 18 March 2005.

<sup>6</sup> GRECO has instigated two Evaluation Rounds. The First Evaluation Round (1 January 2000 – 31 December 2002) dealt with themes based on specific provisions of the Council of Europe's Twenty Guiding Principles for the Fight against Corruption (Resolution (97) 24): 1) independence, autonomy and powers of persons or bodies in charge of preventing, investigating, prosecuting and adjudicating corruption offences; 2) immunities from investigation, prosecution or adjudication of corruption offences; – specialization, means and training of persons or bodies in charge of fighting corruption. The Second Evaluation Round (commenced on 1 January 2003) →

Dutch Government's comment and can be seen as the actual Dutch Government's opinion on corruption.

GRECO addressed seven recommendations to the Dutch Government. There is a need for a more proactive approach to the phenomenon of corruption (1), there is a need for more detailed statistics, targeted research and analysis (2), applying whistleblowing regulations for all public sector entities should be considered (3), a strategy to establish a fluid channel of communication with the private sector should be developed by the criminal information and investigation services (4), there should be more specific anti-corruption in-service training for the police and the public prosecution (5), the Public Prosecution Service should ensure that the prosecution authorities take appropriate and fully informed decisions on whether to initiate or continue a prosecution (6) and the possibility to create specialised panels of judges for the most complex and serious cases related to economic crime offences should be considered (7). In the report there were also three general points of criticism concerning the Netherlands' Corruption Policy.

In the first place there are in the Dutch Policy comprehensive efforts to promote integrity and ethics in the public sector; however, the phenomenon of corruption as such seems to have been given limited attention. It was suggested to GRECO that corruption was probably more widespread than was recognised by the central authorities. Therefore it was recommended that the Dutch authorities which are responsible for formulating anti-corruption policies should adopt a more proactive approach towards the phenomenon of corruption in order to combat it more efficiently. This underlines the importance of a more preventive approach and administrative instruments for a corruption policy by developing administrative law aspects.

A second remark concerns the responsibility of the administrative authorities not only for their own acts, but also for the acts of their civil servants. The situation of (political) responsibilities makes it necessary that administrative authorities have the necessary instruments and the (investigative) powers not only to develop a proactive corruption policy but also to have available controlling and enforcement instruments in relation to corruption. For this policy the administrative authorities need more statistics. The Dutch authorities only have information from the Public Prosecution Service. More detailed statistics would give the authorities a better basis for assessing the threat that corruption poses to Dutch society, thereby enhancing the possibility to implement countermeasures. There is a need for the development of more detailed statistics and targeted research and analysis in order to measure more clearly the extent of the corruption phenomenon in the country and based on that information the authorities at the centralized and decentralized level can develop a real (preventive and repressive) corruption policy.

The third general point of criticism concerns (partial) legislation. With regard to the penal law dimension of the Dutch anti-corruption system the report is very positive: it is broadly based and generally sounds. However, the report explains that in

deals with themes based on specific provisions of the Council of Europe's Twenty Guiding Principles for the Fight against Corruption (Resolution (97) 24) and associated provisions of the Criminal Law Convention on Corruption (ETS No. 173): 1) identification, seizure and confiscation of the proceeds of corruption; 2) the role of public administration, efficiency and transparency with regard to corruption; 3) prevention of legal persons being used as shields for corruption; 4) tax and financial legislation to counter corruption; 5) links between corruption, organized crime and money laundering. About the Netherlands there is only a report on the First Evaluation Round.

the Netherlands there is no ‘Law on conflict of interests’ or a ‘Law on (the Prevention of) Corruption’. In essence, in the Netherlands we are lacking an administrative law Act on (the prevention of) corruption!

Within the framework of the Law on Civil Servants there are some provisions relating to the conflict of interests (the obligation to report outside remunerative work, the registration of those jobs and the prohibition of outside jobs which could pose a ‘risk’ to the proper functioning of the public service) and this law will soon introduce an obligation for each State institution to adopt its own Code of Conduct (although most of them already have such a Code) as an instrument to prevent corruption. This is still a too restrictive approach to corruption: the public sector is made up of more than civil servants, the legal norms of good governance are still lacking (a code is just a good start), including the obligation to make plans for a policy to eliminate and prevent corruption and the administrative sanctions by which to enforce the norms of good governance. Another recommendation was to consider applying whistle-blowing regulations for all public sector entities (at the central, regional, and municipal level) in order to harmonise regulation in this field and to avoid setting double standards.

#### 1.1.4. Report ‘Public Corruption in the Netherlands’; the Dutch Government’s Opinion

The actual situation concerning corruption in the Netherlands as described above is partly based on the report ‘Public Corruption in the Netherlands’ ordered by the Netherlands Government which has been published in May 2005<sup>7</sup> and which was (also) written because of the international criticism on the Dutch Corruption Policy. The study primarily focuses on the quantitative factual and penal law aspects of corruption in the Netherlands. Attention has mainly been paid to the repressive aspects rather than to the preventive aspects of corruption. Fundamental aspects of administrative law (preventive as well as repressive) with regard to corruption were lacking in the report. Within the framework of the administrative law system the administrative authorities have the competence to take preventive or repressive decisions on corruption in the public sector. The administrative law instruments can be used in a much more effective and direct way than the penal law mechanisms, which in general take a long time, often several years. The consequence of the analysed existing situation in the Netherlands is that only the most serious cases of corruption will be brought to Court.

In the report two central questions have been answered. The first question was: what is the nature and extent of public corruption in the Netherlands? The second question was: how are cases of corruption dealt with in internal and criminal investigations? It is first noted that it is very difficult, if not impossible, to disclose all forms of corruption. Only a part thereof (the tip of the iceberg) becomes visible, but nobody knows the exact extent of the problem.

‘It shows that there are a limited number of criminal cases and convictions each year (about 50 criminal cases, 27 convictions and 8 persons imprisoned). Within the whole public sector 130 internal investigations are conducted each year (...).

The surveys of the employees’ estimation on the extent of corrupt behaviour in their work environment show another picture. A survey among Dutch police officers showed that 4% of the police officers noticed bribery at least

<sup>7</sup> Amsterdam Report 2005.

once in their team in the twelve months preceding the survey. For corruption like nepotism, cronyism and patronage, much higher percentages were found. From the surveyed police officers 19% perceived favouritism of family and friends at least once in their work environment and 59% favouritism by the management. A similar survey among 1000 randomly selected workers in the Dutch labour force showed similar patterns for corruption: 7% bribery, 33% favouritism of family and friends, and 73% favouritism by the management'.<sup>8</sup>

(...)

'A ten case multiple case study was conducted with the main research question: What is the nature of corruption in the Netherlands. (...) The nature of corruption is one of officials "sliding down" towards corruption; most processes of becoming corrupt can be qualified as a "slippery slope". Corruption is rarely caused by personal problems of the official, like financial problems. Furthermore, important motives for officials to become corrupt are, next to material gain: friendship/love, status and making an impression on colleagues and friends. About the personality of the corrupt official, it was confirmed that often, corrupt officials have dominant and strong personalities (...). About the organisations of the official, it is noted that in most corruption cases, the supervision over the corrupt official is not very strong and that in many corruption cases, the control procedures are inadequate. About the relationship between the briber and the corrupt official, it is noted that the relationship between the briber and the official is often structural; corruption is part of an enduring relationship. Since both parties may be guilty of a punishable offence, there is trust on both sides (...). Corrupt officials, also the ones who operate outside so-called corrupt networks, do not limit their corruption to one incident. Also, the corrupt official hardly even receives a gift for which a clear compensation is expected'.<sup>9</sup>

In reaction to this report the Minister noted that the most important recommendation of the report is to uniform the recording of integrity violations (among which is corruption) within the public government. The Government attaches great value to sound Government and living in a society with a transparent public administration. Each violation of this rule is detrimental to the confidence of the citizen in the Government. For this reason civil servants and governors should be particularly keen on integrity. The vision of the Dutch Ministers is that the corruption policy must concentrate on the preventive as well as the repressive aspects. The fight against corruption must take place on an ongoing basis. This involves the implementation of an active integrity policy under the coordination of the Minister of the Interior and Kingdom Relations and employing an adequate (criminal) enforcement policy, under the responsibility of the Minister of Justice. About local level several publications have been published.<sup>10</sup>

<sup>8</sup> Amsterdam Report 2005, p. 144.

<sup>9</sup> Amsterdam Report 2005, p. 145.

<sup>10</sup> Van den Heuvel *et al.* 1999; Ministerie van Binnenlandse Zaken en Koninkrijksrelaties *et al.* 2001 and Matla 2004; see about the code of conduct in the academic field: Ten Berge 2005. Also: Huberts & Van den Heuvel 2002, p. 1151 et seq.

Concerning the administrative law aspects, the following two lines can be seen in the Netherlands: corruption policy, the first line, is about the integrity discussion while the second line concerns the case law of the administrative court in civil servant cases. Since 1990 the Minister of the Interior has paid attention to preventive aspects of corruption. In 1992 the Minister made a public appeal to guard against fraud, corruption, breaches of integrity in general, and especially the hidden forms of small-scale bribery. She posited that there was more corruption than people thought and she announced a new policy of maximalizing the integrity of government and government officials. The announcement resulted in administrative measures, public inquiries, policy documents and in legislation. The Ministry of the Interior set up a very influential website on integrity, containing actual developments, advice and good practices.

The case law of the Central Appeals Tribunal (for public servants) has a repressive as well as a preventive effect. In pursuance of the law relating to public servants the public authorities can take disciplinary measures against civil servants who violate certain rules and neglect their official duties. Against those measures civil servants can appeal to the District Court and they can lodge a higher appeal to the Central Appeals Tribunal. The case law of this court provides a good survey of the kinds of violation of integrity norms, including situations of corruption and fraud.<sup>11</sup>

Recently the Dutch Government has taken different measures which were mentioned in the government's answer to the GRECO report.<sup>12</sup> Firstly, in 2003, a 'Policy Document on integrity policy for public administration and the police' was approved by Parliament. It contains an overview of integrity policies within the public administration and the police in the Netherlands and a list of actions ('policy intentions') by which to improve integrity. All these 'intentions' have been implemented:

- the Civil Servants Act has been amended in order to introduce a number of integrity measures addressed to the relevant staff and organisations;
- guidelines for Integrity Projects have been drafted. Public authorities can use these guidelines to identify vulnerable areas within their organisations;
- a guide for confidential integrity counsellors has been drafted and issued to all Public bodies;
- a specific Internet site on integrity issues in the public sector has been created: <<http://www-integriteitoverheid-nl>>;
- the Minister of the Interior and Kingdom Relations has carried out an integrity policy study, the results of which were submitted to Parliament;
- as for 2004, integrity audits are being carried out within all ministries.

