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CONTENTS

Netherlands

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Brief overview of the law and enforcement regime

Bribery of civil servants is illegal under articles 177, 178, 363 and 364 of the Dutch Criminal Code (DCC). Anyone who gives a gift or makes a promise to a former, current or future civil servant or provides or offers him a service with the intent to induce him to or rewarding him for an act or to refrain from certain acts in the performance of his office, is punishable (177 DCC). The civil servant is punishable for accepting or requesting such a gift, promise or service if he knows or should reasonably suspect that it is done with the intent to undertake or refrain from an act in the performance of his current or former office (363 DCC). Since 2001, criminal liability exists regardless of whether the act or omission is in violation of the civil servant's duty. Also, it is not required that the attempt was successful. Bribery of a judge with the intent to exercise influence over the decision in a case is an aggravated offence, especially if the bribery is aimed at obtaining a conviction in a criminal case (363 DCC). Naturally, the judge is also criminally liable (364 DCC).

The term 'civil servants' is not narrowly defined or restricted to an employment law context. It has been determined by law to include judges (178 DCC), all members of representative bodies, the armed forces and arbitrators (84 DCC), as well as persons in the public service and judges of a foreign state or of an organisation under international law (178a and 364a DCC). Well-established case law of the Dutch Supreme Court defines the term even more broadly, as anyone who is appointed under the supervision or responsibility of the government in a position which undeniably has a public nature, in order to carry out some of the powers of the Kingdom or its agencies. Therefore, employees of private organisations may, in certain cases, also qualify as civil servants for the purpose of Dutch anti-bribery legislation.

Commercial bribery is prohibited under article 328*ter* DCC. Any former, current or future (non-public) official who accepts or asks for a gift, promise or service in deviation of his or her duty is punishable, as is anyone offering a gift, promise or service of such a nature or under such circumstances that he or she should reasonably assume the other person to be acting in deviation of his or her duty. Acting in deviation of duty has a broad interpretation, as it includes concealing against good faith a request for or acceptance of a gift, promise or service from his or her employer. In addition, bribery of persons in relation to an act or omission with regard to their own or their employer's legal duty to provide information on telecommunication to the justice or police department or cooperate with telecom interception or recording, is punishable for both parties involved (328*quater* DCC).

The Public Prosecutor has the monopoly on criminal prosecution of bribery and corruption. Bribery and corruption of public officials are usually dealt with by the National Prosecutors' Office (*Landelijk Parket*), a department of the Public Prosecutor's Office that fights

international organised and subversive crime. This often follows on from the investigation of the Internal Investigations Department (*Rijksrecherche*), an independent body which investigates alleged cases of criminal conduct within the government. Suspicions of foreign bribery and bribery of non-government officials are usually dealt with by the National Office for Serious Fraud, Environmental Crime and Asset Confiscation (*Functioneel Parket*). This will often follow on from the investigation of the Fiscal Intelligence and Investigation Division (FIOD) or a specialised fraud unit of the National Police Department. The Public Prosecutor's Office has appointed specialised prosecutors to coordinate the approach to bribery cases.

Bribery of civil servants is punishable for both parties involved, with a fine of up to €87,000 for individuals and/or up to six years' imprisonment. For corporate entities, the maximum fine is up to 10% of annual turnover (177 and 363 DCC). If bribery is committed by certain government officials such as secretaries of state, mayors or members of national or municipal representative bodies, their maximum sentence is increased to eight years' imprisonment (363 DCC). Bribery of a judge with the intent to exercise influence over the decision in a case is punishable with up to nine years' imprisonment – or even 12 years if the bribery is aimed at obtaining a conviction in a criminal case (364 DCC). In addition, the persons involved may be disqualified from their ability to hold certain offices or professions. The maximum penalties for parties involved in commercial bribery are imprisonment for up to four years, or a fine of up to €87,000 for individuals and up to 10% of annual turnover for corporate entities. The aforementioned imprisonment term and fine are not mutually exclusive and may be combined. If multiple offences occur, their maximum sentences may accumulate to a certain extent. In addition, the government may confiscate criminal proceeds. Perpetrators who received monetary compensation for their act or omission may be prosecuted for money laundering as well, if they knew or should have reasonably suspected that they handled an asset that was obtained illegally. Other related offences such as tax offences or forgery may also be separately prosecuted.

