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Anti-bribery & corruption: the fight goes global

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National Report of Belgium

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1. The Legal Framework

1.1 What criminal and/or civil/administrative law(s) exist in your jurisdiction which are specifically targeted at bribery & corruption? Please provide:

a. a brief summary of the offences;

Corruption as such is not a legal term in the Belgian legislation. Corruption covers several criminal infractions, of which the act of bribery is the most common crime.

Different crimes, which are considered as corruption will be described below, but it should be mentioned that these crimes go often hand in hand with other criminal activities such as forgery of documents, fraud or deception.

1. Corruption in the strict sense

Every form of bribery is considered as corruption in the strict sense of the word. In this regard a distinction is made between public and private bribery as well as between active and passive bribery.

Pursuant to Article 246 of the Belgian Criminal Code, passive public bribery exists when a person, who carries out a public function, accepts or asks directly or indirectly, for himself or for a third party, an offer, promise, advantage of any kind, in order to commit a (i) legal act by his office, which is not subjected to payment, (ii) an illegal act or crime in regard to his public function, or to omit an act, which is part of his duties, or (iii) to use his influence to obtain an action of a public government or the omission of an action.

Active public bribery on the other hand implies a direct or indirect proposal of an offer, promise or advantage of any kind to a person who carries out a public function, in order to commit or omit one of the aforementioned actions.

Pursuant to Article 504*bis* of the Belgian Criminal Code, passive private bribery implies the fact that a person, who is director or proxy holder, or representative of a legal person, accepts for himself or for a third party any offer, promise or advantage of any kind, without the approval of the board of directors, in order to facilitate an action of his function or to omit an action.

Active private bribery implies a proposal to the director, proxy holder or representative of a legal person to facilitate an action of his function.

The difference between passive and active bribery is important since they constitute two separate offences. Active bribery targets the person who makes the proposal, while passive bribery sanctions the person who receives the undue advantage. If active and passive bribery meet each other, a corruption pact can be established, which can serve as an aggravating circumstance.

2. Corruption in the broad sense

As described above, the act of bribery is the most common form of corruption. However, the Belgian Criminal Code targets other criminal actions, which can also be brought under the concept of corruption.

Article 240 of the Belgian Criminal Code criminalises embezzlement by a public official. This offence is committed by any person, who carries out a public function and who embezzles public or private funds, which he has at his disposal due to the performance of his activities.

Article 243 of the Belgian Criminal Code criminalises extortion committed by a public official. More specifically, any person, who carries out a public function and who commits extortion by giving the order to collect or receive revenues, taxes, interests, income, knowing that it is not indebted, will be criminally liable.

Furthermore, Article 245 Criminal Code punishes the act of "taking an interest" (*belangenneming / prise d'intérêt)*. This crime is committed when a public official performs an act or tolerates a situation in order to obtain an advantage trough his public function. For example, the High Court held that a mayor, who declares a house uninhabitable to strengthen his (private) position, is guilty of the crime of "taking an interest" (Cass. 22 November 2005, *NC* 2006, 258). The mayor in question declared the house, bought by his brother, uninhabitable. Hence, the court held that through his public function as mayor, he was able to promote his private interests, and by doing so, he was found guilty of the crime of taking an interest. A more typical example of this crime is when a Notary Public acquires goods out of a public auction, which is carried out under his supervision.

b. any affirmative defences that are available;

Both in public as in private corruption, error or force could be used as an affirmative defence.

Specifically in regard to public corruption, it has been held that a private person is not always aware for which actions of a public official he has to pay for or not. Hence, error could constitute an affirmative defence.

Error or force qualify as a justification ground for bribery, which if established result in the person in question being found not guilty.

The law does not foresee many grounds to excuse a person of this type of crime. It should be noted that mitigating circumstances are quite rare in this area of law.

c. the penalties that may be imposed upon offenders.

Depending on the type of bribery committed, different penalties can be imposed.

1. Public bribery

Article 247§1 of the Belgian Criminal Code stipulates that the act bribery with the intent to obtain a legal action of the public official, which is not subjected to payment, will be sanctioned with imprisonment of six months to one year, a fine of EUR 100 to EUR 10,000 or with one of these penalties alone.

These penalties can be increased if there are aggravating circumstances.

If it is established that two or more parties entered into a corruption pact (passive bribery followed by active bribery), the penalties are imprisonment of six months to two years, a fine of EUR 100 to EUR 25,000 or with one of these penalties alone.