Secondly, at the end of 2003 an anti-corruption action plan was prepared, which contains the following proposals: a) to investigate corruption and b) to formulate an anti-corruption policy document that clearly identifies the different organisations involved in the anti-corruption policies and the functioning of the various processes of prevention, investigation and prosecution. The objective of this document is twofold: to describe the current preventive and repressive measures against corruption which

<sup>11</sup> Cases in the case law concerned gifts or grants, corruption and fraud by civil servants, the violation of a code of conduct, the leaking of information and additional activities.

<sup>12</sup> See for an overview: GRECO RC-I (2004) 13E, Strasbourg, 18 March 2005, p. 2.

are in place and to provide a blueprint for the future. The anti-corruption policy document will be completed end of 2005.

In the same document the central authorities have reported that an amendment to the Civil Servants Acts entered into force on 1 May 2003, which provides that every administrative organisation has to draft its own whistle-blowing regulations. The Minister of the Interior has examined how a uniform recording of integrity violations can be achieved. Better registration can provide an insight into the real scope of corruption within public government. Moreover, the Minister has noted, as a result of a study by the General Court of Auditors, that each ministry should record integrity violations in its own department.

The two critical points in the letter by the Minister to Parliament are – in our point of view – that, first, the answer to the problem of corruption should not be the vague standard of integrity and, second, that there is no explanation for the fact that in practice the public service states that there is much more corruption than is reflected in penal cases.

#### 1.1.5. Actual Problems concerning Norms in Administrative Law and Penal Law Corruption Regulations

Here a brief overview will be provided about the administrative and criminal law regulations and case law. This issue will be discussed more in detail in chapter II.

The most important administrative law norms can be found in the Civil Servants Act.<sup>13</sup> In Article 125 there are regulations on prohibiting additional activities which are not conducive to the optimal functioning of the public service. Article 125a contains the norm that civil servants must refrain from revealing ideas and feelings or associating with and meeting certain persons as well as attending certain demonstrations, if such actions are not conducive to the optimal functioning of the public service. But in specific regulations there are also some norms in relation to corruption.<sup>14 15</sup> The Dutch Penal Code criminalises the active and passive bribery of domestic public officials (Arts. 177, 177a, 362 and 363), active and passive bribery in the private sector (Art. 328ter) and active bribery during elections (Art. 126). Provisions on active and passive bribery also apply to national judges (Arts. 178 and 364), former civil servants, foreign civil servants, international civil servants, foreign

<sup>13</sup> Latest version, *Stb.* 2004, 88.

<sup>14</sup> See: General Civil Service Regulations (ARAR): – General: 1) Duties and actions of government personnel (ARAR, Art. 50) and 2) Prohibition on alcohol (ARAR, Art. 78); – Oath and affirmation of office: 1) Oath and affirmation of office (ARAR, Art. 51) and 2) Regulations on the form of the official oath/affirmation of office for civil servants (Order by the Minister of the Interior, Official Gazette 92, 18 May 1998) – Additional functions: 1) Additional functions (ARAR, Art. 61), 2) Contracts and deliveries (ARAR, Art. 62), 3) Payment for work done for third parties (ARAR, Art. 63a) – Gifts: 1) Gifts and services (ARAR, Art. 64). About financial matters: Regulations on the management of contracts 1996 (Central Government Financial Information and Records Manual, *Hafir*). Problems in the case law especially concern the following aspects: gifts or grants; civil servant corruption; civil servant fraud; violations of the code of conduct; the leaking of information; additional activities.

<sup>15</sup> Problems in the case law especially concern the following aspects: gifts or grants; civil servant corruption; civil servant fraud; violations of the code of conduct; the leaking of information; additional activities.

judges and judges of international organisations (Arts. 178a and 364a), as well as future civil servants (Arts.177 and 177a).<sup>16 17</sup>

### *1.2. Definitions: Public Service, Corruption, Fraud, Integrity and Principles of Good Governance*

It is important to use different terms for different activities and norms and clear definitions of these terms so that any misunderstanding will be avoided. Different terms are necessary to highlight the various nuances and to deepen the discussion about the legal aspects – instruments, norms, procedures, compliance, enforcement and legal protection – of the issues surrounding corruption. The problem of corruption can only be properly tackled if there is a regional and international approach in which norms of principles of good governance occupy a central position.

#### 1.2.1. Definition of Public Service

Two aspects are relevant with regard to the term Public Service. Firstly, it must be transparent which persons form part of the Public Service. There are, from a legal perspective, two types of persons working for the public service: civil servants and persons who have a private law (contractual) relationship with the government. Besides, a foreign public official and a person in the public service of a foreign country or an international organization and judges of a foreign state or an international institution can be part of the Public Service. The information mentioned here is mostly taken from the GRECO report.<sup>18</sup> Secondly, we also have the discussion whether politicians and members of representative institutions are also civil servants so that we can speak about a broader interpretation of a civil servant.

##### 1.2.1.1. The Civil Servant in Penal Law

The notion of a ‘civil servant’ is defined in Article 84 of the Penal Code, pursuant to which it applies to ‘all persons elected to public office in elections duly called under the law’ (Art. 84-1), ‘arbitrators’ (Art. 84-2) and ‘all personnel of the armed forces’ (Art. 84-3). The term ‘civil servant’ has been broadly interpreted in the case law and it includes persons who are appointed to a public function by public authorities in order to perform part of the duties of the State or its bodies.<sup>19</sup> In practice, this means that public officials, as referred to in the articles on corruption, are composed of: Ministers (including the Prime Minister), under-secretaries, mayors, Royal Commissioners (of the provinces), aldermen (of the towns), members of the local council, members of Parliament, members of the Provinces States and all other public officials. Furthermore, the Supreme Court has defined a ‘public servant’ as ‘one who under the supervision and responsibility of the authorities has been appointed to a function

<sup>16</sup> Case law has considered the following aspects: ‘to offer, promise or give’, ‘to offer a service’, ‘any undue pecuniary or other advantage’, ‘small facilitation payments’ and ‘whether directly or through intermediaries’.

<sup>17</sup> A recent study about the penal law aspects of civil servant corruption in the Netherlands: Sikkema 2005.

<sup>18</sup> First Evaluation Round Compliance Report on the Netherlands. Adopted by GRECO at its 22<sup>nd</sup> Plenary Meeting (Strasbourg, 14-18 March 2005), Greco RC-I (2004) 13E, Strasbourg, 18 March 2005.

<sup>19</sup> HR (Dutch Supreme Court) 30 January 1994, Ref. W 9149; HR 1 January/December 1992, *NJ* 1993, 354, HR 4 February 1995, *NJ* 1995, 620 and HR 30 May 1995, *NJ* 1995, 620 and recently District Court of Utrecht 15 September 2004, no. 16/351139-03, LJN: R2210.

whose public character cannot be denied with a view to implementing tasks of the state and its organs'. The Supreme Court has also extended this definition by ruling that someone is also considered to be a public official when carrying out responsibilities under the supervision and responsibility of the government and whose work is undoubtedly of a public character in order to fulfil the functions of the State and of its bodies.

Article 178a-1 of the Penal Code extends the meaning of 'public servant' in Articles 177 and 177a (see: I.1.1.4) to 'persons in the public service of a foreign state or an international institution'. Article 178a-3 extends the meaning of a 'judge' in Article 178 to 'a judge of a foreign state or an international institution'. Article 178a extends the application of these offences by stating that the various types of foreign public officials referred to are 'considered as equivalent' to the ones referred to in the offences themselves.

#### 1.2.1.2. Civil Servant in Administrative Law

The notion 'civil servant' in the Administrative Law legislation and case law has a more narrow content. Relevant is the administrative status, the acquisition of that status and the appropriate administrative law. The administrative status has been defined as its own legal scheme of (collective and individual) labour law for the staff at the government and in education. Three characteristics of this administrative status have a substantial meaning: 1. public law regulating the formally unilateral appointment and dismissal of civil servants (versus the two-sided employment contract and the resulting relevance of the Civil Code and other legal provisions); 2. the public legal protection of civil servants under the General Administrative Law Act including the administrative judge (versus the procedure relating to the civil judge); 3. the formal unilaterally determined regulation of labour conditions linked to the scheme of the development of labour conditions (versus the two-sided collective labour contract).

Civil servants are appointed under the Civil Servant Act as a civil servant working in the public service. Nowhere is the content of the term 'appointed' elaborated. However, it is commonly recognized that the actual appointment is a public law act, which is aimed at the realization of a civil servant relationship (administrative status). The administrative appointment takes place under the public law umbrella and is unilateral. The Civil Servant Act does not speak about acceptance or agreement. In practice, however, the appointment is not seen and experienced as a unilateral operation. It is therefore better to talk of a conditioned arrangement: the appointment depends on explicit or tacit acceptance by the person concerned. Public sector employees have been divided into the following sectors: central government, defence, education (primary and secondary), universities, institutions for higher professional education, research establishments, teaching hospitals, adult and vocational education, the judiciary, the police, the municipalities, the provinces and the water boards.

#### 1.2.2. Definitions of Corruption and Fraud

In the Amsterdam report the following definition of corruption in the public context has been provided: 'offering, giving, asking or receiving private gain because of the position or (non-) action of a public functionary'. Public functionaries are, in the context of penal law, civil servants as well as politicians including governors and

ministers. This is not the only definition as also elsewhere in the literature there are many different definitions of corruption.<sup>20</sup>

The following aspects are relevant in relation to the definition of corruption.<sup>21</sup> First, it is important to mention that the only relevant activities are those which are carried out in relation to the function of the person. So purely private activities are not relevant for the discussion about the content of public corruption. Second, the interpretation of persons means that functionaries are civil servants as well as politicians;<sup>22</sup> it concerns corruption in the public service. The third element of corruption is that there is a third party who will profit from the (non-) action of the civil servant and the civil servant will receive something in return for this (non-)action. This party will be mostly somebody outside the public organisation. The fourth aspect is that we can speak about corruption in situations where there is not only a situation of receiving gifts, but also the prospect of receiving such gifts.