In practice, court sentences in bribery cases are usually lower than the maximum penalties. The sentencing guidelines for judges (LOVS) contain a general fraud section that also applies to bribery. The sentences vary between seven different categories from one week to two months for fraud with a financial disadvantage of €10,000; to two years or more where the financial disadvantage has been €1 million or more. Within this framework, courts may take into account mitigating or aggravating factors related to the crime, the suspect or the way in which the proceedings advanced (delays, for example). In practice, courts may also defer to community service, fines and/or conditional prison sentences if they find that the facts and circumstances do not warrant a term of unconditional imprisonment.

Many bribery cases against corporate entities do not make it to court, as companies often prefer to settle with the Public Prosecutor's Office in order to avoid negative publicity and damage to their reputation from lengthy criminal proceedings. Settlement is possible for criminal acts with a maximum penalty of six years or under. The overall impression is that settlement amounts far exceed the fines and confiscation of criminal assets that a court would be likely to impose. This may be curbed with the recent introduction of the Independent Review Committee by the Public Prosecutor's Office; see below. In principle, the policy is to settle with the legal entity whilst still prosecuting the individuals in charge. Therefore, settlements in criminal bribery cases do not always constitute the end of the overall prosecution. Settlement agreements are not published in full, but the Public Prosecutor's Office has a policy to issue a press release and public statement of facts if a settlement exceeds €200,000.

Overview of enforcement activity and policy during the last year

On 1 January 2020, due to inflation corrections, the maximum fine for bribery offences committed by natural persons increased from €83,000 to €87,000.

On 21 May 2020, the Dutch legislation implementing the fifth EU Anti-Money Laundering Directive entered into force. As a result, the Act on the Prevention of Money Laundering and Financing of Terrorism (WWFT) was enhanced, which may lead to further prevention and flagging of unusual transactions, such as bribes. In addition, five prominent Dutch banks (ABN AMRO, ING, Rabobank, Triodos Bank and Volksbank) announced a collaboration under the banner of Transaction Monitoring Netherlands (TMNL) to further focus on identifying unusual patterns in payment traffic that individual banks cannot identify.

On 27 September 2020, the Netherlands established a central register of beneficial owners of legal entities, which is supposed to facilitate the identification of who is behind a legal entity. Nearly all legal entities, with the notable exception of publicly traded companies and government agencies, are obliged to register any person that has more than a 25% economic interest in an undertaking before 27 March 2022. Only part of the data registered on beneficial owners available to law enforcement authorities will be publicly available.

Recent action was taken against the use of shell companies in the Netherlands, at least for tax purposes. The National Statistics Office reported in 2018 that a vast proportion of foreign investment in the Netherlands had left the country again through shell firms. Four in five of the 14,000 'letterbox firms' carry out no economic activity and are used to avoid (or evade) tax, which has a corrupting effect. Following this report and the 'Paradise Papers', the government introduced tough new conditions for advance tax rulings in 2019, such as the requirement of 'substantial economic activities' in the Netherlands, proportionality of the amount of money flowing through the company and its activities, and a maximum term of five years. In April 2020, the Dutch Finance Minister proposed to Parliament the imposition of a total ban on 'funnel companies' at trust offices, stating that the sector does not sufficiently follow integrity rules. These initiatives may also be expected to diminish the involvement of the Netherlands in overseas bribery cases, as jurisdiction was sometimes derived from the popular use of Dutch shell companies or headquarters for tax purposes.

With regard to enforcement, Transparency International and the OECD Working Group on Bribery have criticised the lack of foreign bribery investigations and prosecutions in the Netherlands for the last two decades. Since 2015, maximum sentences for bribery have increased and bribery cases have been given higher priority by the enforcement authorities. The Public Prosecutor's Office has appointed dedicated anti-corruption coordinators and started a task force, in order to professionalise its approach to fighting bribery and corruption. Specialised teams have been formed within the FIOD and Internal Investigations Department to investigate suspicions of corruption. However, many foreign bribery cases do not result from Dutch investigative efforts but follow on from requests by foreign governments (specifically the USA) for legal assistance, often leading to a joint investigation – and settlement. In 2020, the Public Prosecutor's Office has reported nearly concluding a joint investigation with the European Anti-Fraud Office (OLAF) into Mammoet Salvage for the alleged bribery of two Mauritanian civil servants. In addition, an investigation into Royal IHC over allegations of corruption in Brazil is underway.