If it is established that the capacity of the bribed person is a police officer, a judicial police officer or a member of the office of the public prosecution, the aforementioned penalties will be doubled.

Article 247§2 of the Belgian Criminal Code stipulates that the act of bribery with the intent to obtain an illegal action of a public official or the omission of an action, which is part of the duties of the public official, will be sanctioned with imprisonment of six months to two years and with a fine of EUR 100 to EUR 25,000.

Again, aggravating circumstances can increase the penalties. If there is a corruption pact, the law foresees imprisonment of six months to three years and a fine of EUR 100 to EUR 50,000.

If the purpose of the bribery is realised, the maximum imprisonment is five years and the maximum fine amounts to EUR 75,000.

If it is established that the capacity of the bribed person is a police officer, a judicial police officer or a member of the office of the public prosecution, the aforementioned penalties will also be doubled.

Article 247§3 of the Belgian Criminal Code stipulates that the act of bribery with the intent to commit a crime is sanctioned with imprisonment of six months to three years and with a fine of EUR 100 to EUR 50,000.

Article 247§4 of the Belgian Criminal Code imposes penalties on bribery with the intent to use the actual or potential influence of the public official. The penalties are imprisonment of six months to one year and a fine of EUR 100 to EUR 10,000.

If the aforementioned aggravating circumstances are established, it will have the same consequence.

If an arbitrator is involved in the bribery, and the action intended is part of his adjudicative duties, pursuant to Article 249 of the Belgian Criminal Code, he will face imprisonment of one to three years and a fine of EUR 100 to EUR 50,000. If a corruption pact is established, the penalties are imprisonment of two years to five years and with a fine of EUR 500 to EUR 100,000.

If on the other hand a judge would be involved, the penalties are imprisonment of five years to ten years and with a fine of EUR 500 to EUR 100,000. The existence of a corruption pact, would increase the penalties to imprisonment of ten years to fifteen years and with a fine of EUR 500 to EUR 100,000.

It is possible that the court imposes additional penalties such as the deprivation of public rights for a period of 5 to 10 years. Furthermore, the convicted person can be prohibited to perform certain activities, and the advantages obtained trough the bribery can be confiscated.

2. Private bribery

Private bribery is punishable with a fine between EUR 100 and EUR 100,000 and with imprisonment between six months and two years.

If passive private bribery is followed by active private bribery, the maximum fine amounts to EUR 50,000 and the imprisonment can be ordered for three years.

The advantages obtained through the bribery can be confiscated.

3. Other types of corruption

Extortion will be punished with imprisonment of six months to five years, and with a fine of EUR 100 to EUR 50,000 or with one of these penalties alone. If it is established that the extortion is committed through the use of violence, the penalties are increased to five to ten years of imprisonment and a fine of EUR 500 to EUR 100,000. Moreover, the public official can be deprived of his rights to carry out a public function.

Embezzlement will be punished with imprisonment of five to ten years and with a fine of EUR 500 to EUR 100,000.

The crime of taking an interest will be sanctioned with imprisonment of one year to five years and with a fine of EUR 100 to EUR 50,000 or with one of these penalties alone. The public official who committed the crime can also be deprived of his rights to carry out a public function. However, the public official will not be punished if it is established that under the given circumstances, he could not serve his private interests and if he acted in a transparent way.

4. Damages

If a third party (victim) could establish that it suffered damages due to the bribery or other act of corruption, it can file a claim to obtain compensation. The criminal judge will pass judgement on the amount of the damages.

The Belgian legislation prescribes that only actual damages will be compensated. The victim will need to prove the existence of the damages, and a causal link between the act of corruption and the damages.

1.2 Does your jurisdiction outlaw "private" bribery/corruption (i.e. transactions between two or more private entities or persons) as well as "public" bribery/corruption? If so, please explain how the distinction is drawn between private and public bribery/corruption.

Yes, the Belgian Criminal Code makes a clear distinction between both types of bribery. As soon as a public official is involved in the transaction, it will be qualified as public bribery.

The notion 'public official' is interpreted broadly. It concerns any person who somehow holds a public mandate. The duration of the mandate is of no importance, nor is it required that the person is sworn in. Moreover, a certain category of persons are assimilated with public officials, such as a person who is nominated for a certain function, or a person who gives the impression that he carries out a public function (even with the use of a false identity).