The definition provided here is more or less in line with the Dutch Penal Code, especially Articles 362 and 363. To explain this definition we have to study, first, these articles concerning gifts, promises or services and also the articles on bribery (Arts. 177 and 177a).<sup>23</sup> Then we have to highlight the difference between corruption and fraud and what the limitations of these factual illegal activities exactly are. We will see that not only the negative qualifications (corruption and fraud) are relevant, but that for an administrative (preventive and repressive) approach we have to look at the standards which are relevant for the administration. These standards are especially integrity and the principles of good governance and these norms complete the national and international legal framework. But in administrative law we have a more narrow definition of a civil servant and, as a consequence, also a more restrictive content of corruption in which there is only discussion about civil servants, politicians thereby being excluded.

In the Amsterdam report<sup>24</sup> a difference has been made between corruption and fraud; however, the two terms are related because both terms concern personal favours or promises. With regard to fraud there are two parties involved: the fraudster and the harmed person or institution. Corruption takes place between three parties: the civil servant who profits, the public organisation and the person who induces the civil servant to benefit from his (non-)actions.<sup>25</sup> This difference can also be found in the administrative case law<sup>26 27</sup> and administrative policy<sup>28</sup> in the Netherlands.

There is in general an important difference in the Netherlands between the Penal Code and Administrative Legislation. In the Administrative Legislation a distinction is made between a legal fact (*rechtsfeit*), a legal norm (*rechtsnorm*), a legal consequence (*rechtsgevolg*) and a legal act (*rechtshandeling*). In the Penal Code

<sup>20</sup> Amsterdam Report 2005, Definitions (see p. 4 report: Hoetjes (1982), Johnston (1986), Huberts (1992), Heywood (1997), Theobald (1999), Caiden (2001), Heidenheimer & Johnston (2002)).

<sup>21</sup> See Amsterdam Report 2005, p. 4 et seq.

<sup>22</sup> The notion of a civil servant has a broad interpretation in the case law (see HR 30 January 1914, W 9149; HR 1 December, *NJ* 1993, 354; HR 30 May 1995, *NJ* 1995, 620) and according to the law (Art. 84 Penal Code in which it is explained that also members of parliament and members of city Councils are civil servants in this context). In the law special attention has been given to situations before and the situation after the fulfilling of the function of civil servant.

<sup>23</sup> See annex I and annex II of this report.

<sup>24</sup> See Amsterdam Report 2005, para. 1.2.1.

<sup>25</sup> See Amsterdam Report 2005, p. 5.

<sup>26</sup> Corruption: Central Appeals Tribunal 7 November 2002, 00/5791 AW, LJN AF3553.

<sup>27</sup> Fraud: Central Appeals Tribunal 13 November 2003, 02/1004 AW, 03/1535, LJN AN8809.

<sup>28</sup> See about Fraud-policy: *Kamerstukken II* 2004/05, 17 050-29 810, nr. 295.

attention is given to the punishable act (*strafbaar feit*) and the punishment (*straf*). From our point of view a fundamental point is lacking in the Amsterdam report: specifying the norm. We found general reflections concerning integrity. In another report good governance principles were mentioned, but there was also no specification in relation to corruption.<sup>29</sup> There is a need for a positive administrative law norm which can be found in the Principles of Good Governance.

### 1.2.3. Definitions of Integrity and Principles of Good Governance

Citizens expect that the government fulfils its tasks in accordance with the norms of the rule of law and democracy and in an honest and impartial way. That is essential for a high quality, authoritative and reliable government. A breach of quality and integrity in the actions of the government has a great impact on the government's authority and, in that respect, on the effect of the government's actions. This requirement of integrity applies to civil servants as well as to governors; both have responsibility for the functioning of the government.

The basis of administrative integrity is derived from the democratic rule of law principles. To safeguard this integrity specific rules have been laid down in legislation. Moreover, common standards which are accepted by society as a whole play a specific role, such as the rules of social behaviour that every civil servant must observe.<sup>30</sup> The principles of legal certainty and of equality are the basis of the principle of legality which, in turn, is a principle of the rule of law making it necessary to comply with and enforce the law. This line of logic then necessarily leads to a link with the principles of good governance, but the Dutch Government has created the vague norm of integrity, which is not a typical public law norm. Integrity is now frequently considered as the reverse of fraud and corruption. Also in the discussion between the Dutch Government and Parliament corruption and the violations of integrity seem to be the same thing. But integrity is something more than the opposite of corruption. Within dishonest (against integrity) behaviour other forms of undesired behaviour tend to lurk. These forms of behaviour can also influence the way citizens view the Government. Integrity is an inclination of probity, reliability, impartiality, objectivity and justice. The interpretation of this term has been directly linked with socially accepted standards and values and with the principles of democracy and the rule of law.<sup>31</sup> Thus within the framework of integrity the developed standard framework seems to be too wide to encompass the problems of corruption as discussed here.

In the literature a link between corruption and integrity has been made.<sup>32</sup> Corruption can be defined as involving 'behaviour on the part of officials in the public sector, whether politicians or civil servants, in which they improperly and unlawfully enrich themselves, or those associated with them, by the misuse of the public power entrusted to them'. The question here is the following: what is the relationship between corruption and integrity? The answer to this question should be that corruption is seen as a specific type of integrity violation, a violation against the accepted moral norms and values of political and administrative behaviour. From a theoretical point of view a number of integrity violations or forms of public

<sup>29</sup> Huberts 2001, p. 4.

<sup>30</sup> *Kamerstukken II* 2003/04, 29 436, nr. 3, p. 6.

<sup>31</sup> *Kamerstukken II* 2003/04, 29 436, nr. 3, p. 7.

<sup>32</sup> Huberts 2001, p. 3.

misconduct can be distinguished:<sup>33</sup> corruption; bribery; nepotism; cronyism; patronage; fraud and theft; conflict of private and public interests; manipulation of information; discrimination and sexual harassment; improper methods; waste and abuse of resources; misconduct during one's free time. Only a few of these integrity violations can be seen as corruption. This clarifies the fact that integrity or appropriate behaviour means much more than not being corrupt. Nevertheless, it goes without saying that 'behaviour on the part of officials in the public sector, whether politicians or civil servants, in which they improperly and unlawfully enrich themselves, or those associated with them, by the misuse of the public power entrusted to them' is a crucial aspect of organizational integrity. Integrity and ethics are important topics for all organizations, in the public as well as in the private sector. An extra complication in the integrity discussion is that several aspects of integrity standards are the same in the public and the private sector. Our conclusion is that the integrity norm is not a useful norm in the corruption discussion because it is an umbrella standard and it will therefore confuse the discussion about the normative aspects of corruption.

In his foreword to the Global Corruption Report 2005, Fukuyama<sup>34</sup> explains that free markets are not self-sustaining: they presume the existence of governments that are capable of enforcing the rule of law, adjudicating disputes, and establishing property rights as the basis of long-term investment and growth. The consensus on the importance of institutions and good governance belies several critical weaknesses with regard to implementation. Not only in the developing countries but also in the Western world there are continuing problems with corruption in the construction industry and the Global Corruption Report 2005 focus on this factor. There are institutional, normative and political dimensions in improving governance by combating corruption. The Principles of Good Governance can play a crucial role in that fight.

Three levels of Principles of Good Governance (PGG) can be discerned: different conceptions of good governance associated with this concept (1), which are expressed in different sets of principles of good governance (2), which in their turn form an interpretation of the relevant practices and legal materials (3). When we look at the different approaches of the Principles of Good Governance the following three functions can be distinguished. The first function is that the Principles of Good Governance exist in international law (especially in relation to development aid) and form an *external field of normative reference*. The second function of the Principles of Good Governance is in the field of public administration: *principles of good governance used in the process of developing networks*. The third function based on administrative law has been elaborated in this article: Principles of Good Governance forming the *internal fundamental basics for the administration*.

In line with this third function of the Principles of Good Governance the following six types of principles have been developed based on regional (including European) and international regulations and case law:<sup>35</sup> the principles of proper administration, the principles of transparent administration, the principles of public participation, the principles of accountable administration, the principles of effective and efficient administration and the principles of human rights administration.

There are also two rather new types of principles which can play a crucial role in the fight against corruption: the *principles of accountable administration* and *those of*

<sup>33</sup> Van den Heuvel *et al.* 1999; Gibbons 1989, p. 763-767.

<sup>34</sup> Fukuyama 2005, foreword. See also Fukuyama 2004.

<sup>35</sup> Addink 2005, p. 21-48.

*effective administration*.<sup>36</sup> The principles of accountable administration ensure that government acts are carried out not only in a proper legal manner, but in a manner which is consistent with fairness and good administrative practice.<sup>37</sup> Recently the Dutch Court of Audit clarified that its work will focus on Principles of Good Governance, in particular the principles of accountable administration.<sup>38</sup> In European law the principles of accountable administration and those of effective administration are much more developed than on the Dutch level. On the national level these principles are quite new, but subject to the influence of European law our expectation is that these principles will be developed on the national level very quickly.

## **2. Rules Safeguarding Institutions**

### *2.1. Preventive Measures*

In the GRECO report the following remarks are made about the preventive measures on corruption in the Netherlands.<sup>39</sup> In the field of policy and legislation on integrity in the public sector, the Ministry of the Interior is the coordinating State institution: given the decentralised structure of the Dutch system it establishes principles and guidelines for all governmental bodies. Apart from the Civil Servants Act and a specific regulation establishing that judges and prosecutors have the obligation to report any additional functions, there are no other specific regulations established at the national level. The Dutch authorities adopt policies based on the consideration that established rules alone are not enough to promote integrity among administrative bodies. They rely on civil servants' conscience with regard to integrity problems. The main focus of the current Dutch policy on integrity is that administrative bodies: are aware of the importance of integrity; promote awareness; identify vulnerable spots in their organisations; take measures to reduce risks; have the capacity and the will to cope with violations of the integrity principle; and keep integrity at the top of the agenda. In answer to the GRECO criticism the Dutch government made it clear that in 2003 there was a policy paper from the government in which there were many good intentions which have now all been implemented. But is this a real answer to the Greco criticism? Firstly, we only have to look at the clouded discussion between the Dutch Government and Parliament on corruption, fraud and integrity; see our comments regarding the results of this discussion and the importance of the principles of good governance. Secondly, there was a request for a law on the prevention of corruption. In our opinion the presented legislation within the framework of the Civil Servants Act cannot be seen amounting to such a recommended Act. In that Act there is a restrictive definition of civil servant (omitting politicians) and only the too broad standard of integrity has been introduced in that Act. Our suggestion is to use the broader concept of civil servant (as we have in the penal law act) and to create instruments and norms in chapter 2 of the General Administrative Law Act. The instruments should contain generally binding rules in relation to activities which violate the Principles of Good Governance.