In its October 2020 report *Exporting Corruption*, nevertheless, Transparency International concluded yet again that the Netherlands is not sufficiently enforcing rules that prohibit foreign bribery by Dutch organisations. The Netherlands was dubbed one of the world's

greatest exporters (3.1% of global exports) with one of the worst track records on enforcement. Active enforcement declined again from 2018 onwards. Between 2016 and 2019, 16 investigations and two court cases were initiated for foreign bribery. Only three cases resulted in sanctions. Only one foreign bribery case ever made it to court (against Takilant Ltd in 2017), and it was tried *in absentia*. The Public Prosecutor's Office has yet to prosecute any individual in court for their responsibility in foreign bribery. According to the watchdog, the Public Prosecutor's Office still has insufficient means to investigate complex cross-border bribery, as is illustrated by an investigation that has been running for years into Shell for suspected bribery in Nigeria. Also, Transparency International found that Dutch out-of-court settlements are insufficiently publicly communicated, not transparent and do not contribute to a culture of integrity.

The OECD phase 4 report on implementing the Anti-Bribery Convention in the Netherlands adopted on 16 October 2020 reflects the same criticism on the low number of bribery cases concluded with sanctions. According to the OECD, the processes for assessing legal privilege claims are proving a significant obstacle to investigating and prosecuting foreign bribery cases. Also, the lack of a comprehensive legal framework for self-reporting and non-trial resolutions generates uncertainty and reluctance in the private sector. In addition, concerns were raised about the independence of Dutch foreign bribery investigations due to political interests, the whistleblower protection regime and the proportionality and transparency of sanctions, in and out of court.

Out-of-court settlements for bribery cases did reach new highs in recent years: Ballast Nedam (2012: €17.5 million); KPMG Accountants (2013: €7 million); SBM Offshore (2014: US$240 million); VimpelCom (2016: US$795); Telia Company (2017: US$965 million); and ING Bank (2018: €775 million). The process of increasing out-of-court settlements has been described as the 'Americanisation' of the Dutch anti-corruption effort, inspired by the US Department of Justice (DOJ). Critics complain that international bribery cases and settlements are used as a cash cow to fund the Dutch Public Prosecutor's Office. There was a growing call for court oversight to regulate the practice, increase transparency and accountability, and try more prominent bribery cases in court (in the public eye), to ensure that multinationals are held to the same standards of justice as other parties. A proposal to implement judicial oversight of out-of-court settlements before Parliament has yet to be considered.

Also worth noting are court proceedings started by a group of victims including IB Capital in July 2020, to seek the prosecution of ING and the bank's officials in deviation of the settlement concluded with the Public Prosecutor's Office. The court ordered a hearing of former ING CEO Hamers as one of the accused in the affair. The hearing has yet to take place. If the complaint is successful, the Dutch government would have to reimburse the settlement amount of €775 million and further prosecute the criminal case.

On 4 September 2020, the Public Prosecutor's Office responded to the aforementioned criticism by introducing a new instruction with procedural rules for handling large settlements. Large settlements are defined as penalty amounts over €200,000 or combined settlement amounts over €1 million. As an interim measure pending further legislation, the instruction requires an independent review committee to assess whether proposed settlements are reasonable and appropriate, and to advise accordingly. The committee consists of a former judge, a professor of criminal law and former Public Prosecutors. It will hear both the Public Prosecutor's Office and the defence. In the case of positive advice, the settlement offer continues to the Board of the Procurator General for final approval. In the case of negative

advice, the case is referred back to the Chief Public Prosecutor to issue a new prosecution decision. This means that the defence could also potentially use the procedure as a lever in the negotiations of a settlement offer, if negotiations are stuck and it is able to convince the committee that the deal is unfair.

