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Seventh Edition

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PREFACE

We are pleased to present the seventh edition of *Global Legal Insights – Bribery and Corruption*. This book sets out the legal environment in relation to bribery and corruption enforcement in 28 countries and one region worldwide.

This edition sees the addition of new chapters relating to Belgium, Poland, Hong Kong and the Czech Republic, as well as an Asia-Pacific overview. In addition to addressing the legal position, the authors have sought to identify current trends in enforcement, and anticipated changes to the law and enforcement generally.

Incidents of bribery and corruption often involve conduct and actors in several different jurisdictions. As enforcement activity increases around the world, attention is being focused on particular problems companies face when they seek to resolve cross-border issues.

Coordinating with multiple government agencies can be challenging at the best of times, and can be even more difficult when dealing with bribery and corruption laws that have been amended or have just entered into force. Sometimes a settlement in one jurisdiction can trigger a further investigation in another. Stewarding a company through these sorts of crises involves not only dealing with today's challenges, but thinking about the next day, the next week, the next month, and beyond, on a global stage.

We are very grateful to each of the authors for the contributions they have made. We hope that the book provides a helpful insight into what has become one of the hottest enforcement topics of current times.

Jonathan Pickworth & Jo Dimmock
White & Case LLP
November 2019

Netherlands

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Brief overview of the law and enforcement regime

Under Dutch law, multiple forms of bribery are criminalised in the Dutch Criminal Code (**DCC**). A distinction is made between bribery of (foreign) public officials and private commercial bribery, depending on the capacity of the person who was bribed. Furthermore, a distinction is made between active bribery, which relates to the briber's conduct, and passive bribery, which relates to the person who was bribed.

Bribery of public officials

Active bribery

Active bribery of public officials is regulated in Articles 177 and 178 DCC. Article 177 DCC criminalises making a gift or promise, or providing or offering to provide a service, to a public official: (i) with the aim to induce him or her to perform an act or to refrain from acting in the performance of his or her duties; or (ii) as a result or as a consequence of acts or omissions of the public official in the current or former performance of his or her duties. The situation as mentioned under (i) also applies if the bribed person has the prospect of an appointment as public official, once such appointment has followed.

Whether the public official acts, will act or has acted in accordance with or contrary to his duty, is of no relevance. Furthermore, the completion of the offence does not require the gift, promise or service to be accepted by the public official, nor that the public official responds in any way to the gift, promise or service by acting or refraining to act. Solely the making of a gift or promise, or providing or offering to provide a service, with the aforementioned intention, is punishable as such. Therefore, bribery attempts are also punishable under Dutch law. Moreover, the Dutch Supreme Court ruled that Article 177 DCC not only applies in the situation that there is a direct link between the gift or promise, on the one hand, and a concrete consideration on the other hand; it also covers the situation of making a gift or promise in order to establish or maintain a relationship with the public official in order to gain a (future) preferential treatment. In addition, the Dutch Supreme Court ruled that gifts and promises in the private sphere can also be made in the context of Article 177 DCC, since it cannot be excluded that the briber had the intention to bribe the public official and that the public official also accepts this.

Passive bribery

Passive bribery of current, future or former public officials is criminalised in Articles 363 and 364 DCC. Article 363 DCC prohibits a public official to accept or ask for a gift, promise or service: (i) in order to be induced to act or refrain from acting in the performance of his duties; or (ii) as a result or consequence of acts or omissions of the public official in the current or former performance of his or her duties. With regard to accepting a gift, Article

363 DCC requires that the public official does so while knowing or reasonably suspecting that the purpose thereof is to induce him or her to act or refrain from acting.

Articles 177 and 363 DCC are also applicable to bribery of judges. A separate criminalisation applies in Articles 178 and 364 DCC for the situation in which a judge is (actively or passively) being bribed with the aim or purpose to: (i) influence the decision in a case which is subject to his or her judgment; or (ii) obtain a conviction in a criminal case. Bribing a judge, or an attempt to bribe a judge, with the intention as mentioned under (i) or (ii), tends to be considered more severely than bribing a public official, which is the reason why higher maximum penalties apply. Whether the judge is actually influenced is of no relevance. Criminal liability exists, even if the (i), decision or (ii), conviction that one tries to obtain is correct and justified.

