



PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN BELGIUM

October 2013

This Phase 3 Report on Belgium by the OECD Working Group on Bribery evaluates and makes recommendations on Belgium's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the Working Group on 11 October 2013.

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EXECUTIVE SUMMARY

The Phase 3 report on Belgium by the OECD Working Group on Bribery in International Business Transactions (Working Group) evaluates and makes recommendations on Belgium's implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention) and related instruments. Phase 3 focuses on key Group-wide (horizontal) issues, in particular enforcement and practical application of the Convention. It also examines country-specific (vertical) issues on progress made in addressing shortcomings identified in Belgium's Phase 2 evaluation in 2005 or issues arising from changes in Belgium's legislative and institutional framework.

The Working Group is disappointed by the lack of priority Belgium gives to the fight against bribery of foreign public officials by Belgian individuals and companies. It is seriously concerned by the flagrant lack of resources of the Belgian authorities in charge of investigations, prosecutions and sentencing in these cases, which, in some foreign bribery cases, leads to investigations not being opened, cases being closed and the expiry of the statute of limitations. Although investigations are ongoing in six foreign bribery cases and a prosecution has commenced in another, not a single Belgian national or company has ever been prosecuted in a foreign bribery case to date. The Working Group is also concerned that the Belgian authorities take into account factors such as exceeding a 'reasonable time limit', which is shorter than the statutory limitation period, in decisions to open investigations or at sentencing stage in foreign bribery cases. The Working Group notes that the Belgian authorities have jurisdiction to prosecute cases involving fraud against the European Union, including corruption, and that this amounts to a very significant workload that is not accounted for by an increase in resources. The lack of sufficient investigative means, the length of procedures and the short timeframe for exceeding a 'reasonable time limit' have serious consequences for Belgium's ability to implement the Convention. This is even more alarming, given the Belgian law enforcement authorities' evident lack of proactivity, demonstrated by their stated policy of not opening investigations following foreign bribery allegations contained in mutual legal assistance (MLA) requests and by the fact that they are disinclined to initiate foreign bribery cases in the absence of a formal referral. In this respect, foreign bribery allegations involving Belgian natural and legal persons are not reported by Belgian embassies and diplomatic missions abroad.

In addition, the Belgian legal framework for combating foreign bribery is of significant concern to the Working Group. Belgian law relating to liability of legal persons has not been modified since Phase 2, despite a recommendation from the Group in this regard. The lack of clarification of the requirement for attributing the mental element of the foreign bribery offence and the application of the principle of mutually exclusive liability between the natural and legal persons hinder enforcement of corporate liability. Furthermore, applicable penalties are not effective, proportionate and dissuasive, particularly in relation to legal persons. Additional sanctions such as debarment from public procurement appear difficult to apply in practice, given the absence of a criminal record for legal persons. Belgium's approach to exercising extraterritorial jurisdiction in foreign bribery cases could create difficulties for the full implementation of the Convention. Finally, in terms of detection, the Working Group regrets that recently adopted legislation in the area of whistleblower protection does not extend to public and private sector employees who report suspected acts of foreign bribery to the competent authorities.

On the other hand, the Working Group welcomes the progress made by Belgium since Phase 2. On 6 May 2013 the Brussels Court of Appeal confirmed the first conviction in Belgium of natural and legal persons for the foreign bribery offence. However, the Belgian natural and legal persons involved in the foreign bribery in this case were not prosecuted. Following the enactment of the Law of 11 March 2007, Belgian legislation explicitly prohibits the tax deductibility of secret commissions by companies and awareness-raising measures have been undertaken by the tax administration. The Working Group also

notes with satisfaction the clarifications made by this law, to private persons performing a public service role, in order to conform to the provisions of Article 1 of the Convention. The Group also welcomes the active role played by the Belgian financial intelligence unit (CTIF) in the detection of bribery cases and notes the increase in the number of CTIF reports to the Public Prosecutor's Office involving the predicate offence of foreign bribery.

The report and its recommendations reflect findings of experts from France and Switzerland and were adopted by the Working Group on 11 October 2013. The Phase 3 Report is based on legislation, regulations and other documents provided by Belgium, along with information obtained by the evaluation during its three-day on-site visit to Brussels from 24 to 26 April 2013, during which the team met representatives of the Belgian federal administration, private sector and civil society. Belgium will provide a written report on recommendations 2, 3(a), 3(b), 4(a), 4(b), 6 and 13(a) in one year (i.e. October 2014). The Working Group invites Belgium to submit a written follow-up report on the implementation of all recommendations in two years (i.e. October 2015).