However, it is required that the action committed by the public official falls within his competences. For example, a officer of the police who would receive payment to omit to draft a police report regarding a territory, which does not fall under his jurisdiction, would not be guilty of bribery. Nonetheless, he could be charged with fraud.

As mentioned under section 1.1.c, the type of mandate will have an influence on the penalties.

The other elements, which constitute the crime, are quite similar.

1.3 Is your law extra-territorial? If so, in what circumstances can it be enforced if the relevant acts/omissions of bribery/corruption occur outside your jurisdiction?

Pursuant to Article 10*quater* of the Preliminary Title of the Belgian Criminal Procedure Code, persons who are guilty of bribery, committed outside of the Belgian territory, can be put on trial in Belgium. It should be noted only public bribery is covered by Article 10*quater*.

Moreover, double incrimination is not required regarding bribery acts committed by Belgian officials, European Member State official, European Union officials of officials of international public organisation.

If the act of bribery concerns an official of a Third Party State, prosecution is subject to the rules of double criminality.

1.4 Are there any "safe harbours" or exemptions in relation to transactions that might otherwise be regarded as bribes, such as "facilitation payments", which are expressly excluded from being illegal? If so, is this determined by statute/codified law, by case law or otherwise?

No form of safe harbour exists in this matter. Facilitation payments, regardless the amount, can in theory be qualified as bribery.

However, not every gesture towards a public official will be considered as a form of corruption or bribery. For example, the Court of First Instance of Leuven held in 2011 that dinner in a restaurant with a representative of a public office does not constitute bribery, and falls within the professional activities. According to the Court, a dinner in a restaurant can occur in a professional atmosphere, without any expectation of the other party to provide a return (Rb. Leuven 9 December 2011, *Fisc. Act.* 2012, 14).

In any case, intent needs to be established. The offender must act willingly and knowingly, by which he intends to obtain an act by means of bribery.

1.5 Does the financial regulatory system (i.e. the law and regulations governing the operation and conduct of banks and other financial institutions) in your jurisdiction address the topic of bribery & corruption? If so, please provide a brief summary of the obligations (including systems/controls and reporting obligations) that are imposed on banks and other financial institutions in this regard.

The Law of 2 July 2010 has created the FSMA, which is the Financial Services and Markets Authority. It is the successor of the CBFA, which was the Commission on Banking, Finance and Insurance. The FSMA has more competences than the CBFA and exercises the supervision of the rules of conduct applicable to financial, insurance, credit or similar institutions.

One of its main tasks is the supervision of corporate governance. In this regard it has issued various circular letters to regulated institutions on how to implement compliance functions in their organisations. Although it is mainly intended to prevent financial fraud or money laundering, the internal codes of conduct address corruption as well.

In 1993, the compliance function in financial and insurance institutions was introduced into Belgian legislation. Since then, financial institutions are required to appoint one or more persons who are responsible for the application of the law within their institution. These persons are bound to implement procedures concerning internal control, supplying information in order to prevent transactions which relate to money laundering. Over the years, the scope of the compliance function has been extended, and since 2011, the compliance officers who operate under the responsibility of the management, have to be recognised by the FSMA. However, it should be noted that the compliance officers have the obligation to report to management and not to the FSMA.

Regarding the compliance function, the FSMA issued a circular letter in 2012, in which it explained the governance of the compliance function. It stipulated that the board of directors has to take the initiative to promote integrity in the course of doing business. It has to ensure that

the corporate entity has implemented an adequate integrity policy. According to the FSMA, this implies that there has to be a code of conduct, in which the subject of corruption is covered. The institution has to prescribe rules concerning the receipt of gifts, or the award of undue advantages.

Although a general notification duty is not prescribed by law, the FSMA can intervene when certain events come to light. In 2011 the CEO of Belgacom (a public telecom company) was suspected of corruption. Given that Belgacom did not immediately share this information with the market, the FSMA intervened and questioned Belgacom why it had withheld that information from the market.

The Law of 6 April 2010 on strengthening corporate governance in publicly listed companies, obliges publicly listed companies to publish a corporate governance statement, in which they determine that the Belgian Corporate Governance Code of 2009 shall be applied, with a 'comply or explain' requirement. The Corporate Governance Code requires the corporate entity to take specific arrangements, which the staff of the corporate entity may use, to raise concerns about possible improprieties. In other words, the Corporate Governance Code requires the establishment of a whistle blower system. However, it is up to the corporate entity to set out the specific procedures and the possible actions it will take.