Definition of public official

The question is when a bribed person qualifies as a public official. The DCC does not contain a definition of the term *public official*. The Dutch Supreme Court has ruled in the past that someone qualifies as a public official if he or she is appointed to a public position by a public authority to perform a part of the tasks of the state or its bodies, regardless of whether this person qualifies as a public official according to labour law. A definition in more recent case law seems to show a broader interpretation, namely: a person who is appointed under the supervision and responsibility of the government in a function to which a public character cannot be denied. Article 84 of the DCC extends the definition of public official to, amongst others, members of public representative bodies and members of the armed forces.

According to Articles 178a and 364a DCC, the provisions on bribery of public officials are also applicable to public officials of a foreign state or organisation governed by international law.

Gift, promise or service

According to case law of the Dutch Supreme Court, each transfer of something material (for instance, money, presents, discount, etc.) or immaterial (for instance, sex) which represents, or is of value to the receiver, constitutes a gift. Remarkable gifts that we have seen so far are, for instance, expensive watches, football tickets, flower subscriptions, paintings (sometimes considered ugly by the recipient and therefore questionable whether this represents any value to the receiver) and donations to the local carnival.

A promise comprises the offender's word to a public official that something with value will be given (in the future). Therefore, offering money is considered to be a promise. A service can, for instance, consist of junkets and beanfeasts, or offering a vacation home for a special rate.

Whilst in principle, anything of value can constitute a bribe, the legislative history indicates that the legislator accepts certain gifts or promises to be permissible (small gifts that do not represent a serious threat of influencing a public official). In the past, there were discussions about the question of whether or not more clarity had to be given on what was being considered a permissible/socially acceptable, *vs*. a punishable, gift or promise. However, the legislator considered it to be too difficult to provide objective criteria in this regard, due to the fact that the permissibility/social acceptance of the gift can depend on multiple factors (for instance, currency depreciation and norms and values). Instead, the legislator noted that the Dutch Public Prosecution Service (**DPPS**) itself could provide guidance by publishing own guidelines on this matter.

Since 2002, the DPPS has published Instructions on the investigation and prosecution of public corruption in the Netherlands (next to the Instructions on the investigation and prosecution of public corruption abroad), in which the DPPS describes which factors it takes into account in determining whether or not to start investigation and/or prosecution. The Instructions do not mention a strict limitation regarding the value of the gift in euros. Whilst the Code of Conduct for Integrity in the public sector states that public officials are in principle allowed to accept gifts of a maximum of €50 per year, the Instructions indicate that it does not mention an amount in euros. This is because the multiple making/acceptance of gifts worth €50 can be worthy of prosecution on the one hand, while on the other, a relatively small, one-off payment can lead to official behaviour that makes the case prosecutable. Dutch case law also shows that gifts with a value of less than €50 can constitute a bribe (if it is being given with the intention to induce the public official).

Private commercial bribery

Both active and passive commercial bribery are criminalised in Article 328*ter* DCC.

Passive private commercial bribery

Passive private commercial bribery concerns a person, not being a public official, who, in the (current, former or future, once appointment has followed) service of his employer or acting as an agent, as a consequence of what he has undertaken or refrained from undertaking contrary to his duty, requests or accepts a gift, promise or service. In this case, there should be a direct link between the gift, promise or service and the compensation of the person being bribed. The kind of compensation is not clarified by law. Article 328*ter* DCC does require that the compensation should be given contrary to his or her duty as employee or agent. According to Article 328*ter* DCC, "contrary to his duty" in any case means that the employee or agent, contrary to good faith, fails to disclose to his employer or principal the request for or acceptance of a gift, promise or service.

Active private commercial bribery

Active private commercial bribery exists if the person making the gift or promise, or providing or offering a service, knows or can reasonably assume that the employee or agent, by receiving the gift, promise or service, acts contrary to his or her duty. This also includes the situation in which someone makes a gift or promise, or provides or offers a service, to a former employee or agent or to a future employee or agent, once appointment has followed. Also in this situation, "contrary to his duty" in any case means that the employee or agent, contrary to good faith, fails to disclose to his employer or principal the request for or acceptance of a gift, promise or service.