A. INTRODUCTION

1. The on-site visit

1. A team from the OECD Working Group on Bribery in International Business Transactions (the Working Group) visited Brussels from 23 to 25 April 2013 as part of the Phase 3 evaluation of Belgium's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention), the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009 Anti-Bribery Recommendation) and the 2009 Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009 Tax Recommendation).

2. The evaluation team was composed of lead examiners from France and Switzerland and members of the OECD Secretariat.¹ In order to prepare for the on-site visit, the Belgian authorities provided the Working Group with answers to the Phase 3 questionnaires. They also produced the texts of laws and regulations, case law and various government, private-sector and civil-society publications. The evaluation team also consulted other sources of publicly available information. During the visit, the team met representatives of the Belgian public and private sectors and of civil society.² They note that representatives of the Belgian authorities did not take part in meetings with non-governmental representatives. The members of the evaluation team appreciated the efforts made by Belgium to ensure the smooth conduct of the on-site visit and the cooperation and frankness shown by all the participants in discussions during the visit.

2. Overview of the evaluations prior to Phase 3

3. The Working Group evaluated Belgium in Phase 1 (October 1999), Phase 2 (July 2005) and the Phase 2 written follow-up report (January 2008).³ In January 2008, Belgium had implemented nine of the 16 Phase 2 recommendations. The four recommendations not implemented concerned the liability of legal

¹ France was represented by **Mr. Hubert Gasztowtt**, Legal advisor to the Director General of the Treasury, Economic and Financial Controller General at the Directorate General of the Treasury, French Ministry for the Economy and Finance, and **Ms Alexandra Vaillant**, Judge at the Economic and Financial Law Bureau of the Criminal Matters and Pardons Directorate, French Ministry of Justice. Switzerland was represented by **Ms Claire A. Daams**, Federal Prosecutor, Office of the Attorney General of Switzerland, **Mr. Markus Leibundgut**, Attorney, Head of the Legal Team, Federal Department of Finance FDF, Federal Tax Administration FTA, Main Division for Federal Direct Tax, Anticipatory Tax and Stamp Duty, and **Ms Barbara Maurer**, Legal advisor to the Federal Department of Economic Affairs, Education and Research EAER, State Secretariat for Economic Affairs. The OECD Secretariat was represented by **Mr. Patrick Moulette**, Head, Anti-Corruption Division, **Ms France Chain**, Senior Legal Analyst and Coordinator of the Phase 3 evaluation of Belgium, **Ms Leah Ambler**, Legal Analyst, and **Ms Lise Née**, Legal Consultant, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs. **Ms Sophie Wernert**, Junior Legal Analyst, Anti-Corruption Division, also represented the Secretariat during the evaluation by the plenary.

² See the list of participants during the on-site visit in Annex 4.

³ See the [Phase 1](#), [Phase 2](#) and [Phase 2 follow-up](#) reports available on the OECD website.

persons, measures to raise awareness in the public and private sectors, whistleblower protection and public advantages.

3. Outline of the report

4. This report is structured as follows. Part B examines Belgium's efforts to implement the Convention and the 2009 Recommendations. The report deals with key horizontal issues identified by the Working Group and with vertical, country-specific issues. Particular attention is paid to enforcement efforts and to progress made by Belgium in remedying the shortcomings identified in previous evaluations. Part C sets out the recommendations made by the Working Group and issues for follow-up

4. Economic background

a. Economic structure

5. With a gross domestic product (GDP) of USD 514.7 billion (EUR 369.9 billion),⁴ Belgium is a particularly open economy in terms of foreign trade and investment, especially in its role as host to major international and European institutions. Although Belgium has not been spared the jolts of the global economic recovery, nor the eurozone crisis, Belgium's GDP in 2012 was still higher than in 2008. Belgium's economy is heavily oriented towards services, which accounted for 76.6% of GDP in 2011, followed by manufacturing and construction (22.7%) and the primary sector (0.7%). In terms of high-risk sectors for bribery of foreign public officials, Belgium has a number of sensitive industries such as the diamond trade, pharmaceuticals, construction, telecommunications, mining and arms. Small and medium-sized enterprises constitute the basis of Belgium's productive capacity.