<sup>36</sup> See on the principles of effectivity: Van der Heijden 2001, p. 273; Jans *et al.* 2002, p. 74-77 and p. 84-85.

<sup>37</sup> See also Brophy 2002, p. 9.

<sup>38</sup> Stuiveling 2003.

<sup>39</sup> First Evaluation Round. Evaluation Report on the Netherlands. Adopted by Greco, Strasbourg, 24-28 March 2003.

## 2.2. *Administrative Law Rules*

Articles 125, 125a and 125c are in this context the most relevant articles in the Civil Servants Act (latest version, *Stb.* 2004, 88).<sup>40</sup> But there are additional administrative law regulations: the General Civil Service Regulations (ARAR), the Civil Servants Pay Decree (BBRA) 1984 and the Pension Regulations.<sup>41</sup> The following brief description of the administrative norms will provide an overview. Civil servants are expected to act with *integrity*, in other words to be incorruptible, unassailable and trustworthy. Rules on ethical behaviour – governing the acceptance of gifts, outside activities, confidentiality and whistle blowing – are included in the regulations on the legal status of civil servants. Civil servants are sometimes *offered gifts or services* by third parties. Standards have been laid down to preserve civil servants' independence in such situations. They may only accept gifts with the competent authority's permission, and all gifts worth more than €50 must be refused. In principle, civil servants may engage in *outside activities* alongside their main job. This means activities with which a civil servant has not been, and could not be, charged by virtue of his position. These activities may be paid or unpaid, and may be performed in or outside normal working hours. Civil servants are required to notify the competent authority of certain outside activities, while other activities are prohibited in order to prevent any risk of a conflict of interest. Civil servants are also obliged to maintain *confidentiality* concerning everything they learn in the course of their work if the nature of the information calls for this. An exception is made in the case of information which should be given to the management or where management has exempted an employee from the obligation of confidentiality with respect to a particular matter. Employees who decide to blow the whistle place themselves in a very vulnerable position. It may very well destroy their careers. The *Whistle-blowers' Order* is there to offer them the necessary protection. Civil servants may invoke the Whistle-blower's Order establishing the procedure to be followed in dealing with suspected abuse. If a civil servant suspects unethical conduct within his or her department, this should be reported to his or her line manager or, if this is not considered appropriate, to a confidential adviser. The line manager or confidential adviser then notifies the competent authority. The competent authority instigates an inquiry and the employee receives confirmation of this investigation. Within eight weeks the employee is notified about the views of the competent authority regarding the alleged unethical conduct. In certain circumstances the employee can also approach the *Commission on Integrity in the Civil Service* (central government sector) if: the civil servant disagrees with the competent authority's viewpoint, has not received any notification within the requisite eight weeks or within the extended (unreasonable) deadline.

Public officials are obliged to report suspicions of wrongdoing to their superior (under the Civil Servants Act). The order sets out in detail certain obligations and procedures for reporting any suspected abuse by central government officials. A failure to report is considered to be a 'neglect of duty', whereas disciplinary measures may be undertaken under the provisions of the Civil Servants Act. The obligation exists if there are reasonable grounds to suspect the following: a serious criminal offence; a gross breach of regulations or policy rules; misleading the criminal justice

<sup>40</sup> See also: *Kamerstukken II* 2003/04, 29 436, nr. 1 etc. in which is written down the norm: the good civil servanthship, the legal base for an integrity policy and the legal base for a code on good civil servant behaviour.

<sup>41</sup> See annex I of this report.

authorities; a serious risk to public health, public safety or the environment; or the deliberate withholding of information relating to any of the above.

### 2.3. *Administrative Case Law*

In an overview of the administrative case law in relation to these articles and more specifically about integrity including corruption and fraud, the following situations can be distinguished: accepting gifts or grants; civil servant corruption; civil servant fraud; violations of the code of conduct; the leaking of information; additional activities.

In a case concerning grants, the court's conclusion was that the employee had acted against the code of conduct on administrative integrity established by the municipality. The court considered, however, that the resulting instant dismissal was disproportionate to the violation in question.<sup>42</sup> Then there are two cases concerning civil servant corruption. In the first case, a civil servant employed by a municipality entered into discussions with potential contracting partners on the possibility of concluding a contract on labour protection services and thereby influenced the consultations so that labour protection activities would be carried out by one specific labour protection service. The civil servant attempted to obtain financial advantages for himself as a private person by offering the labour protection service contract to one specific enterprise and had therefore abused his position. It was therefore a case of attempted administrative corruption and the disciplinary measure of (unconditional) dismissal was considered by the Court to be an appropriate punishment.<sup>43</sup>

In another case the director of a municipal service had accepted gifts from construction companies while he was the person responsible for advising the municipal board on invitations to tender. The civil servant had invited a specific company without authorization while ignoring one of the companies on the list decided by the municipal board. In so doing the civil servant had exerted undue influence, in an unlawful manner, on the registration procedure. The administrative measures taken were a deduction in salary, provisional suspension and resulting dismissal.<sup>44</sup>

In another fraud case there was the situation where upon the appointment of a civil servant, the civil servant in question had concealed relevant facts and therefore the principle of integrity had been violated. The confidence of the employer in relation to the integrity of the civil servant had undoubtedly been affected.<sup>45</sup>

In a case concerning a violation of the code of conduct an employee of the Immigration and Naturalisation Service (the IND) had not communicated to his employer certain private contacts with an interpreter. The IND's code of conduct prescribes that any undue influence on the functioning of the civil servant should be controlled and prevented and appropriate measures can be taken before such contacts have an influence on the work in question.<sup>46</sup>

In a case concerning the leaking of information by a civil servant working for the customs authorities, the civil servant in question had contacts with persons who dealt

<sup>42</sup> District Court of Alkmaar 29 April 2003, AW 02/789 (LJN-number: AF8057).

<sup>43</sup> Central Appeals Tribunal 7 November 2002, 00/5791 AW (LJN-number: AF3553).

<sup>44</sup> District Court of Alkmaar 8 April 2004, AWB 04/447 and AWB 04/614 (LJN-number: AO7454).

<sup>45</sup> Central Appeals Tribunal 13 November 2003, 02/1004 AW, 03/1535 AW (LJN-number: AN8809).

<sup>46</sup> District Court of Arnhem, 10 October 2003, 03/1533 AW and 03/1532 AW (VV) (LJN-number: AM3274).

in narcotic substances. He had failed to inform the public prosecutor about an attempt to bribe him and had violated his duty of confidentiality by supplying oral and written information to third parties concerning the activities of the customs authorities in relation to transportation from another country. He had violated the principle of integrity as regards himself and his organisation and was punished by a disciplinary sanction and unconditional dismissal.<sup>47</sup>

Another case about the leaking of information concerned an interpreter working at a police station. He had passed on confidential data – the result of a widespread investigation by a specific police force of which he had specific knowledge as he had acted as an interpreter in the investigation – to the main suspect within that investigation. This was therefore a case of a violation of professional secrecy in exchange for personal financial gain.

There is also a case concerning additional activities where a civil servant worked for a municipality and his task was to appraise and prepare decisions on dispossession, company damage regulations and the granting of subsidies. He had failed to communicate to his employer that he intended to operate a bar for commercial purposes. Moreover, he had also failed to communicate an offer to join the board of a specific company. Due to this the civil servant in question had received a reprimand. Later the person became an associate in a commercial company in the area concerned and he also did not communicate this to his employer. The municipality thereby dismissed the civil servant because he was no longer suitable for the post.<sup>48</sup> In another case a police officer wanted to own a bar in the former area which she patrolled. She had provided full information about these intended additional activities. Her employer had to assess whether there was an unacceptable conflict of interests. Her employer indicated that these activities could not be permitted. When working in a bar the police officer could have ended up in a situation where she had to act as a police officer or she could have faced her colleagues while they carried out an investigation.<sup>49</sup>

#### 2.4. *Penal Law Rules*<sup>50</sup>

Articles 362 and 363 of the Penal Code contain offences relating to the active bribery of civil servants. In the 1990s there were some 20 to 25 such cases per year based on the old version of these articles. In 2001 these articles were amended because up until then there was no regulation within the law on the (non-)acceptable amount of bribery.<sup>51</sup> These articles establish the criminal liability of the public servant who accepts a gift or promise, knowing or reasonably suspecting that such a gift or promise has been made in order to induce him to act or refrain from acting in the execution of his duties in a manner either not contrary (Art. 362) or contrary (Art. 363) to the requirements of his office. Secondly, the request of a gift or promise by a public servant for the same purpose is also criminalised. Thirdly, accepting or requesting a gift or promise is also penalised if this is done by a former public servant or future public servant. The terms ‘gift’ and ‘promise’ are broadly interpreted by the

<sup>47</sup> Central Appeals Tribunal, 20 November 2003, 02/3716 AW (LJN-number: AN 8832).

<sup>48</sup> Central Appeals Tribunal 6 May 1999, 97/5694 AW (LJN-number: AA3987).

<sup>49</sup> District Court of Breda 2 November 2001, 00/1804 AW (LJN-number: AD5054).

<sup>50</sup> See for an overview: Roording 2002, p. 106-139.