Penalties

The maximum penalties for bribery of public officials vary and can consist of 6 to 12 years' imprisonment or a fine up to €83,000, per violation, depending on the intention of the bribe and the status and function of the public official. Legal entities may be subject to a maximum fine of €830,000 or, if the Court rules that such fine is not a proper punishment for the crime, a fine of 10% of the annual turnover of the company. We note that we have not yet seen such fines being imposed by the Court for bribery offences.

The maximum penalties for private commercial bribery consist of four years' imprisonment or a fine up to €83,000. Legal entities may be subject to a maximum fine of €830,000 or, if the Court rules that such fine is not a proper punishment for the crime, a fine of 10% of the annual turnover of the company.

In practice, when deciding upon a penalty, the Court can take into account the so-called

LOVS-guidelines, which include starting points for sentencing. These guidelines were made after research of sentences in practice and after consulting all Dutch Courts. The guidelines provide a framework for the Courts, to which they can refer in order to satisfy the convicted person that their sentence is in accordance with national practice. The fraud section, which includes bribery, contains seven categories depending on the financial disadvantage arising as a consequence of the crime. Penalties vary from one week to two months' imprisonment (€10,000 financial disadvantage) to 24 months' imprisonment (€1 million or more financial disadvantage).

However, the Courts are not bound by the guidelines. They are responsible for determining and imposing appropriate penalties in individual cases. According to the LOVS-guidelines, different factors can be taken into account in this respect, such as the duration of the crime, the advantage gained from the crime for the suspect, whether the suspect is an individual or legal entity, and the duration of the criminal procedure.

Furthermore, the DCC provides for certain measures that may be imposed by the Court in the case of a conviction. Relevant measures in this respect are, for instance, a professional prohibition and the recovery of illegally obtained assets.

Settlements

Apart from bringing a case before the Court, which could lead to a conviction and aforementioned penalties, the DPPS is also entitled to settle a case itself with a suspect. In the case of bribery, we have seen a few out-of-court settlements with large amounts of fines and confiscation. This will be discussed further below. In any event, the overall picture appears to be that suspects pay much higher fines when settling a case with the DPPS than the Court is used to imposing. In addition, it is the DPPS's policy that settlements representing amounts of €50,000 or more will be made public via a press release. Large bribery cases that have been made public via a press release include Ballast Nedam (2012), SBM Offshore (2015), Vimpelcom (2016) and Telia Company (2017).

Enforcement

The DPPS is responsible for the investigation and enforcement of criminal offences. The Public Prosecution Office in Rotterdam has appointed a special prosecutor in charge of coordinating bribery cases. This prosecutor has particular expertise in investigating and prosecuting bribery cases and provides assistance to local public prosecutors, who are authorised to investigate and prosecute bribery cases in their jurisdictions.

To guarantee the impartiality of the investigation as far as possible, the National Police Internal Investigations Department is charged with investigating cases of public bribery involving high-ranking officials, judges and politicians. In other cases of (public and commercial) bribery, the investigation can be conducted by regular police forces as well.

The starting point is that the DPPS may only prosecute offences which are criminalised by law (principle of legality, Article 1 DPC). If an offence is criminalised by law, the DPPS can decide to start prosecution (so-called discretionary principle, Article 167 DCC). The DPPS may also refrain from prosecution on public-interest grounds. Furthermore, the DPPS is entitled to use an alternative solution (such as offering a settlement) in a case. Mitigating circumstances may be taken into account by the DPPS in deciding whether or not to prosecute in a specific case. In addition, as discussed, the DPPS has drafted its own guidelines (which are publicly available) which can be used by the DPPS in deciding how to deal with a criminal case. The DPPS Instructions on the investigation and prosecution of public corruption in the Netherlands and abroad contain factors which the DPPS takes

into account when deciding on the opportunity of prosecution in bribery cases, such as:

- the initiator of the gift;
- the value of the gift (as discussed above);
- the degree to which the relevant civil service organisation meets the integrity policy prescribed in the Civil Servants Act;
- the (social) acceptance of the gift;
- whether or not there have been actions contrary to the organisation's integrity code of conduct;
- the secrecy of the gift;
- the frequency of the gift;
- the relationship between the provider and recipient;
- the function of the briber public official in terms of status, relation to colleagues and content;
- the effect on the government;
- the possibility of alternative measures, such as those involving the public official in a disciplinary procedure; and
- the consequences of the official's actions.