6. Public enterprises occupy a significant place in the Belgian economy. The federal authorities own shares in these public enterprises, which are overseen either by the Minister for Public Enterprises and Development Cooperation or by the Federal Holding and Investment Company (*Société Fédérale de Participation et d'Investissement*, SFPI), of which the federal government is the sole shareholder and which is overseen by Minister of Finance. Eight companies are overseen by the Minister of Public Enterprises and Development Cooperation, most of them in the telecommunications and transport sectors. They have a total of 92,361 employees and represent a total market value of USD 57.8 billion.⁵ Belgacom alone has 17,371 employees and represents a total market value of USD 13.2 billion. The SFPI manages a portfolio of seven public enterprises and 14 enterprises in which the Belgian federal government owns between 10 and 50% of the shares. They operate, *inter alia*, in telecommunications, energy project financing, banking (Belfius recently became a public enterprise) and the financing of foreign investment by Belgian companies.⁶ Public enterprises also exist at a regional level. Although the OECD does not have official figures provided by the Belgian government, there are reported to be around 355 local public enterprises.⁷ They mostly operate in the energy and water sectors and could be active on international markets. In terms of the economic importance of public enterprises, Belgium is in the middle group of OECD countries.

⁴ OECD Economic Survey, Belgium 2013, p. 7.

⁵ OECD (2011), "The size and composition of the SOE sector in OECD countries", *OECD Corporate Governance Working Papers*, No. 5, <http://www.oecd.org/daf/corporateaffairs/wp>.

⁶ See www.sfpi-fpim.be/fr/portefeuille-pour-compte-de-letat-federal.

⁷ 2008 Dexia Banque study, *Les entreprises publiques locales en Belgique*; <https://www.belfius.be/>.

b. International trade

7. Outward flows of Belgian foreign direct investment (FDI) amounted to USD 85 billion in 2012, placing the country third out of the member countries of the Working Group.⁸ Belgium is one of the most successful countries in the world attracting FDI.⁹

8. With exports accounting for nearly 85% of GDP in 2011 and representing 2.18% of global exports,¹⁰ Belgium is one of the economies most open to international trade. Trade within the European Union accounts for most of Belgium's foreign trade, representing nearly 80% of imports and exports. Its main trading partners are Germany, France, the Netherlands, the UK, Italy and the United States. The country also has diplomatic and trade links with its former colony, the Democratic Republic of Congo (DRC). In geographical terms, 49% of exports in 2011 were to neighbouring countries, 29% to other European countries, 13% to America, 13% to Asia and 2% to Africa.¹¹ The main exports of goods include chemicals and related products, machinery and transport equipment, goods and services and manufactured goods (petroleum oil, medicines, motor vehicles and diamonds).

9. Although large firms produce most of Belgium's exports, 93% of all Belgian exporters in 2010 were small businesses. Thirty-eight per cent of large Belgian companies are subsidiaries of a multinational and they account for over half (51%) of the multinationals' exports. They operate mostly in sectors where Belgium generates an export surplus (food products, textiles, metal products, pharmaceuticals, chemicals and motor vehicles) and use Belgium as an export hub to serve other European countries. Belgium is increasingly an intermediary in the global supply chain.

5. Belgian authorities' cooperation during the evaluation

10. Under the evaluation schedule, accepted by Belgium, the Belgian authorities were due to submit their answers to the Phase 3 questionnaires on 20 March 2013. Three weeks after that date, most of the answers had not been provided. The missing answers mostly related to the fundamental issues raised in Phase 3, namely investigations and prosecutions of foreign bribery cases. This considerably hampered preparation of the on-site visit by the French and Swiss examiners and the members of the OECD Secretariat.

11. Furthermore, Belgium's answers to the Phase 3 standard and supplementary questionnaires questions were insufficient and in some cases related only very indirectly to the questions. A vast amount of statistical information was provided by the Prosecutor's Office, which did not cover all the areas dealt with in the report and specifically did not enable the examiners to distinguish between domestic and foreign bribery and the evaluation team did not receive translations of excerpts from certain court judgments and information about ongoing foreign bribery cases until a very late stage. For that reason, a substantial portion of discussions during the on-site visit was devoted to the examination of matters which should have been resolved by the answers to the questionnaire.

⁸ OECD: FDI in Figures, April 2013 (see: <http://www.oecd.org/daf/inv/FDI%20in%20figures.pdf>).

⁹ In its 2012 World Investment Report, UNCTAD (United Nations Conference on Trade and Development) put Belgium in third place behind the United States and China (but ahead of Hong Kong) in terms of FDI inflows in 2011.