<sup>51</sup> The Minister of Justice explained (*Kamerstukken II* 1998/99, 26 469, nr. 3, p. 4) that there is a preference for directives from the public prosecutor because these are more flexible in relation to the developments in society.

courts and include ‘something of value for the recipient’ (gift),<sup>52</sup> and ‘something that will be carried out in the future for the benefit of the public servant’ (promise).<sup>53</sup> The benefit in question can concern money, goods or activities, but it is also possible that the benefit could be immaterial like a public decoration or sexual services.<sup>54</sup>

For the penalisation of corruption by passive bribery Articles 177 of the Penal Code (bribery of an official in violation of his duty) and 177a of the Penal Code (bribery not in violation of an official duty) are relevant. These articles, together with Articles 362 and 363 were amended in 2001 because of the need to sharpen and broaden the criminal law instruments. This was necessary not only because of the specific Dutch situation, but also because of certain international treaties on corruption which the Netherlands had entered into.<sup>55</sup>

Within the framework of the above amendment a new article (Art. 178a) has been added to the Penal Code in order to extend the application of the active bribery offences. Previously bribery offences only applied to domestic public servants, to ‘persons in the public service of a foreign state or an international law organisation’, ‘former public servants’ and judges ‘of a foreign state or an international law organisation’. A new article (Art. 177a) has been added to the Penal Code in order to establish the offence of bribing a public servant in order to obtain an act or omission by him/her that is not in breach of his/her official duties. Article 177, which pertains to the bribery of a public servant, only applies where the purpose of the bribe is to obtain an act or omission in breach of official duties. The maximum term of imprisonment and the fine that apply under Article 177 of the Penal Code (i.e. where the bribe is intended to obtain an act or omission in breach of official duties) have been increased from 2 to 4 years imprisonment and from a category 4 fine (max Euro 11250) to a category 5 fine (max Euro 45.000). The offences have been extended to cover the case where a person renders or offers a public servant a ‘service’ (Arts. 177, 177a and 178 of the Penal Code). In Article 178 also bribery in relation to a judge has been included and in Article 179 Articles 177 and 177a this has been extended to persons working in the public service of a foreign state or an organisation governed by international law as such persons are considered to be equivalent to civil servants. Provisions on active and passive bribery also apply to national judges (Arts. 178 and 364), former civil servants, foreign civil servants, international civil servants and foreign judges and judges of international organisations (Arts. 178a and 364a), as well as future civil servants (Arts. 177 and 177a).

As regards sanctions, they vary from a maximum term of 12 years imprisonment for the passive bribery of judges to a maximum of 2 years for the passive bribery of civil servants acting ‘(...) not in violation of his duty (...)’. The active bribery of public officials is punishable by a maximum of 9 years imprisonment in the case of judges, and 2 years for civil servants if the returned favour was not in violation of his/her duty. This sanction can be increased to a maximum of six years where the offence is committed by a Minister, an under-secretary, a mayor or certain other political officials.

<sup>52</sup> HR 25 April 1916, *NJ* 1916, 551.

<sup>53</sup> HR 21 October 1918, *NJ* 1981, 1128.

<sup>54</sup> HR 31 May 1994, *NJ* 1994, 673.

<sup>55</sup> *Kamerstukken II* 1998/99, 26 469, nr. 3, p. 1 etc.

## 2.5. Penal Case Law

In the Penal Case Law there have been problems of interpretation concerning the following points in the Penal law legislation: ‘gifts or promises’, ‘civil servant’, ‘knowing that it is made to him in order to induce him to act or to refrain from acting’ and ‘not contrary to the requirements of his office’.

‘Offering, promising or giving’. In the original text of the Act (before 2000) there was only a reference to a gift or a promise. In the case law offering or accepting a gift is explained as handing over or the factual acceptance of something that has value for the receiver.<sup>56</sup> In relation to promising or accepting such a promise, this can refer to a future or an immediate favour for the civil servant in question.<sup>57</sup> The benefit does not have to consist of money, goods or performance. It can also have an immaterial character, like receiving a decoration or obtaining sexual favours.<sup>58</sup> The Supreme Court specifically decided this in 1994.<sup>59</sup> In relation to the fact that a civil servant could have received the favour as a private person, the Minister has answered that for the criminal responsibility of a civil servant it is not relevant whether the civil servant has received the gift or the promise in his position as a civil servant.<sup>60</sup>

The term ‘promise’ has a broad meaning and is considered to include the notion of offering. In a judgement by the Supreme Court<sup>61</sup> it has been explicitly determined that offering falls under the making of a promise. Another element is ‘any undue pecuniary or other advantage’ – Articles 177.1(1), 177a.1(1) and 178. But what type of advantage is here prohibited? Only the term ‘service’ conveys the substance of the advantage that is prohibited, and, as mentioned above, the legislator chose to add this term to the listed offences because practice had shown that the previous language (i.e. ‘makes a gift or a promise’) did not necessarily include the notion of services. In the notes on the law it is indicated that the term ‘service’ would, for example, cover ‘participation in ‘freebie trips’, providing a holiday bungalow for a ‘derogatory price’ or offering a seat on the Board of a company’. The term ‘service’ was added for linguistic reasons and for the purpose of codifying the law; it does not affect the broad scope of the provision. The term ‘gift’ is understood to mean ‘something that has value to the recipient’, and the term ‘promise’ conveys the same notion, but that it will be carried out in the future. Thus, the advantage does not have to consist of money, goods or services, but may be of a non-material nature. In the notes on the law it is provided that ‘bagatelle (trivial) gifts’ have not been expressly exempted from the reach of the offences due to the drafting difficulties that would arise, and doubts as to whether an express exemption would create greater transparency. Although it is not the intention to exclude facilitation payments from the offence, under certain circumstances it would be possible to consider not prosecuting a case involving a facilitation payment. The intention of the Department of Public Prosecutions is to issue guidelines for corruption cases, including facilitation payments.

The final aspect to be considered here is ‘whether directly or through intermediaries’. Articles 177, 177a and 178 do not expressly apply to bribes made through intermediaries. It was decided that an amendment to this effect was not required. The term ‘to make a gift or a promise to a public servant or renders or offers

<sup>56</sup> HR 25 April 1916, *NJ* 1916, 551.

<sup>57</sup> HR 21 October 1918, *NJ* 1918, 1128.

<sup>58</sup> HR 31 May 1994, *NJ* 1994, 673.

<sup>59</sup> HR 31 May 1994 *NJ* 1994, 673.

<sup>60</sup> HR 10 April 1893, *W* 6333.

<sup>61</sup> HR 25 April 1916, *NJ* 1916, p. 300.

him a service' is intended to be interpreted in a broad, functional sense, and thus it would cover the case where an intermediary receives or transmits the payment or offer or the advantage is paid into an account which is accessible to a foreign public servant. This was the interpretation provided by the Minister of Justice and it has also been accepted in a judgement of the Supreme Court.<sup>62</sup>

## 2.6. *International Rules*

More specifically in relation to corruption, on the international and European level we can see several sources of these norms. Developments in regional<sup>63</sup> and international policy on corruption have been taking place which are in particular relevant for the Netherlands.<sup>64</sup> And there are specific agreements to which the Netherlands is a party. The Netherlands signed the OECD Corruption Convention on December 17, 1997<sup>65</sup> and deposited the instrument of ratification on January 12, 2001. The Ratification Bill and Implementation Bill were enacted on December 13, 2000 and came into force on February 1, 2001. These Bills have been passed by Parliament in relation to the obligations under the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and three other treaties on controlling fraud and corruption. But there are other more relevant treaties<sup>66</sup> on Corruption to which the Netherlands is a party.

The United Nations Convention against Corruption (UNCAC) of December 2003 will enter into force on 14 December 2005 and that is important because bribery payments, the laundering of corrupt income and the flight of corrupt officials are cross-border phenomena which demand an international solution. The Convention will: a) accelerate the retrieval of funds stolen by dictators and other public officials via quicker and better cooperation between governments; b) encourage banking centres in countries to become more responsive to such investigations and to take

<sup>62</sup> HR 21 October 1918, *NJ* 1918, 1128).

<sup>63</sup> See: Corstens 2001, p. 21 et seq.; Fijnaut 2000, p. 478-508; Mededeling van de Commissie betreffende een algemeen EU-beleid ter bestrijding van corruptie, COM(2003), 317.

<sup>64</sup> These activities gave rise to the development of Transparency International 2001. But also international conferences on corruption were important, for example the Anti-Corruption Conference (IACC), 1983; the Anti-Corruption Conference Amsterdam: 1992; the 11<sup>th</sup> International Anti-Corruption Conference; the Global Forum on Fighting Corruption and Safeguarding Integrity (The Hague 2001).

<sup>65</sup> *Trb.* 1998, 54.

<sup>66</sup> 1) The Convention drawn up on the Basis of Article K.3 of the Treaty on the European Union, Concerning the Protection of the European Communities' Financial Interests (*Trb.* 1995, 289; Pb Nr. C316 van 27/11/1995 p. 0049-0057), the Fraud-convention; 2) The Protocol drawn up on the Basis of Article K.3 of the Treaty on the European Union, Accompanying the Convention on the Protection of the European Communities' Financial Interests, Article 6 (*Trb.* 1996, 330), the Corruption-protocol; 3) Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union. *OJ C* 195, 25/06/1997 p. 0001, 26 May 1997; *Trb.* 1997, 249, Pb EG No. C 195 25/06/1997, p. 1-11; 4) The Protocol drawn up on the Basis of Article K.3 of the Treaty on the European Union, Concerning the Interpretation, by way of Preliminary Rulings by the Court of Justice of the European Communities, of the Convention on the Protection of the Financial Interests of the European Communities, *Trb.* 1997, 40. On May 11, 2000, in Strasbourg accepted Resolution R (2000) 10 about the behaviour codes for civil servants there will be no need for an implementation regulation. The Netherlands ratified the Criminal Law Convention on Corruption, 27 January 1999, Strasbourg, (*Trb.* 2000, 130 and *Trb.* 2002, 109) on 11 April 2002. There is a Protocol, *Trb.* 2004, 226, on the involvement of arbiters and members of juries. The Civil Law Convention of 4 November 1999, has not yet been signed and ratified given the fact that the matter is still under consideration.

action to prevent money laundering and enable global judicial action against those who are corrupt, no matter where they are hiding, and nations will be able to pursue foreign companies and individuals that have committed corrupt acts on their soil; c). result in a prohibition on the bribery of foreign public officials, thereby drying out a major channel for 'dirty' money. This convention provides a framework for domestic anti-corruption legislation, introducing, in particular, whistle-blower protection, freedom of information and accountability systems for the public sector. Thus far, 129 countries have become signatories, thereby giving it an unprecedented geographical reach. Yet only a quarter of them have ratified the Convention, meaning that widespread adoption into national law is still a long way off.