If the DPPS decides not to prosecute a certain person, interested parties may file a complaint against such decision with the Court of Appeal (Article 12 DCC). The Court of Appeal assesses the complaint and – if it finds the complaint to be well-founded – may order the DPPS to start prosecution. However, this does (solely) mean that the DPPS should bring the case before a criminal judge, and does not particularly mean that someone will be convicted for a criminal offence by the criminal judge.

Jurisdiction

According to Article 2 DCC, Dutch criminal law is applicable to anyone who commits a criminal offence in the Netherlands (the so-called principle of territoriality). The DCC also establishes jurisdiction for the DPPS for certain types of bribery committed abroad. For instance, the DPPS has jurisdiction to prosecute, amongst others, the following persons: (i) a Dutch national who commits (public or private commercial) bribery abroad; (ii) the bribed Dutch public official abroad; and (iii) anyone who bribes a Dutch public official abroad. For these situations, the DCC requires that the (criminal) act is also punishable in the foreign country where it has been committed.

Limitation periods

The limitation period depends on the maximum penalty that can be imposed for the specific criminal offence (Articles 70 and 71 DCC). In the case of bribery, the limitation periods vary from 12 years (for general active/passive public and private commercial bribery) to 20 years (for bribery of a judge in order to gain a certain decision in a case that is subject to his or her judgment), provided that no aggravating circumstances apply. No limitation period applies for bribing a judge in order to gain a conviction in a criminal case.

Associated criminal offences

Bribery hardly ever comes alone. The most frequently related criminal offences are: forgery, money laundering, fraud and tax offences.

Overview of enforcement activity and policy during the last year

Though the DCC has contained several provisions on bribery for decades, enforcement of bribery action had a limited priority for the DPPS until the last few years. It can only be guessed at, whether this lack of enforcement was linked to the fact that the Netherlands has always been ranked high and therefore (very) clean in Transparency International's *Corruption Perception Index* since the 1990s. Nevertheless, the Netherlands was criticised by the OECD Working Group on Bribery in International Business Transactions (the **Working Group**), especially in its report of 2012, in which it stated that it had "*serious concerns that the overall results of foreign bribery investigations and prosecutions to date are too low*".

An OECD press release following that report stated that the Netherlands was failing to vigorously pursue foreign bribery allegations, and must do more to enforce its foreign bribery laws. The fact that 14 out of 22 foreign bribery allegations did not result in the opening of an investigation, called into question the Netherlands' ability and proactivity in investigating and prosecuting foreign bribery, and therefore triggered such statement. As a consequence, the Working Group made numerous recommendations on the Netherlands's implementation and enforcement of the OECD Anti-Bribery Convention and related instruments. Additionally, Transparency International reported in 2014 that the Netherlands had little or no enforcement activity.

Since these reports, the (foreign) bribery enforcement culture seems to have gone through significant changes. The OECD Working Group on Bribery reported in 2015 that the Netherlands demonstrated significant progress with regard to enforcement, as it had opened seven new foreign bribery investigations since December 2012, bringing the total number to 16 since 2001. The Working Group reported positively on the out-of-court settlements that the DPPS reached with SBM Offshore (US$ 240 million, 2014), Ballast Nedam (€17.5 million, 2012) and KPMG Accountants NV (€7 million, 2013). According to Transparency International's *Progress Report 2015*, the Netherlands moved from little or no enforcement activity to "Little Enforcement".