¹⁰ See World Trade Organisation, Trade Profiles, April 2013.

¹¹ See [Brochure Be International, FEB, 2012](#) (exports).

6. Cases of bribery of foreign public officials

12. With regard to the data discussed below, it should be noted that Belgium does not distinguish in its statistics between bribery of Belgian public officials and bribery of foreign public officials. The information below is therefore mostly based on the knowledge and memory of the investigating and prosecuting authorities who replied to the Phase 3 questionnaire and were interviewed by the evaluation team during the on-site visit.

13. The Brussels Court of Appeal confirmed on 6 May 2013 the conviction of two foreign companies and three foreign individuals of bribery of foreign public officials. A prosecution has been initiated in another case of alleged bribery of foreign public officials involving Belgian residents and companies and the case is due to be heard before the Brussels Criminal Court in early 2014. Investigations are ongoing in five other cases; in some of them, however, prosecutions may be brought not for bribery but for other offences. Another case is being studied by the Federal Public Service (SPF) of Foreign Affairs. Two cases of foreign bribery have been closed. The examiners note that cases originating from a referral by the European Anti-Fraud Office (OLAF) are one of the priorities of Belgian prosecutors. Of the ten cases of bribery of foreign public officials, four originated with OLAF and are those in which proceedings are furthest advanced. No court judgment has been handed down in Belgium in a case of bribery of foreign public officials by Belgian nationals or companies.

14. The Belgian authorities have also been advised of at least seven allegations of foreign bribery involving Belgian natural or legal persons, three of which stem from mutual legal assistance (MLA) requests addressed to Belgium, mentioning the involvement of Belgian natural or legal persons in active bribery. As a result of the dedication of their resources to the cases referred by OLAF, the representatives of the Belgian police and prosecutors interviewed during the on-site visit clearly indicated that they were not in a position to open further investigations into foreign bribery unless they were referred to them by the countries concerned.

a. *Convictions of non-Belgian natural and legal persons for bribery of foreign public officials*

*Case 1 – EU cereals subsidies:*¹² This case, referred to the Belgian authorities by OLAF, concerns the bribery of a Dutch European official by non-Belgian companies and nationals for the provision of information covered by professional secrecy relating to the fixing of prices for cereals on the European market. The total amount of bribes in the case (travel, luxury goods, property and transfers of cash) was estimated, in the court's judgment, at EUR 850 000, and the total amount of advantages obtained by the companies in question was approximately EUR 22 million. Belgium exercised its territorial jurisdiction in relation to the offence of bribery of foreign officials (the European official was based in Brussels). The investigations were conducted by the Central Office for the Repression of Corruption (*Office central pour la répression de la corruption*, OCRC) in 2003 and the Brussels Court of First Instance handed down a conviction on 27 June 2012. On 6 May 2013 the Brussels Court of Appeal upheld the initial conviction of two foreign companies for bribery of a foreign public official, in this case a European official. Of the eight non-Belgian individuals prosecuted for foreign bribery in this case, four were acquitted; one received a suspended conviction; and three individuals were sentenced to suspended prison sentences of 12 to 18 months and fines of EUR 2,500 to 7,500. The only Belgian individual involved in the case was not prosecuted for foreign bribery, nor was the subsidiary, active in Belgium, of the convicted French company.

¹² "EU Case" (i.e. Cases 1-5) relates to cases referred to the Belgian prosecution service by OLAF for fraud against the European Union or cases involving European Union officials.

b. Ongoing cases of bribery of foreign public officials by Belgian natural or legal persons

Case 2 – EU property transactions: Following a complaint from a competitor, in 2004 OLAF referred this case to the federal prosecutor's office,¹³ which conducted an investigation with the help of the OCRC. The case concerns allegations of bribery, fraud and organised crime by residents of Belgium and other State Parties to the Convention. They are alleged to have paid millions of euros in bribes over a ten-year period in connection with the securing and rental of buildings to accommodate EU delegations. Operations were conducted in various State Parties to the Convention during the investigation. Arrest warrants for the suspects were issued in 2007. The case was due to be heard before the Brussels Criminal Court on 18 September 2013 but has been postponed until 24 March 2014.