### **3. Rules Safeguarding Transactions**

#### *3.1. Public Procurement Policy and Regulations*

The Dutch Public Procurement Policy complies with the requirements of the GATT/WTO Agreement on Public Procurement and with EU public procurement legislation.<sup>67</sup> The aim is to enable cross-border competition between suppliers and service providers from the different EU member states. Bidders and interested parties must have equal opportunities to compete for public contracts and the general principles of transparency and non-discrimination must be observed. The implementation of these obligations has contributed to greater transparency at the central and local government levels. The Netherlands follows the approach of prohibiting restrictive agreements and the abuse of a dominant position and in 1998 a new Competition Act was adopted; within the framework of this Act also the new competition authority, the Netherlands Competition Authority (NMa), was established. The interdepartmental project unit for public procurement and tendering began its work in 2000. Its purpose is to improve both procurement and tendering within central government. Further efforts to encourage European tendering are needed, given that the value of European public procurement (as a percentage of GDP) in the Netherlands is slightly above the EU average. The interdepartmental project will also initiate measures designed to have electronic tenders introduced.

#### *3.2. Public Authorities and Public Tendering Procedure*

Often public authorities want to award a specific contract for public facilities and they will have to issue an invitation to tender in accordance with the rules defined by the European Public Procurement Directives. The different Directives specify that contracting authorities, such as provinces, waterboards, cities and bodies governed by public law, must comply with specific procedures when the estimated value of the contract to be granted exceeds certain threshold values. In most cases the public tendering procedure must be observed. This procedure starts with an announcement of the contract (the 'tender notice') in the Official Journal of the European Communities. This tender notice must contain the grounds for exclusion and the requirements for eligibility that the bidders and their offer must meet in order to qualify for the contract. It must also be stated on the basis of what tendering criteria (the lowest price or the economically most favourable tender) the contract will be awarded.

<sup>67</sup> Supplies Directive 93/36/EEC, Works Directive 93/37/EEC, and Utilities Directive 93/38/EEC.

### 3.3. *Procurement Procedures*

Contracting Authorities can choose between the public procedure and the non-public procedure to award a contract. Both procedures specify (minimum) terms and requirements with regard to the publication of the contract. The Utilities Directive also offers the possibility of the award procedure through negotiation. The Directives incorporate the negotiation procedure with and without a preliminary announcement (the tender notice). These last procedures can only be used if specific conditions specified in the Guidelines are met.

- a. The public procedure. The public procedure starts with an announcement of the contract via the Publications Office of the European Community. This announcement must comply with certain requirements. The specifications must then contain the grounds for exclusion and the requirements for eligibility with which the bidders must comply in order to qualify for the contract. The specifications must also specify on the basis of what tendering criteria (the lowest price or the economically most favourable tender) their tender will be assessed. The public procedure comprises one round in which all interested parties may submit a tender. The suitability of the interested party to execute the contract and the compliance of the tender with the tendering criteria are assessed in one round. This assessment results in the selection of the successful bidder: the bidder who was found to be the most suitable and who submitted the best tender.
- b. The non-public procedure. The non-public procedure is a procedure in two phases. In the first phase, every interested party can express his interest. The interested parties must demonstrate that they meet the selection criteria which were published beforehand via the Publications Office of the European Communities. Furthermore, none of the grounds for exclusion may apply. On the basis of these selection criteria, the contracting authority initially selects at least five interested parties, who may then submit a tender. The contracting authority selects the winning bidder, which is awarded the contract, from the tenders on the basis of the award criteria (the lowest price or economically the most advantageous tender).

### 3.4. *The Netherlands Competition Authority (NMa)*

In 1998, the Netherlands enacted its first strong national competition law, which set up an entirely new enforcement authority, the NMa. Now that there has been some experience with using it, including several major actions against bid-rigging cartels in the construction sector, there are plans to improve the enforcement system, with stronger investigation powers and sanctions. Thus, for its first few years, much of the NMa's enforcement effort was devoted to decisions about applications for an exemption from the law's prohibitions. To get results, these cases were selected to avoid controversies about jurisdiction and difficult, complex, novel legal theories. To show that the law was relevant in the Netherlands, the cases would target anti-competitive codes of 'unfair competition' in industry associations and similar groups, because these industry associations and the 'PBOs' that organise several sectors of the Dutch economy were important elements of the traditional way of doing business, and their rules were likely to be an important source of constraints on competition. The NMa is now, since recently, no longer an agency of the Ministry of Economic Affairs, but an autonomous administrative organisation (in Dutch terms, a 'ZBO'). The legislation has also changed the structure of the NMa, replacing the single Director General with a 3-person Board of Directors. That structure provides some assurance

against arbitrariness, which may be considered prudent for a more formally independent body.

### *3.5. Enforcement by the NMa*

To step up enforcement against construction industry cartels, the NMa set up a 30-person task force, including detectives, investigators and information-technology specialists to search computer records. The initial focus was on public projects, following up on the information that had sparked the Parliamentary inquiry: access to one firm's 'accounts' of how the market division pool was monitored. Since then, the NMa has followed tips, carried out dawn raids to examine company records, and commissioned a systematic canvassing of large-scale public construction projects to assess the market conditions that support co-operation and make anti-competitive arrangements feasible. The process took about two years, from the time the key evidence became available in December 2000 until sanctions were imposed in the large-scale cases at the end of 2003. The administrative fines against 22 companies for price fixing, market division, and bid rigging in large infrastructure projects, road maintenance, and other areas, totalled EUR 100.5 million. Six firms were fined over EUR 10 million each. One case was small in scale but nonetheless deserved increased attention because the parties had entered into their agreement after the Parliamentary inquiry was already underway and after the NMa had publicly announced its intention to take enforcement actions. Enforcement has not been limited to the construction industry. Other sectors in which firms have faced substantial penalties for horizontal collusion include cleaning services (total, EUR 17.0 million), shrimp production (total, EUR 13.8 million), mobile phones (between EUR 6 million and EUR 24 million), and veterinary services (between EUR 750,000 and EUR 9.7 million). Most of the NMa's recent formal enforcement initiatives – 14 out of 16 'reports' concerning violations in 2003 – have been aimed at horizontal restrictions. A number of vertical restraints have been considered in the context of applications for exemptions, and vertical price fixing and similar practices have attracted fines in a few cases. The sanctions that are potentially available against actual violations appear to be generally adequate.

### *3.6. Legal Protection in Public Procurement Matters*

The European Remedies Directives<sup>68</sup> specify minimum requirements with which the national legal systems must comply concerning the protection of rights in procurement affairs. These minimum requirements mean that injured companies must have access to the courts and that there must be specific remedies to which injured companies can refer. The administrative appeal process in relation to the use of enforcement instruments is evidently becoming cumbersome. There were over 140 administrative appeals processed in 2003, most involving energy decisions. Legislation is being prepared to streamline this process, principally by providing means to get cases into the courts more quickly. Appeals lie to the Rotterdam District Court, and from there to the Regulatory Industrial Organisation Appeals Court. Judges are showing an increasing interest in the economic motivation and reasoning of competition cases. Their interest may have been awoken by attending course programmes that were aimed at educating them about the subject.

<sup>68</sup> Directive 89/665/EEC as amended by Directive 92/50/EEC, and Directive 92/13/EEC.

#### **4. The Investigation of Potential Corruption: Investigators, Procedures and Penalties**

##### *4.1. Administrative Law: Investigators, Procedures and, Penalties*

###### 4.1.1. The Administration

The coordinating role of the Minister of the Interior is related to the work of the civil servants. In terms of policy at the initiative of this Minister, some policy papers have been published and also the Civil Servants Acts has been amended. Mostly the Minister speaks about integrity and not about corruption. When serious cases of corruption are at issue and the penal enforcement law has a role to play, and the Minister of Justice plays a coordinating role. At the administrative law level there is also the responsibility of the individual administrative authorities on the central and decentralized level. On the national level we find individual ministers and functional decentralisation and on the territorial decentralized level we find the various provincial, municipality and waterboards levels.

###### *The Integrity Bureau of the City of Amsterdam*

The city of Amsterdam employs some 20,000 civil servants for a population of about 800,000. Following the Parliamentary Investigation Committee's results on organised crime and methods of detection, the City Council of Amsterdam has developed quite a wide range of plans and actions aimed at more effectively preventing and fighting corruption within the municipality. A three-year research programme was carried out from 1997 to 2001 in order to identify the most vulnerable persons and fields. The main risk areas were identified in the procurement field and at the managerial level. It was also decided to create the Integrity Bureau whose main aim is to develop and monitor municipal integrity policy. To date, a public prosecutor (seconded, temporarily, from the PPS, but without the powers of a public prosecutor) appointed for three years by the Central Public Prosecutors Office manages the Bureau and 15 other people who work there. The main activities of the Bureau are prevention (charting risks and vulnerabilities, providing assistance by means of risk-analyses and preventive investigations), compliance (internal investigations into suspected breaches of integrity: during these investigations the Bureau can use those investigative powers that belong to the employer of the civil servant investigated) and awareness (providing training courses – 'dilemma-training sessions' – to all civil servants and managers). A code of conduct for all civil servants of the City of Amsterdam is the core written document upon which the courses are based. The Bureau also organises the activities of the Central Registration Office for fraud and corruption, where all the integrity-related situations are registered, and the Report Desk for breaches of integrity which was expressly set up for those who suspect that a case of fraud or corruption has occurred within the administration or who wish to report an integrity-related problem.