As of 1 January 2015, amendments to (foreign) bribery provisions of the DCC entered into force. The amendments, amongst other things, contained an increase of the maximum penalties for foreign bribery, to six years of imprisonment for individuals and up to 10% of annual turnover for legal entities. In addition, promises by the Netherlands to increase the resources of Dutch anti-corruption bodies resulted in an extra budget allocation to intensify the fight against corruption since 2016. Over the last few years, the DPPS reached large settlements with telecom company VimpelCom Ltd (US$ 397.5 million, 2016), Telia Company AB (US$ 274 million, 2017) and ING Bank NV (€775 million, 2018). In addition, the VimpelCom settlement (2016) and Teliasonera settlement (2017) were close collaborations between the DPPS and foreign state authorities, which shows that the DPPS investigations are increasingly gaining a cross-border character.

Other recent developments that were significant in Transparency International's *Exporting Corruption* report 2018 include: the Dutch Whistleblower's Authority Act, which entered into force in 2016; increased public awareness, following the 'Panama Papers', that Dutch 'mailbox companies' pose a risk for the Netherlands' financial integrity; and a greater focus by the DPPS on the role of service providers in facilitating foreign bribery.

Despite these efforts, Transparency International's *Exporting Corruption* report 2018 concludes that there is still too limited enforcement on corruption in the Netherlands, because to date, only one foreign bribery case (against Takilant Ltd) has been brought to court, and that was a trial *in absentia*. This conclusion has led to Parliamentary questions. The Minister

of Justice and Security answered that the number of foreign bribery cases that have been investigated has increased since 2013. Some of these are still under investigation while other, new investigations have started. According to the Minister, investigating foreign bribery cases is very labour-intensive and time-consuming and therefore the results of the increased efforts will become apparent over time. The DPPS expects the upward trend to continue.

So far, the DPPS seems more eager to start prosecution in national bribery cases, especially in cases concerning bribery of public officials. For instance, the DPPS charged a Dutch politician for bribery offences, which case resulted in a conviction in the first instance and appeal (verdict on appeal in 2017 and confirmed by the Supreme Court in 2019). In June 2019, the DPPS ordered 12 months' imprisonment for a public official and six months' imprisonment for a former public official for alleged bribery offences. However, the Limburg district court acquitted the (former) public officials. In the same month, the Overijssel district court convicted a former police chief for bribery and imposed a sentence of one year's imprisonment (of which six months were suspended). In October 2019, the National Police Internal Investigations Department raided offices of two public officials in The Hague who are currently suspects in a corruption case.

In recent years, the DPPS has prosecuted high-placed executives of, amongst others, Dutch railway company NS, and requested the court to impose imprisonment sentences of up to one year. However, all suspects were acquitted, which was seen as a heavy defeat for the DPPS (verdict in December 2017).

Since last year, intense discussions have arisen about DPPS enforcement policy in major cross-border criminal cases, some of them involving bribery offences. The DPPS is being criticised for certain decisions it took, for instance, in the Libor affair (Rabobank) and, more recently, the ING Bank case. The criticism includes so-called back-room politics of the DPPS, of which it is being said that it closes agreements with suspected multinationals without providing (enough) transparency. The DPPS is also being criticised for settling such major cases out of court with multinationals and not bringing the responsible individuals before the Court, while small(er) legal entities and the involved individuals are often being dragged through long criminal proceedings, with all the associated consequences. This is also why the term "class justice" is often heard these days.

Another recent development in the enforcement landscape is that the DPPS demands that a suspect has to explicitly admit guilt of certain actions in order to reach an out-of-court settlement. Whilst the DPPS has not yet clarified what this condition exactly includes (admission of guilt to specific criminal actions, or perhaps a certain admission that, with hindsight, things could have been done in a better way), this also attracted a lot of criticism, especially from defence counsel.

These developments show that the DPPS, also in bribery cases, nowadays sets high requirements for suspects to gain an out-of-court settlement. In April of last year, the Dutch *Financial Times* reported that Ernst & Young had declined a proposal for an out-of-court settlement for its involvement in the aforementioned VimpelCom case and, as a consequence, decided to let the DPPS bring the case before the Court. However, it is unclear if the condition of admission of guilt played a (significant) role in this decision.