Case 3 – EU consulting firms: OLAF referred this case to the federal prosecutor's office, which investigated with the help of the OCRC. The European Commission concluded master agreements for posting public procurement experts to countries joining the EU in order to set up procedures for the award of public procurement contracts. Belgian consulting firms allegedly won such contracts by paying bribes and sold sensitive information obtained during their assignment to other firms. The Belgian companies allegedly used lobbyists from another State Party to the Convention to obtain confidential information. The investigation, initiated by OLAF in 2007, was conducted simultaneously in Belgium and the other State Party to the Convention, including in the framework of a Joint Investigation Team (JIT). There are two separate aspects of the case, related to the two countries (not Parties to the Convention) where the bribery took place. The Belgian authorities indicated that investigation of the two aspects of the case is now complete and that both cases have been referred by the investigating magistrate. The two aspects of this case are waiting to be filed by the Prosecutor's Office.

Case 4 – EU relocation contracts: OLAF referred this case to the federal prosecutor's office, which investigated with the help of the OCRC. It concerns irregularities committed by a European official and Belgian companies and residents in connection with the award of public contracts for relocation. According to the Belgian authorities, it involves small-scale corruption, in particular the creation of false competitors, the payment of bribes not having been proven at the time of the on-site visit. Furthermore, the Belgian legal entities were unlikely to be prosecuted, having been declared bankrupt following loss of the contracts.

Case 5 – EU IT contracts: OLAF referred this case to the Belgian authorities. Companies from Belgium and other European countries, members and non-members of the Working Group, allegedly paid bribes to European officials between 2000 and 2005 for the award of IT contracts, the total amount of the fraud being EUR 300 million. The investigation was conducted by the OCRC under the supervision of the federal prosecutor's office. Prosecutors indicated that it may be difficult to prove bribery of foreign public officials in this case but that false accounting; money laundering and organised crime should be easier to prove. The various countries' law enforcement authorities are cooperating within the framework of Eurojust, though there have been some difficulties, in particular in connection with the lifting of immunities.

Case 6 – Development assistance project: This case involves suspicions of fraud and embezzlement by Belgian nationals and companies from a country which is not a member of the Working Group, in a country not Party to the Convention. The case was opened in Belgium following a complaint from the Belgian State Secretariat for Development Cooperation, which

¹³ See [Section 5.a.iii](#) on the jurisdiction of the Belgian federal prosecutor's office in EU cases referred by OLAF.

was funding the development assistance project. The investigation is being conducted by the Brussels federal criminal police. At the time of the Phase 3 on-site visit, it was not certain that a charge of bribery of foreign public officials would be brought in the case.

Case 7 – Money laundering and bribery via a subsidiary: A Belgian company with a subsidiary in a country that is not a member of the Working Group allegedly paid bribes through the subsidiary to a public company in a country not Party to the Convention. The Brussels prosecutor's office is currently investigating the case. At the time of the Phase 3 on-site visit, it seemed unlikely that a charge of bribery would be brought, since money laundering is easier to prove.

Case 8 – World Bank: Several nationals of Belgium and of other countries that are members or non-members of the Working Group are suspected of embezzlement in a country not Party to the Convention in the context of a World Bank call for tenders for the construction of various infrastructure projects. Belgium indicated that the Minister for Foreign Affairs is considering the case but gave no further details. The Belgian law enforcement authorities interviewed during the on-site visit were not aware of the case.

c. *Closed foreign bribery cases*

Case 9 – Mining deposits: A Belgian businessman allegedly paid bribes to a public official of a country not Party to the Convention in connection with the exploitation of mining deposits in the country. The investigation, opened by the Brussels prosecutor's office in 2009 with help from the Brussels federal criminal police, was closed due to a lack of investigative resources (see Section 5.a. below on the recurring problem of the resources available in Belgium to combat foreign bribery).

Case 10 – Money laundering and bribery: An MLA request was transmitted to Belgium by another State Party to the Convention concerning alleged bribery by a Belgian citizen in connection with an “enormous contract” in a country not Party to the Convention. Following the request, the Belgian anti-money laundering unit (*Cellule de traitement des informations financières*, CTIF) discovered a number of suspicious financial transactions, mostly dating from 2006. The Brussels prosecutor's office, which opened the investigation in 2010 with the help of the Brussels federal criminal police, closed the case for having exceeded a "reasonable time limit" (*délai raisonnable*). Representatives of the prosecutor's office explained that four years had already elapsed by 2010, making it unlikely that the case would come to a conclusion before it was time-barred, given the notorious backlog in the Belgian criminal justice system (see Section 5.d. below on the application of the limitation period in Belgium). They also explained that the case had initially been opened for money laundering, partly because the offence is easier to prove and partly because, the predicate offence probably pre-dating the money laundering, the limitation period was even more advanced.