###### 4.1.2. The BIBOB Mechanism; Integrity Evaluations by Government Bodies

In 1999, the Ministries of the Interior and Justice introduced the 'BIBOB' Act which was a response to the results of the Parliamentary fact-finding Committee (the 'Van Traa' Committee) which, in 1996, investigated the scope and influence of organised crime in the Netherlands. The Committee concluded that criminal organisations often rely on public services to carry out their illegal activities. The BIBOB law provides for the setting up of a central BIBOB Office within the Ministry of Justice and which supports authorised local authorities in enforcing the BIBOB law. By order of these

local authorities, this Office investigates the integrity of applicants for licences and subsidies. In order to do this, the Office has numerous sources of judicial, financial and police information. As a result of its investigations, the Office assesses the risks and likelihood that applicants will abuse the required facility. These findings will be formulated in a written advice for the local authority. In this advice, the Office indicates the severity of the situation: the threat of abuse is either very serious, serious or not serious.

#### 4.1.3. The Police: Administrative and Criminal (Preliminary) Procedures

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

As the person responsible for allocating the budgetary resources over the different regional forces, the Minister of the Interior is directly involved in managing the police on a national level. The chiefs of the regional police forces formulate rules regarding the administrative management of the regional police forces and receive all relevant information from police administrators and mayors and they can establish policies on regional police force cooperation. When matters also concern the enforcement of penal law, the Minister of Justice has to be consulted. When enforcing activities to maintain public order and to provide assistance, the police operate under the authority of the mayor of the largest town of the region.

A penal procedure is commenced with the pre-trial investigation carried out by the police when there exists a reasonable suspicion that a criminal offence has been committed (Art. 132a of the Penal Procedure Act). The purpose of the pre-trial investigation is to gather information on the offence and the suspect. At the end of their investigation, the police prepare a written report containing the allegations regarding the suspect and other persons and other relevant findings. The police reports may be used as evidence by the court. When the police investigation is terminated, the reports are forwarded to the prosecutor for a decision on an eventual prosecution. If the police investigation cannot be finalised because some further specific investigative activities need to be undertaken, the public prosecutor may request the investigative judge to commence judicial preliminary investigations. He can notably order a witness to make a deposition, allow the use of some special investigative means (telephone tapping, interception of mail) and order a psychiatric examination of the suspect.

In addition to the regional forces, the police have organised six so-called 'Core teams' consisting of about 50 to 90 persons recruited from the regional police forces. These teams are designed to investigate cases concerning serious and organized crime in cooperation with the regional forces. Another specialised unit (the National Investigation Team) pays special attention to financial and economic crime and international requests for mutual legal assistance. This team mainly has expertise in financial and fiscal investigations and large-scale fraud cases. It is organized under the KLPD. The KLPD employs a staff of over 3500, and supplies the regional forces with specialised experts and other resources.

#### 4.1.4. The (Administrative Law and Penal Law) Courts

In the Netherlands there are 19 District Courts (for administrative law and penal law cases), 5 regional Courts of Appeal for criminal cases and 3 national courts (the judicial division of the Council of State, the Central Appeals Tribunal and the Trade and Industry Appeals Tribunal)<sup>69</sup> of (final) appeal for administrative affairs and 1 Supreme Court for penal cases. The regional Courts of Appeal and the Supreme Court each have a procurator general's office attached to them. The judiciary largely manages its own work.

To this end, a Council for the Judiciary has been established consisting of three judges and two representatives of the business sector. The Council is informed of financial requirements and submits a budget proposal for the courts to the Minister of Justice. This is then forwarded to Parliament for a decision. The Council is also responsible for selecting judges. The Council for the Judiciary has no disciplinary powers. However, it ensures that the rules relating to the courts are complied with and supervises events in the courtroom and the development of the courts. It also promotes the further modernisation of the judicial system. There are no specialised courts for dealing with economic crime, but there is one for cases involving competition law. According to the Code of Penal Procedure, minor penal law cases are distributed to individual judges, and panels of three judges deal with more serious cases. The question of experience naturally plays a certain role here. Each of the 19 District Courts has investigating judges who deliver the decisions requested by the Public Prosecutor's Office.

#### 4.1.5. The Ombudsman Institutions: Central and Decentralised Level

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

The NO is appointed, for six years renewable, by Parliament upon a recommendation by a Committee composed of the Vice-President of the Council of State, the President of the Supreme Court and the President of the Netherlands Court of Audit. The NO may be dismissed by Parliament only on the grounds laid down in the Act, which are similar to those that apply to members of the judiciary. About 115 staff is employed at the NO Office.

There are two ways that can lead to a NO's investigation: by a petition from anybody (who has the right to complain about the actions of an administrative authority or a civil servant) or on his/her own initiative. When investigations are terminated, the NO prepares a report with recommendations. It is up to the administrative authority to decide what action should be taken. Sometimes reports contain a recommendation in which there is explicit advice for an administrative authority to act in a certain way. These recommendations are not enforceable by the Courts, but as they are always brought to the attention of Parliament, they do have

<sup>69</sup> The Central Appeals Tribunal is the appeal court in civil servants' labour disputes. The Trade and Industry Appeals Tribunal is responsible for all disputes concerning organs like the Socio-Economic Council, product boards, Chambers of Commerce, etc. The judicial division of the Council of State is in general for other administrative law affairs.

substantial influence. In his annual report of 2001 the National Ombudsman gave an explanation of four reports about integrity in relation to the police.<sup>70</sup>

On 22 February 2005, the External Complaints Procedures Act was published.<sup>71</sup> The Act prescribes uniform arrangements for external complaints procedures and a countrywide system of independent external complaints bodies on central and decentralised levels. The Act is particularly important for municipalities and joint bodies not yet falling within the ambit of the National Ombudsman, because they have to create – from January 1, 2006 – their own external complaints procedure, and, if not, local authorities will automatically fall within the ambit of the National Ombudsman. Most of the rules for external complaints procedures have been integrated in the General Administrative Law Act. In addition, most of the provisions in Chapter II of the National Ombudsman Act are to be transferred to the General Administrative Law Act.

#### 4.1.6. The Netherlands Court of Audit

The Netherlands Court of Audit (NCA) is an independent body, consisting of a board, which is made up of a President and two members, and it employs about 320 staff and produces 60 reports per year. The NCA derives its statutory basis from the Constitution, which stipulates that the Court examines revenues and expenditures of Ministries and, more generally, whether Dutch public funds are collected and spent properly and effectively.<sup>72</sup> The NCA does not have any specific competence or power to investigate cases of corruption like in some other countries, but several reports on corruption, fraud and integrity have been published during the last few years.<sup>73</sup> As regards the fight against corruption, the NCA focuses on preventive measures. These include regularity audits and examining the orderliness and audit ability of financial management on an annual basis and audits of a specific nature, such as: the performance of vital institutions, auditing integrity policies and responding to requests from Parliament. In December 2000 the NCA published an audit report concerning 'Investigation and prosecution on fraud'. The aim of the report was to clarify central government knowledge of the outcome of investigations on fraud (tax evasion, social insurance fraud, fraud in connection with tender procedures) and it revealed that in most cases no prosecutions were carried out. There are a certain number of cases where serious and major irregularities have been discovered. The Minister of Education, Culture and Science and the NCA were asked by Parliament to audit some alleged irregularities. Certain Dutch institutions for Higher Education were suspected of having enlisted a larger number of students in order to receive more state funds.

<sup>70</sup> Annual Report National Ombudsman 2001, p. 273.

<sup>71</sup> *Stb.* 2005, 71.

<sup>72</sup> Local authorities are not included in the list of agencies submitted to the Court of Audit's auditing activities. They have their own internal auditing bodies, especially the larger cities.

<sup>73</sup> Policy on ethical standards at Dutch prisons, *Kamerstukken II* 1999/00, 27 080, nr. 1 e.v. Report of an audit; Integrity and the Netherlands Court of Audit. Background information, March 2002; Corruption survey: Eurosai results; Interim report on integrity policy (summary), Published 30 June, 1998, as part of Regularity Audit 1997; Integrity Management, a base-line measurement in 2004 (*Kamerstukken II* 2004/05, 30 087, nr. 1 e.v.); Calls for tenders by NS Railinfrabeheer, published 28 June, 2001; Investigation and prosecution of fraud, 14 December, 2000; Tackling illegal employment; Fighting Fraud, the situation in 2004, published 30 September, 2004; VAT fraud working group; Questionnaire on fraud and corruption; Investigation and prosecution of fraud, published 14 December, 2000.

#### 4.2. *Penal Law: Investigators, Procedures and Penalties*

Relatively speaking, investigations into corruption are frequently conducted by the regular police.<sup>74</sup> The National Police Internal Investigation Department (NPID) is also an important player in this field. In addition to regular police authorities, Netherlands law enforcement consists of numerous special agencies. One third of the investigations into corruption result in the prosecution of one of the primary suspects. On average, every year 33 persons receive a subpoena in relation to corruption. The main reason for the public prosecutions department to waive prosecution is the execution of a disciplinary sanction by the employer of the corrupted public servant. If the latter is suspended or fired, and the public prosecutions department is convinced that prosecution is not in the general interest, the (criminal) file will be closed. In nine out of ten cases the prosecution of a suspect leads to a criminal conviction. Most people who are convicted of corruption are sentenced to probation and/or a fine. Over a period of ten years, only 77 persons have been incarcerated, most of them were sent to prison for a relatively short period of time. The Amsterdam study reveals a gap between the sentence that the public prosecutor has in mind and the final decision by the judge. The latter takes several circumstances into account – i.e. publicity, organisational chaos at the workplace of the public servant – and tends to interpret these elements to the advantage of the convicted persons.

##### 4.2.1. The Public Prosecution Service; the Principle of Prosecution and Immunities

Article 124 of the Judicial Organisation Act provides that the Public Prosecution Service (PPS) is responsible for the criminal enforcement of the legal system and for other tasks as established by law. The Minister of Justice is politically responsible for the Public Prosecution Service. The PPS consists of (Art. 134 Judicial Organisation Act): the Board of Procurators General and its Office, the district Public Prosecutors Offices, the National Office of the Public Prosecution Service and The Public Prosecutors Offices at the Courts of Appeal.

The PPS is headed by a Board of Procurators General (BPG), which consists of three to five members, and takes its decisions collegially. The BPG determines policies with regard to investigations and prosecutions. It also supervises the National Public Prosecutor for Corruption and the NPID.