For example, Ageas (insurance company) implemented an internal alert line for employees. It is however hard to say what sort of consequences would arise in response to a notification of an act of bribery.

Public officials on the other hand have a legal obligation to notify any crime. Pursuant to Article 29 of the Belgian Code on criminal proceedings, a general notification duty is imposed on any public official. This implies that a public official is required to report any crime to the office of the public prosecutor, which comes to his attention during the performance of his activities. If a public official of the FSMA would become aware of a possible act of bribery, he is required by law to report it.

In this regard, the Central Service on the Fight against Corruption is the main authority within the police, which is competent to investigate and provide support in the investigations against corruption in the broad sense of the word. It works together with the OESO, Transparency International, GRECO, and INTERPOL.

2. Corporate Criminal Liability

2.1 In the context of bribery/corruption, does your law recognise the concept of corporate criminal liability? E.g. can a corporate entity be found guilty of bribery?

Yes, since the Law of 4 May 1999, legal persons can be held criminally liable for the crimes they committed. This liability is independent of the potential liability of its directors, or representatives. A corporate entity can be prosecuted for crimes, without any requirement to identify or prosecute its directors.

Pursuant to Article 5 of the Belgian Criminal Code, a corporate entity can be held criminally liable for crimes, which are intrinsically connected to the realisation of its object (as set out in the articles of association), or, if it would be committed on behalf of the corporate entity.

It should be noted that in case a corporate entity is held criminally liable solely because of the actions of a private person, only the one who committed the heaviest fault can be convicted. However, only if the private person has committed the fault knowingly and willingly, he can be convicted together with the company.

A corporate entity could be held criminally liable for crimes, which fall under the scope of corruption. However, in the case law, no specific example is published yet.

2.2 If the answer to 2.1 above is "yes", please provide a brief explanation of the legal theory of corporate criminal liability (i.e. what circumstances must be established for corporate liability to arise and what form does that liability take) as well as the penalties that may be imposed upon a corporate offender.

As a general principle, in order to be criminally liable for a certain act, that act has to be imputable to the person who has committed it. One can only be held criminally liable for one's own (criminal) fault. In other words, personal guilt needs to be established. In order to prove the guilt of a corporate entity, it needs to be established that the crime results from an intentional decision within the corporate entity, and which has a causal link to the crime.

It should be noted that contrary to other jurisdictions, according to the Belgian law corporate criminal liability is not a derived liability. It stands on its own. A distinction needs to be made between the material element and the moral element of the crime. Both have to be present, in order to prosecute a corporate entity for that crime.

The material element will be established by the attribution of the crime to the corporate entity. One of the following three conditions has to be fulfilled in order to be able to attribute the crime to the corporate entity. The crime committed has to (i) relate to the object of the corporate entity, as described in the articles of association, (ii) serve the interests of the corporate entity, or (iii) be committed on behalf of the corporate entity.

The moral element relates to the intent of the corporate entity. A discussion exists in the doctrine on how the intent can be attributed to a corporate entity. It has been held that the corporate policy can indicate the intent to commit a crime. Other criteria are a deficient internal organisation or a general negligence within the corporate entity.

Pursuant to Article 7*bis* of the Belgian Criminal Code, different penalties can be imposed on corporate entities. These penalties can be divided in four categories, (i) patrimonial penalties (fines and forfeitures), (ii) penalties concerning the activities of the company (the interdiction to carry out certain activities or the closure of one or more divisions of the company), (iii) penalties concerning the reputation of the company (the publication and dissemination of the condemning judgment), and (iv) penalties which terminate the existence of the company (liquidation).

2.3 Are there any pending or expected changes to the law of corporate criminal liability in your jurisdiction? If so, please explain the proposed changes and the expected timeframe for implementation.

No.

3. Mutual Legal Assistance / Co-operation

3.1 Is your jurisdiction a signatory to any bi-lateral or multi-lateral treaties or other instruments regarding mutual legal assistance / co-operation in the context of bribery & corruption? If so, which ones?

Belgium is signatory to the following treaties:

1. European Union

- Convention of 1 May 1997 drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union ;
- Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector;

2. Council of Europe

- The Criminal Law Convention on Corruption of 27 January 1999 (Council of Europe ETS No. 173);
- The Civil Law Convention on Corruption of 4 November 1999 (Council of Europe ETS No. 174);
- The additional Protocol to the Criminal Law Convention on Corruption (Council of Europe ETS No. 191);

3. OESO

- Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 17 December 1997;

4. UN

- United Nations Convention of 31 October 2003 against corruption.