d. *Oil-for-Food*

15. Belgium states that it opened a number of tax cases in connection with breaches of sanctions under the oil-for-food programme even before the inquiries carried out by the United Nations commission and publication of the Volcker report. According to the Belgian authorities, there were sufficient grounds to open an investigation in 14 of the 35 cases, sent to various local prosecutors' offices. The Belgian authorities provided information about measures taken in connection with these cases (several different measures may have been taken in relation to the same case): five are under investigation, seven have been referred to the tax authorities, three have been taken up by an investigating magistrate, eight have been

closed and two have been referred to the law enforcement authorities of another State Party to the Convention. At the present time, of the 12 cases ongoing in Belgium, bribery has been dropped as a charge in one (forgery and use of forged documents, breach of the Belgian Tax Code) and another is still under investigation. Five cases are still with the tax authorities. The Belgian authorities indicate that one case involving alleged foreign bribery has been closed because of the length of time that has passed, the number of investigative measures to be conducted abroad involving officials no longer employed and the very limited territorial link to Belgium. Other reasons given for closing other cases were the limitation period for bringing proceedings and insufficient means of investigation.

Commentary

The lead examiners are seriously concerned by the flagrant lack of resources of the judicial system in relation to the treatment of the foreign bribery offence, which significantly hampers effective implementation of the Convention, leading to investigations being closed, or not even opened, and time-barring of some foreign bribery cases. They are further concerned by the lack of proactivity on the part of the Belgian law enforcement authorities, who seem disinclined to act of their own accord in foreign bribery cases if there is no formal referral.

B. APPLICATION AND ENFORCEMENT BY BELGIUM OF THE CONVENTION AND THE 2009 RECOMMENDATION

16. This section of the report looks at Belgium's approach to key horizontal issues concerning all countries, identified by the Working Group for the Phase 3 evaluation of all Parties. Where relevant, we will also look at vertical (country-specific) issues raised by Belgium's progress in remedying the shortcomings identified in Phase 2, or problems arising from changes to Belgium's laws or institutional framework.

1. The foreign bribery offence

17. Following the conclusions of Phase 2 in 2005 and the written follow-up to Phase 2 in 2008, the articles of the Belgian Penal Code (CP) criminalising bribery of a foreign public official appear to be broadly consistent with the Convention. Analysis of current foreign bribery cases and discussions with the authorities responsible for investigating and prosecuting foreign bribery show that the obstacles to enforcement do not stem from the legislation (see Section 5 below on investigation and prosecution for an analysis of the obstacles to applying the foreign bribery offence). Nonetheless, questions remain over the extraterritorial application of the offence.

a. The notion of private individual providing a public service

18. The offence of bribery of a foreign public official was introduced into Belgian law by the Law of 10 February 1999, evaluated by the Working Group in 2005. Following the Phase 2 recommendations, the foreign bribery offence was amended by the Law of 11 March 2007. During the Phase 2 Written Follow-Up Report on Belgium in 2008, the Working Group examined the new features introduced by the 2007 Law and found that the elements of the foreign bribery offence defined in Article 1 of the Convention are

now fully covered in Articles 246(2) and 250 CP which define the Belgian offence of bribery of foreign public officials.¹⁴

19. Nevertheless, a question remained over the concept of a "private person providing a public service". The Phase 2 report noted that "doubt remains, though, as to how this new definition of a public official will be applied to those who, while not exercising a public function, work for public authorities for example under a private law contract".¹⁵ In conclusion, the Working Group recommended that the issue of whether "the broad interpretation of the exercise of the official functions of a public official" be followed up in order to ensure that the Belgian offence covered the bribery of a foreign public official, even an individual under a private law contract but exercising a public function. During the on-site visit, the Belgian authorities asserted that even private individuals providing a public service were deemed to exercise a public function. This interpretation is confirmed by case law and in the preparatory work for the 1999 Act, which states that "the notion of 'any person exercising a public function' ... covers all categories of persons who, whatever their status ([...] including private persons providing a public service), exercise a public function of whatever sort".

b. Extraterritorial application of the offence of bribery of foreign public officials

20. The changes introduced by the Law of 11 March 2007 extended the extraterritorial jurisdiction of Belgian law with regard to foreign bribery. Nevertheless, the principles by which Belgium exercises extraterritorial jurisdiction over cases involving bribery of foreign public officials differ according to the organisation to which the public official belongs.