The BPG may give instructions to the chief public prosecutor of the district Public Prosecutors Offices concerning their tasks and powers in relation to the administration of criminal justice and other statutory powers, i.e. the supervision of the police. Such an instruction may be of a general criminal policy nature or concerning an individual criminal case. Prosecutors are legally bound by these instructions. According to Article 127 of the Judicial Organisation Act, the Minister of Justice is empowered to give general or specific instructions on the exercise of the PPS's tasks and powers. Those instructions can also relate to the investigation and prosecution of individual cases. Prosecutors are required to follow these instructions. A ministerial instruction not to investigate or not to prosecute a criminal offence has to be sent to Parliament together with the BPG's opinion. The BPG is responsible for 19 regional departments. There is a Public Prosecutor's Office in every town, which is the seat of a court. A Chief Public Prosecutor, who is responsible for ensuring that the policy of the PPS is implemented in his or her district, heads it. The public prosecutors' offices employ some 2,000 staff, 500 of whom are public prosecutors.

<sup>74</sup> See: Amsterdam Report 2005, p. 146.

The five courts of appeal are each assigned their own Public Prosecutor's Office. There is also a 'prosecution office' at the Supreme Court, the Procurator General. At the regional public prosecutors' offices there are currently seven centres with experts for certain types of fraud-related crime, for example in Haarlem for economic crime and public health crime and in Rotterdam for fraud causing damage to the European Union and for combating crime in connection with animal feed. Furthermore, there is a National Office of the Public Prosecution Service in Rotterdam for the prosecution of serious international organised crime.

The tasks of the public prosecutors' offices include responsibility for police work in criminal investigation proceedings. According to Article 149 of the Code of Penal Procedure ('investigations, preliminary inquiries'), the public prosecutor institutes an investigation after being informed of a criminal offence, provided the case is within the jurisdiction, and is responsible for both that investigation and the police work involved. The police is required to refer cases involving specific types of offences to the public prosecutor, who decides whether to institute investigations or exercise his or her discretionary prosecution powers. Although there are currently no firm rules in the Netherlands for deciding in what cases a criminal offence must be prosecuted, a Directive by the BPG 'on the investigation and prosecution of corruption of officials' was adopted on 8 October 2002 and came into force on 15 November 2002.

#### 4.2.1.1. Prosecution Principle

In the Netherlands prosecutions are discretionary. Prosecutions are conducted according to the principle of expediency or advisability. Article 167 of the Netherlands Code of Penal Procedure allows the public prosecutor to discontinue proceedings in the public interest. The Public Prosecutor has discretionary powers to dismiss cases and also has the power to settle cases out of court by the use of a 'conditional waiver' or 'transaction'. A 'conditional waiver', which is not regulated by law, is given when the prosecutor believes that an alternative to a criminal trial is preferable. Such a waiver could, for instance, be conditional upon alcohol or drug treatment, community service, or restitution to the victim. A 'transaction' is governed by Article 74 of the Penal Code, and essentially involves the payment of a sum of money by the defendant to avoid criminal proceedings. It can also involve the renunciation of title to or the surrender of objects that have been seized and are subject to forfeiture and confiscation, or the payment of their assessed value.

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

The Directive by the BPG 'on the investigation and prosecution of corruption of officials' leaves quite a broad autonomy to the public prosecutors in the decision-making process. In addition to the Directive, there is also a set of policy rules for the PPS ('Guidelines for the handling of sensitive cases') that came into force on 15 June 2001. According to these Guidelines, the public prosecutor cannot take a decision completely autonomously.

#### 4.2.1.2. Immunities

For immunities from investigation, prosecution and adjudication for corruption offences Article 42, second section, of the Dutch Constitution stated, ‘the King is immune’. This means that the King enjoys complete immunity and therefore proceedings cannot be brought against him for any crime whatsoever. Article 71 of the Constitution states that Members of Parliament, Ministers, Under-Secretaries of State and other persons taking part in the deliberations may not be prosecuted or otherwise held liable in law for anything they say during Parliamentary sessions or any meetings of its committees or for anything that they submit to them in writing. This form of immunity relates to prosecution for deeds in the exercise of the above-mentioned persons’ functions.

The Dutch Constitution recognises, as a general rule, also the possibility that political officials may be investigated, prosecuted and arrested just as any other citizen. Nonetheless, Article 119 contains an exception:

‘Members of the States General, Ministers, Under-Secretaries of State shall be tried before the Supreme Court on account of a serious offence involving abuse of office, during and after their period in office. The instruction to prosecute shall be issued by Royal Decree or by decision of the Second Chamber’.

The decision to prosecute the persons mentioned in Article 119 for serious offences involving abuse of office thus remains entirely in the hands of political bodies: the government (‘by Royal decree’) or Parliament (‘by decision of the Second Chamber’). The expression ‘Serious offences involving abuse of office’ refers notably to Title XXVIII of the Penal Code and includes also the passive bribery of domestic public officials (Arts. 362 and 363). Article 119 was established for two main reasons: 1) to set up a special procedure aimed at providing political officials with protection against prosecution ‘for rash reasons’ and 2) to guarantee that a prosecution (against a political official) which is deemed necessary is certainly initiated. The government and the Second Chamber are only entitled to instruct the prosecution of those persons mentioned in Article 119. This means that the Public Prosecutor cannot in any case initiate prosecutions.

#### 4.2.2. The National Public Prosecutor for Corruption, the Netherlands National Police (NNP) and the National Security Service (AIVD); Investigative Means and Witness Protection

In 2000, the Ministry of Justice created a National Public Prosecutor for corruption and the Netherlands National Police (NNP). The National Office of the Public Prosecutions Service appointed, within the National Organised Crime Prosecution Unit, a Public Prosecutor as the national corruption officer as of 1 December 2000 and he/she has no more powers than any other Public Prosecutor. This person directs investigations into the corruption of foreign public officials and can advise, assist or direct national corruption investigations. Furthermore, this person is responsible for the coordination and control of the Criminal Intelligence Unit (CIE) of the NNP and works very closely with the NNP. The NNP is responsible for investigating cases of corruption involving police officials (usually senior officials), members of the judiciary and prominent office holders. The NNP is involved in the investigation of about 75 corruption cases per year. About 40% of these cases concern police officers. The task of the National Security Service (AIVD, the former BVD) is to protect

national security. This also covers taking security measures for the protection of the democratic legal order. The AIVD is also involved in promoting integrity within the public administration. The powers are anchored in the Intelligence and Security Services Act (*Wiv*) and the Security Investigations Act (*Wvo*).

Since the act governing special investigative means (*BOB Act*) came into force, a large number of special investigative means have been regulated in the Code of Penal Procedure. The rule for all these powers is that their use must be in the interest of the investigation and a Public Prosecutor must give an order to apply a particular measure. They can almost always be used within the framework of corruption investigations. In practice they are usually recommended for a period of four weeks and around the time that the order is coming to an end, an assessment of the situation and as to whether the order can be extended is made. The following special investigation means can be used: systematic observation; infiltration; pseudo-purchase or pretending to provide a service; systematically obtaining information; entering secure establishments; direct monitoring; telephone tapping; telephone prints. The law also permits the deployment of a citizen for the benefit of systematically obtaining information, for the infiltration of citizens and citizens making pseudo-purchases or pretending to provide a service.<sup>75</sup>

Persons who play a role in penal investigations can be subject to protective measures prior to, during and after a penal procedure. The measures cover a wide range of possibilities, which make it possible to create specific circumstances for every case, including corruption cases. A special witness programme was designed in 1995, following a report from a special working party. A public prosecutor is specifically charged with nationwide authority over the activities. The Dutch authorities have been working specifically with the witness protection programme in which the measures that can be taken are very varied and range from a witness 'going into hiding' in a safe place for a short time, to moving the witness and his family to a different country, and changing his identity.

#### 4.2.3. The Fiscal Intelligence and Investigation Service and the Economic Investigation Service

The FIOD/ECD is a special unit under the Ministry of Finance whose main tasks are: a. to investigate fiscal, financial, economic fraud and customs fraud; b. to trace, collect, process and provide information concerning tax and customs; c. to contribute to the prevention of/and combating organised crime. The FIOD/ECD employs about 1100 officers. They concentrate their investigative activities on: integrity in the financial markets, combating money laundering, VAT fraud, drug trafficking and misuse of beneficial ownership. In addition to the responsibility for tracing corruption 'in society', they are also responsible for internal investigations within the tax and customs authorities. The FIOD/ECD also conducts investigations into integrity breaches by tax officials. On average (over the last four years) the integrity investigations have resulted in approximately 35 reports per year, which include: disciplinary actions, examination of the facts and criminal investigations. One or two cases of corruption per year are revealed, so that corruption is not perceived to be a big problem.

<sup>75</sup> Articles 126v up to and including 126z.

## **5. Conclusions and Recommendations**

In the Netherlands there are more corruption cases than penal law court decisions on corruption; the administrative law approach in corruption policy was underestimated for a long time. The Netherlands Parliament and the Fourth Power institutions have played an important role by producing investigation reports. Also there are critical signals to the Dutch Government's anti-corruption policy. Now the Dutch Government should develop a real preventive and repressive anti-corruption policy with clear definitions of acts of corruption and the norms of Good Governance. On the national, regional and international level these norms are completely accepted. This anti-corruption policy contains norms for the administrative authorities and civil servants, which can be elaborated by using administrative law instruments for implementation and enforcement. The GALA should be the main general framework for this and it can be elaborated in specific acts like the Civil Servants Act and the Competition Act. The administrative instruments and enforcement mechanisms used by the Netherlands Competition Authority (NMa) illustrates the success of the new administrative law developments. Also the activities of the administrative authorities at the decentralized level, the effectiveness of the BIBOB mechanism, the work of the police and the Courts make an integral approach to anti-corruption policy necessary. Reports by the Ombudsman institutions and the Netherlands Court of Audit on corruption and fraud and the development of norms of good administration makes the administrative law approach complete. Only when the administrative law method will be completely developed will not only the most serious penal law cases of corruption be on the table, but also the less important cases. That is crucial for the future of the Dutch administrative authorities and their civil servants.

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Cite as: G.H. Addink & J.B.J.M. ten Berge, *Study on Innovation of Legal Means for Eliminating Corruption in the Public Service in the Netherlands*, vol. 11.1 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (May 2007), <<http://www.ejcl.org/111/article111-1.pdf>>.