3.2 Are the regulatory/prosecution authorities in your jurisdiction parties to any formal or informal co-operation arrangements with equivalent authorities in other jurisdictions (e.g. a memorandum of understanding, etc.)? If so, please provide a brief summary of the arrangements and the other authorities/jurisdictions.

Yes, the public prosecutor or the investigative judge can call for mutual legal assistance in cross-boarder criminal investigations. The extent of the mutual legal assistance depends on the legal framework, wherein it is been carried out. The mutual assistance is most often based on bilateral or multilateral treaties.

However, the Law of 9 December 2004 on the providing of personal information, information with judicial purposes, and mutual assistance in criminal cases on an international level sets out the basic rules on mutual assistance. It provides that the Belgian judicial authorities will provide mutual assistance in the largest extent, but with regard to the law and international regulations. According to the law, every request will be carried out on the condition that there is reciprocity with the requesting state.

Requests can be refused if it would harm the safety, public order, or essential interests of Belgium, if it is motivated by reasons which are connected to race, ethnicity, religion, political ideas, sexual orientation, or if it concerns a crime which is punishable by death in the requesting state.

The Ministry of Justice is competent to handle the requests.

However, where a specific agreement in this regard exists, the procedures described in the applicable agreement(s) will be followed. Belgium is signatory to the following agreements:

1. European Union

Within the European Union, Member States will offer assistance to each other under the European Convention on Mutual Assistance in Criminal Cases.

This Convention provides that the contracting parties undertake to afford each other, in accordance with the provisions of this convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of requesting party. However, this Convention does not apply to arrests, or the enforcement of verdicts.

In principle, it is not required that the Minister of Justice authorizes a request of mutual assistance from another Member State.

2. The United States of America

On 8 December 1988, Belgium entered into a mutual agreement with the United States of America concerning mutual assistance in criminal cases. The assistance concerns the localisation of persons, the communication of documents or, pieces of evidence, the interrogation of witnesses, the performance of house searches, etc.

Both parties will install a central authority, competent to treat the requests for mutual assistance. In Belgium, the requests are handled by the Minister of Justice. In the United States, the Attorney General is competent in this regard.

It should be noted that in 2003, the European Union entered into an agreement with the United States of America on mutual assistance. This agreement mainly concerns the requests on identification of banking details.

3. Canada

On 11 January 1996, Belgium and Canada entered into an agreement on mutual assistance in criminal cases. The assistance concerns the localisation of persons and objects, the communication of documents, taking statements, house searches, etc.

Both in Belgium, as in Canada, the Minister of Justice is competent to handle requests.

4. Morocco

On 7 July 1997, a mutual agreement between Belgium and Morocco was entered into. It mainly concerns assistance in the communication of objects and documents, house searches, serving of witnesses or experts, serving of judicial decisions in criminal cases.

The competent authorities to handle the requests are the Ministers of Justice.

5. The People's Republic of China

Belgium and the Peoples Republic of China entered into an agreement on 20 September 2004 on mutual assistance in criminal cases.

The Agreement envisages that both parties will provide mutual assistance concerning the localisation of persons and objects, the receipt of evidence, objects or documents, the performance of house searches, etc. It does not apply to the execution of criminal judgments.

Both parties have to install a central authority to which the request for mutual assistance can be made.

This list is not exhaustive. Similar agreements exist with other countries, such as South Korea, Thailand, and others. The European Union entered as well into similar agreements with Japan, Iceland, Norway or Switzerland.

4. Cases

4.1 Please describe in brief three (3) cases of bribery/corruption in (or involving) your jurisdiction which illustrate the trend towards cross-border/global investigation and enforcement of anti-bribery laws. For example, cases where:

Unfortunately, I could not find any example of a cross-border investigation relating to corruption cases.

a. your jurisdiction's law(s) were enforced on an extra-territorial basis;

b. there was a degree of cooperation/assistance provided by your jurisdiction to another jurisdiction, or vice versa; and/or

c. penalties were imposed by your jurisdiction as well as by other jurisdictions, in relation to the same set of facts.

These cases will be discussed in greater detail during the workshop in London.