The instruction requires a press release for every large settlement. Contrary to earlier statements by a prominent Public Prosecutor in the media, the instruction does not require an admission of guilt or assent to the charges in order to enter into a settlement. However, the company does have to acknowledge the facts that led to the settlement. A full statement of facts is to be published with the press release of the settlement. Whether adequate compliance measures are taken has been introduced as a decisive factor in the settlement decision. Also, the instruction now provides that the Public Prosecutor's Office may agree with the company upon external or internal supervision over the enforcement of the settlement agreement, either by other enforcement authorities (e.g. DNB or AFM), an appointed monitor, or by regular reporting to the Supervisory Board. The effects of this new policy are yet to be seen.

On 1 October 2020, the Public Prosecutor's Office revised its instruction on handling foreign bribery cases. Of particular note are the new position on prosecuting facilitation payments (see below) and the introduction of a new consideration in deciding the case, namely whether the bribery was a structural part of conducting business. The instruction also warns that the use of intermediary partners (representatives or consultants) does not indemnify the company, as it should be aware that such parties are often used for facilitating bribes. According to the Public Prosecutor's Office, being insufficiently vigilant as to the nature and activities of the intermediary parties could result in criminal liability as well. It appears that this wording is more stringent than the current bribery legislation, which requires as a minimum for criminal liability that the company consciously accepts a significant chance that bribery could take place. Being insufficiently vigilant is not, in itself, criminal behaviour.

In court, the prison sentences awarded to individuals involved in bribery have increased over the last couple of years. In 2020, the conviction of a police 'mole' who regularly sold confidential information to criminals, to five years' imprisonment and disqualification as a civil servant for 10 years, was confirmed by the Court of Appeals in Den Bosch. The Court of Appeal in The Hague awarded a prison sentence of 14 years to a corrupt customs officer who knowingly allowed drug shipments to come into Rotterdam harbour for years. The organiser of the shipments was convicted to 11 years and four months for the drug and bribery charges combined. In Curaçao (part of the Kingdom of the Netherlands), the Court of First Instance convicted four individuals to prison sentences of 30 to 36 months for asking for US$5 million in bribes from Refineria di Korsou (RdK) in the *Lacerta* case. In Sint-Maarten, a former secretary of state and political party leader was convicted to five years' imprisonment for taking US$4 million in bribes. A former director of a building company was sentenced to one year and an intermediary who acted as a cooperating witness was sentenced to three years' imprisonment for offering the bribes.

National bribery cases are expected to increase. The famous EncroChat investigation into encrypted messaging in the criminal environment led to new suspicions of corruption within the police force, which are currently being investigated by the Internal Investigations Department. According to the chief of the National Police, it would appear that police corruption has increased in the last few years. It is also worth noting that a high-profile investigation was launched into suspicions of fraud by two municipal councillors in The

Hague for bribery last year, which led to a raid and new charges against directors of real estate companies in 2020. Also, in recent years, an increasing number of investigations into bribery have been conducted in the Caribbean part of the Kingdom of the Netherlands.

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

Facilitation payments and hospitality fall within the reach of the Dutch anti-corruption legislation. Neither the aim nor the nature of a bribe is relevant for criminal liability. There is no minimum pecuniary value for what constitutes a bribe.

The Public Prosecutor's Office has provided some guidance on whether prosecution for a bribe is appropriate or not. Among the many relevant factors listed are, in short: who initiated the gift (if the civil servant did, this is more reason for prosecution); the value of the gift; the extent to which the public organisation meets the prescribed integrity policy of the Civil Servants Act; the extent to which the gift is socially accepted; whether acts were contrary to the behavioural code within the organisation; awareness of the civil servant of the illegality of his act; concealment of the gift; the incidental or structural character; the relationship between parties; the position of the civil servant in terms of his/her level in the organisation and relationship to colleagues and their access to sensitive documentation and/or power within the organisation; the effect on the reputation of the government or agency; the possibility of alternative sanctions, including disciplinary sanctions; and the consequences that the behaviour had for the civil servant involved.

Until 1 October 2020, the Public Prosecutor's Office had adopted the policy that it would not conduct a more rigorous investigation and prosecution in the cross-border context than called for by the OECD Convention. As such, facilitation payments in foreign countries would generally not lead to prosecution. However, the revised instruction on foreign bribery dated 1 October 2020 has removed this restriction, thereby allowing for prosecution of facilitation payments as well. Given that it is now also a consideration in how a case should be dealt with (see below) if the bribery is a structural part of conducting business, it is likely that prosecution of these types of cases will follow. It is too soon for any observations on the effect of these changes.