21. Under article 10*quater*, paragraph 1 of the Belgian Code of Criminal Procedure (*Code d'instruction criminelle*, CIC), introduced by the Law of 11 March 2007, Belgium has universal jurisdiction over any person who has committed a foreign bribery offence "where the person who exercises a public function in a foreign State or in a public international organisation is Belgian or where the public international organisation for which the person exercises a public function has its headquarters in Belgium".¹⁶ In contrast, if the public official is neither Belgian nor employed by an international organisation having its headquarters in Belgium (i.e. in many cases of bribery of foreign public officials), under article 10*quater*, paragraph 2 CIC, jurisdiction on the grounds that the briber is a Belgian national (or resident) is conditional on the offence being "punishable under the laws of the country in which it was committed".¹⁷ After the on-site visit, the Belgian authorities explained that the provisions of the Code of Criminal Procedure relating to Belgium's extraterritorial jurisdiction draw a distinction between offences which directly harm the organisation and operation of the State, for which the dual criminality requirement does not apply (articles 6 and 10 CIC), and other offences for which the dual criminality requirement does apply (article 7 CIC). According to the Belgian authorities, paragraphs 1 and 2 of article 10*quater* apply that distinction, such that the offence of bribery of a foreign public official by a Belgian national is not deemed to directly harm the organisation and operation of the Belgian state.

22. This distinction raises two problems. First, the dual criminality requirement imposed by article 10*quater*, paragraph 2 means that Belgium cannot prosecute if foreign bribery is not a criminal offence in the country where it is committed. This can happen either if a Belgian person bribes a public official of country X where domestic bribery is not a criminal offence, or if a Belgian person bribes a

¹⁴ See the relevant extracts of legislation in Annex 2, and Recommendation 4(c) and the Working Group's evaluation of its implementation in 2008 in Annex 1.

¹⁵ See [Phase 2 Report on Belgium](#), para. 119.

¹⁶ See the relevant legislation in Annex 2.

¹⁷ *Ibid.*

public official of country X from a third country, Y, where foreign bribery is not a criminal offence. Moreover, it requires the prosecuting authorities to produce an additional element of proof. Second, the distinction between Article 10^{quater}, paragraphs 1 and 2 can pose problems with regard to implementation of Article 4.2 of the Convention, which states that "Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles" (emphasis added). To give an example, the Belgian authorities closed a case relating to the oil-for-food affair on the grounds, *inter alia*, that the elements of bribery were very limited in Belgium. Belgium did not therefore exercise extraterritorial jurisdiction in this case. In the absence of any other case law on the issue, the lead examiners fear that Belgium is still not always able to prosecute when a Belgian national bribes a foreign public official. This is all the more significant in that Belgium limits itself to fulfilling its obligations with regard to international cooperation without opening investigations for foreign bribery in Belgium even though Belgian nationals appear to be involved (see Section 5.a on the principles of investigation and prosecution and Section 9.a on mutual legal assistance.) Article 10^{quater} is also the basis for Belgium's jurisdiction to prosecute parent companies for the actions of their foreign subsidiaries, which raises the question of Belgium's capacity to exercise its jurisdiction where the foreign country does not recognise the liability of legal persons (see Section 2.a).

23. In addition, during the Phase 3 on-site visit, the federal police representatives were not aware of the extraterritorial application of the offence of bribery of foreign public officials in international business transactions. Asked about the Belgian authorities' competence to prosecute a Belgian natural or legal person who had paid bribes to a foreign public official, they asserted that it was essential to establish a territorial link with Belgium; to the best of their knowledge, only the offence of child abuse could be prosecuted on the grounds that the perpetrator had Belgian nationality without any territoriality requirement. In contrast, the prosecutors and judges interviewed during the on-site visit along with the private-sector lawyers seemed to be aware of Belgium's extraterritorial jurisdiction in cases of foreign bribery, including the different methods of application under Article 10^{quater}, paragraphs 1 and 2 CIC.

Commentary

The lead examiners note with satisfaction the clarifications made by Belgium concerning the concept of a private individual providing a public service. They consider that these explanations remove any questions that may have remained concerning compliance with Article 1 of the Convention.