Law and policy relating to issues such as facilitation payments and hospitality

Facilitation payments

As a starting point, for criminal liability on the basis of Dutch (criminal) law, the aim of a certain payment, etc. to a public official is not relevant. Therefore, strictly speaking,

'facilitation payments' can lead to criminal liability as well. However, according to the DPPS Instructions on investigation and prosecution of public bribery abroad, the DPPS does not consider it appropriate to conduct a more rigorous investigation and prosecution on tackling bribery of foreign public officials than is called for by the OECD Convention. This means that payments which, in terms of the OECD Convention, are considered to be 'facilitation payments' will, in general, not lead to prosecution. The Instructions mention a few factors that, according to the DPPS, weigh against prosecution, namely:

- It concerns acts or omissions to which the official concerned was already legally obliged. The payment in no way had a distorting effect on competition.
- It concerns small amounts, in absolute or relative terms.
- It concerns payments to lower officials.
- The gift must not be kept secret but be included transparently in the accounts of the company.
- The initiative to the gift must have come from the foreign official.

Hospitality

As discussed, in principle, anything of value to the recipient can constitute a bribe. Therefore, providing or accepting gifts and hospitality, also (seemingly) for promotional purposes, can qualify as bribery. Of relevance is the answer to the question of whether or not the intention to induce, as mentioned above, exists.

Key issues relating to investigation, decision-making and enforcement procedures

Although Dutch law does not contain a statutory provision that provides for an obligation or process for self-reporting bribery and corruption cases, Dutch case law shows that various factors can be taken into account as mitigating circumstances by the DPPS when reaching a settlement, as well as by the criminal judge when deciding the level of penalties, such as:

- voluntary disclosure of wrongdoing/self-reporting;
- cooperation with enforcement authorities through the investigation;
- existing prevention and detection measures, such as risk-assessment, training and detection mechanisms;
- commitments to implement new prevention and detection measures; and
- assistance in investigation and prosecution (of individuals).

Dutch law does not recognise the concept of a "plea bargain" as such. However, according to Dutch law, the public prosecutor is authorised to settle a case under certain circumstances and under certain conditions, where settlement could, for instance, include paying a certain amount of money (as discussed).

Whilst the Dutch Whistleblower's Act has been in force since 1 July 2018, up until now it has not proven very effective. Transparency International reported, in its 2018 *Exporting Corruption* report, that there is still weak protection for whistleblowers. These days, it is often heard that there are too many reporting points, which also causes difficulties for whistleblowers in reporting wrongdoing. It is expected that the new EU whistleblowers' directive will provide more clear rules and additional protection for whistleblowers.

In the past, some Dutch whistleblowers became famous in the Netherlands for standing up against (alleged) criminal offences, including bribery, occurring within their companies.

For instance, the following Dutch criminal cases came to light via whistleblowers: SNS Fraud case (2013); SBM Offshore (2012); the Construction Fraud case (1990s); and the housing association Vestia case (2012).

Corporate liability for bribery and corruption offences

Corporate criminal liability

Legal entities

According to Article 51 of the DCC, both individuals and legal entities are capable of committing criminal offences. It follows from Dutch case law that a legal entity can be held criminally liable for criminal offences of individuals (for instance, employees) if these offences can be 'reasonably attributed' to the legal entity, which depends on the specific facts and circumstances of the case. According to the Dutch Supreme Court, an important point of reference in this context is whether the offence (of the individual) took place within the 'sphere' (context/interest) of the legal entity. This can be the case if one or more of the following criteria apply:

(i) it concerns an act or omission of someone who works for the benefit of the legal entity either via an employment contract or otherwise;

(ii) the act or omission fits within the normal business activity of the legal entity;

(iii) the act or omission has benefited the legal entity (financially or otherwise) in the performance of its business; or

(iv) the legal entity was able to prevent or influence whether the act or omission would occur but instead accepted the act or omission or similar conduct. In this respect, the failure to exercise due care is considered to be evidence of the act or omission.

It follows from this case law that a legal entity can defend itself by arguing that the aforementioned criteria have not been met. However, case law shows that in practice, Courts consider these criteria to be met very soon, especially in the situation where (sometimes solely) criteria (ii) applies. In determining whether a legal entity should be held criminally liable, the Court can take into account whether or not the entity had procedures in place to prevent criminal behaviour (this especially relates to criteria (iv)). However, Dutch law does not provide for a statutory defence if a legal entity had adequate procedures in place to prevent criminal behaviour as such. Unlike, for instance, the UK Bribery Act, the DCC also does not criminalise solely the failure to prevent bribery.