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

There is no legal framework for self-reporting or plea bargaining in the Netherlands, other than negotiating out-of-court settlements as referred to above. The Public Prosecutor's Office may also award a penalty order (*strafbeschikking*) if the maximum penalty set by law for the offence does not exceed six years' imprisonment. Such a penalty order may entail the payment of a fine and/or the performance of community service. The Public Prosecutor is not authorised to impose any term of imprisonment. If a prison sentence is deemed appropriate, the case has to be brought before the court. In court, it is possible that the defence and the Public Prosecutor will reach an agreement regarding the mutual trial position and present their consensus. However, the judge is not bound to honour such agreements and may independently proceed with the hearing and impose an entirely different sentence.

Key considerations for the Public Prosecutor's Office in deciding how to deal with a foreign bribery case are: the value of a gift, promise or service; whether bribery was a structural part of conducting business; involvement of influential or prominent civil servants or politicians or their direct relatives; whether the bribes were paid out of public or charitable funds; the damages from the bribe (for the foreign country); the level of market distortion;

recidivism; and the options for further investigation and successful prosecution. Also, self-reporting, cooperation and transparency are relevant for resolution and to establish the penalty to be levied.

The Public Prosecutor's Office has the policy to accompany bribery cases with a demand for a confiscation order if the profit is valued above €500. We note that in the guidelines of the Public Prosecutor's Office, bribes are not subtracted from illegally obtained profit when calculating the total demand for a confiscation order or disgorgement. This position is contested by defence counsels and has not yet been decided on by the Supreme Court.

With regard to whistleblowing, we note that every employer that employs 50 people or more is obliged to have an internal reporting procedure for abuses under the Whistleblowers Authority Act. Corporate Governance Codes also require listed companies and companies in specific sectors (e.g. the cultural, healthcare and education sectors) to have reporting procedures. Companies may formulate their own internal reporting procedure that regulates how whistleblowers can report, what happens with the report and what protection is given to whistleblowers. An employee who makes a report of an abuse in the correct manner may not be retaliated against for that reason. Complaints by the whistleblower of being retaliated against may warrant an investigation by the Whistleblowers Authority, civil liability and administrative fines. An employee who does not correctly follow the internal reporting procedure can neither claim protection against disadvantage nor request help from the Whistleblowers Authority. Therefore, companies can uphold the rights of a whistleblower while safeguarding their own interest by setting up a carefully thought-out reporting procedure. Transparency International noted in its October 2020 report that only three investigations into retaliation had been started.

Overview of cross-border issues

According to the instruction on handling foreign bribery cases, the Public Prosecutor's Office will decide if prosecution for foreign bribery is appropriate based on its own applicable rules and principles without consideration of the national economic interest, the effect on relations with other states and the identity of the natural or legal entity involved (article 5 OECD Anti-Bribery Treaty). Based on the new instruction for handling foreign bribery cases, the Dutch anti-bribery approach may now be more rigorous than required by the OECD with regard to, amongst others, prosecution for facilitation payments (see above).

The Dutch government is generally known as highly responsive and cooperative with regard to requests for legal assistance by foreign governments. Cooperation with the DOJ in particular has led to high fines in the past. Requests for assistance in bribery cases have also led the Netherlands to start its own investigation in some cases. Such involvement may lead to a joint investigation – and thus higher settlements. There has been criticism that the Dutch authorities stretched or even overstepped the bounds of their jurisdiction to take part in the investigations and settlements.

Corporate liability for bribery and corruption offences

As is clear from the legal framework described above, legal entities as well as the natural persons involved may be prosecuted for bribery (51 DCC).

The legal entity may be criminally liable if (a) it is the party to which the violated norm applies, or (b) a relevant criminal act or omission of a natural person can be reasonably attributed to the legal entity. Attribution is possible if the conduct has taken place within the sphere of the legal entity. Important factors in that decision are: if it is an act or omission

of a person working for the legal entity; if the act has taken place within the normal course of business of the legal entity; if the act has benefitted the legal entity; if the legal entity had the power to decide whether the act took place; and/or if such or comparable conduct was accepted or tolerated by the legal entity in practice. For this purpose, acceptance includes the omission to take due care by the legal entity in order to prevent the conduct.