Individuals

According to Article 51 DCC, if criminal liability of the legal entity has been established, individuals who ordered the commission of the criminal offence or actually directed the unlawful behaviour may also be prosecuted and convicted for such criminal offences. According to Dutch case law, criminal liability for an individual could exist when he or she, while he or she was authorised and reasonably obliged to take measures to prevent or end the criminal conduct, knowingly accepted the likely change that the criminal conduct would occur. By doing so, the individual is considered to have intentionally facilitated the criminal conduct. It often concerns persons holding managerial or legal positions within the legal entity. However, the mere circumstance that a person is a director of the legal entity is not sufficient to hold him or her criminally liable. On the other hand, such a legal status is no requirement. Someone who is not employed by the legal entity can be considered as the one who directed or ordered the criminal offence by the legal entity as well. Criminal liability therefore does not depend on someone's formal position, but on

his or her actual involvement in the criminal offence committed by the legal entity.

Criminal liability of individuals in this regard can only exist if criminal liability of the legal entity has been established. This does not mean that the legal entity itself has to be actually prosecuted and convicted for the alleged offence. It is very well possible that only individuals will be prosecuted, and not the legal entity. However, in practice, in major criminal cases we often see legal entities reaching a settlement with the DPPS, and individuals getting off the hook as a consequence.

Proposed reforms / The year ahead

As discussed in this chapter, the DPPS seems to be under fire for the way it deals with major criminal cases involving large multinationals. Last year, the Council for the Judiciary has also stated that major out-of-court settlements, such as seen in the ING case, are harmful to trust in the rule of law. Though we have seen developments whereby the DPPS tries to provide more transparency (for instance, via major press releases), different voices are being heard that such major out-of-court settlements should be subject to judicial authorisation. In Dutch literature, reference is also made to the "Americanisation of the fight against corruption".

However, it is not yet clear how a judge can be involved in such settlements, or what the scope of his involvement should be. Perhaps we can provide some more information on this in the 2021 edition. Nevertheless, the situation seems to have become unsustainable and the DPPS, and maybe even the legislator, should act in order to stop the negative feelings these major settlements cause in society. The Minister of Justice and Security last year stated that the settlement practice is currently being reviewed. In an interview in May 2019, a spokesperson from the DPPS stated that the DPPS is exploring the option to implement a self-reporting procedure and corresponding sentencing guidelines, for which it will also consult the judicial authority and advocacy. We expect the DPPS to apply such guidelines also in (future) corruption cases.

In addition, in 2019 the OECD Working Group on Bribery launched its fourth phase of monitoring the implementation of the OECD Anti-Bribery Convention in the Netherlands. The phase 4 Report will be discussed in June 2020.

A last trend, which we expect to evolve in the near future, is the appointment of monitors in major corruption cases. While at the moment the DPPS does not have the power to appoint a monitor as condition of a settlement agreement, large settlements such as the one with VimpelCom show that the importance of (external) monitors is increasing. Therefore in future criminal cases, we expect more companies to explore the option of a monitorship in order to gain a settlement with the DPPS.

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Madelon specialises in financial, economic and tax sanctions law. She advises and assists legal entities, banks and other financial institutions (managing directors and/or supervisory directors) that are faced with (imminent) supervision or enforcement issues under administrative or criminal law, e.g. involving matters of corruption, (tax) fraud, forgery, bribery, money laundering or compliance with environmental and working conditions legislation. Madelon also has experience in organising and conducting internal investigations. She frequently advises on compliance and integrity issues, particularly in the field of Dutch and international anti-corruption and anti-money-laundering regulations (under the Dutch Money Laundering and Terrorist Financing (Prevention) Act). Furthermore, she organises training sessions, e.g. on how to act in the event of an investigation or dawn raid by supervisory authorities or law enforcement agencies. Madelon is a board member of the NVJSA (Dutch Association of Young Criminal Lawyers) and member of the Women's White Collar Defence Association.

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