Section 51 article 2 sub 3 DCC explicitly states that the legal entity and the actual director/officer responsible can be prosecuted for the same facts. In practice, often both are prosecuted. Criminal proceedings may be instituted against natural persons who have ordered the commission of a criminal offence as well as actual directors, which may be other legal entities (51 article 2 DCC). In case law, four criteria are established which lead to actual directing and upon which managers, officers and directors have criminal liability: (i) the officer must have the authority to intervene; (ii) the officer must have been 'reasonably required' to undertake measures to prevent the illegal act; (iii) despite this, he must have omitted to take these measures; and (iv) he must have at least 'consciously accepted a significant chance' that the illegal acts would occur.

As noted previously, a new instruction of the Public Prosecutor's Office on foreign bribery states that being insufficiently vigilant on the nature and activities of intermediary parties could result in criminal liability as well. This wording appears to be more stringent than the current bribery legislation. Criminal liability requires, at a minimum, that the company consciously accepts a significant chance that bribery takes place. This minimum requirement is generally carefully upheld in court decisions. We would argue that failure to take adequate precautions by itself would be insufficient to fulfil this required minimum of intent, contrary to the position that the Public Prosecutor's Office seems to be taking. Naturally, however, vigilance is advised in order to minimise the chances of prosecution.

Proposed reforms / The year ahead

With regard to policy, the Dutch Parliament is expected to start deliberations on the proposal for judicial oversight of large settlements. In the meantime, it will be interesting to see if the Independent Review Committee established within the Public Prosecutor's Office for large settlements will have an effect on the settlement amounts and/or willingness to settle in foreign bribery cases. In addition, the register for beneficial owners is expected to start functioning properly, with the deadline set for 27 March 2022.

With regard to enforcement, more bribery investigations may result from the broader scope of the Public Prosecutor's Office's instruction on handling foreign bribery cases. It is also expected that the harsh criticism of Transparency International with regard to enforcement in anti-bribery legislation will be followed up with political discussion on further needed reform.

The Public Prosecutor's Office recently opened discussions on introducing the option of self-reporting, and a procedure for internal investigations under the direction of the enforcement authorities, to make efficient use of their limited means. It is not yet clear how these proposals would work in practice and/or who would be appointed to execute such internal investigations. As the proposals were met with a lot of criticism, it is unclear if such policies will be implemented in the future.

The court is likely to decide on the complaint against the decision not to prosecute ING next year, after hearing the ING CEO. If further prosecution is ordered, this would be a landmark decision and would likely have a major effect on the willingness of the Public Prosecutor's Office to settle such cases in the same fashion in the future and thus lead to more prosecutions. Further progress is anticipated in investigations into the accountancy firm EY

(which rejected a settlement in 2017) and Shell (charges having been announced in 2011). The Public Prosecutor's Office reported last year that sufficient evidence had been found to prosecute Shell for criminal acts. As far as we are aware, this position has not changed now that the US Securities and Exchange Commission has ceased its investigation into the oil deal. New criminal charges against the Amsterdam Trade Bank (2017), Odebrecht SA (2019), Mammoet (2020) and IHC Royal (2020) were also made public, but have not led to a resolution either. With regard to national bribery cases, it is expected that the EncroChat investigation will result in more police corruption cases.

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Ms. Dekkers graduated *cum laude* in both criminal and civil law. During her studies she worked as a clerk at the District Court of Maastricht and lectured at the university. Among other subjects, she has specialised in forensic investigations and evidence.

In 2013, she published the book *Forensic familial DNA searching examined: Forensic & human rights safeguards for criminal investigations into genetic family relationships*. *The Legal 500* describes Ms. Dekkers as a 'rising star' in its 2020 rankings: 'smart, knowledgeable, experienced, and very responsive.'

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In addition, he is active as a defence lawyer for CEOs, chairpersons, non-executive directors, managers and advisors who are involved in corruption cases, market abuse cases (e.g. insider trading and market manipulation), money laundering cases, criminal tax cases and other white-collar cases.

Mr. Van der Laan has a great deal of experience with technically complex transnational litigation and maintains good contacts with defence lawyers abroad, especially in the US. He is considered an expert in the field of international criminal law and also litigates before the Dutch Supreme Court.

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