In contrast, the lead examiners note that the principles for the exercise of jurisdiction on the basis of Belgian nationality differ according to the organisation to which the bribed public official belongs. They consider that this distinction based on the passive personality of the bribed official could make it difficult to implement Article 4.2 of the Convention. They fear that the dual criminality requirement imposed by Article 10^{quater}, paragraph 2 CIC complicates the task of the prosecuting authorities in foreign bribery cases, especially as they already seem disinclined to take action in such cases where the offence has been committed in another country. Consequently, the lead examiners recommend that the Working Group follow-up the application of Belgium's extraterritorial jurisdiction in foreign bribery cases, and in particular application of the distinction based on the origin of the bribed foreign public official. The lead examiners further recommend that Belgium swiftly make the Belgian federal police, and especially the OCRC, aware of the existence of the extraterritorial jurisdiction of Belgian law in cases of foreign bribery.

2. Liability of legal persons

24. The shortcomings in the rules governing the criminal liability of legal persons identified in the Phase 2 evaluation of Belgium remain, despite the Belgian government's attempts to remedy them. Specific problems remain with the attribution of liability to legal persons and the need for a link with a natural person. One question not raised in the Phase 2 report concerns the exemption from liability of certain public legal entities.

25. Belgian law on the liability of legal persons has not changed since Phase 2, despite the Working Group's recommendation (Recommendation 4(d)) to clarify how the attribution of the intentional element of the foreign bribery offence, a recommendation deemed not to have been implemented at the time of the Written Follow-Up Report in 2008.¹⁸ The Belgian authorities mentioned that members of the Senate¹⁹ and the Chamber of Representatives²⁰ had introduced bills seeking to amend Article 5 CP in relation to the criminal liability of legal persons.²¹ The two bills sought to eliminate the mutually exclusive nature of the liability of related natural and legal persons in Article 5, paragraph 2 CP and to amend the exemption from liability of public legal persons in Article 5, paragraph 4 CP. However, these bills do not solve the question, raised by the Working Group during the Phase 2 evaluation, of the attribution of liability. The Belgian authorities interviewed during the on-site visit did not know which of the two bills had priority, nor the precise timeline for passing one or other. Nor is there any government initiative to address Recommendation 4(d).

26. Belgium provided four court judgments²² concerning legal persons held criminally liable for bribery (private and public domestic) and accounting offences. One judgment in first instance, *Case 1 – EU cereals subsidies*, was upheld on appeal on 6 May 2013, after the on-site visit. A fifth judgment concerns a legal person acquitted on appeal by the Antwerp Court of Appeal.²³ Legal persons have been acquitted in first instance in a sixth and seventh case, in which appeals were pending at the time of the Phase 3 evaluation.²⁴

¹⁸ See Recommendation 4(d) and the Working Group's evaluation of its implementation in 2008 in Annex 1; [Phase 2 Report on Belgium](#), paras. 123 and 178; [Phase 2 Written Follow-up Report](#), paras. 5 and 7.

¹⁹ Document 5 – 1258/1, Belgian Senate, 2011-12 Session, Bill amending the Penal Code with regard to the criminal liability of certain public legal persons (in French): www.senate.be/www/?MIval=/index_senate&MENUID=22105&LANG=fr.

²⁰ Document 2147, Belgian Chamber of Representatives, 13 April 2012, Bill amending the Penal Code with regard to the criminal liability of legal persons (in French): www.lachambre.be/FLWB/PDF/53/2147/53K2147001.pdf.

²¹ See Article 5 CP in Annex 2.

²² *Judgment 1 – Tram screens* (active private bribery; 2009/1615 of 9/4/2009); *Judgment 2 – Supplies and services contracts* (active private bribery); *Judgment 3 – Police vehicle recovery* (active private bribery/forgery); *Case 1 – EU cereals subsidies case*.

²³ *Judgment 4 – Police vehicle recovery* (active private bribery/forgery).

²⁴ *Judgment 5 – Lease agreements* (active and passive private bribery/forgery); *Judgment 6 – Army false invoices* (forgery).

a. Rules and principles of liability

(i) The link with the purpose, interests or on behalf of the company in question

27. In order for a legal person to incur criminal liability for bribery it is necessary to prove, by means of "concrete evidence", that the offence was committed on its behalf. The extent of the required link between the act of bribery and the company's benefit or interest is not clear. Only one judgment (*Case 1*) refers to this element of the offence but does not examine it in detail, merely finding that "the concrete elements in the criminal case prove that [the actions] were committed on its behalf".

(ii) Link with the criminal liability of natural persons

28. Article 5 CP does not establish the explicit autonomous liability of legal persons. Rather, article 5(2) envisages the possibility of a mutually exclusive liability of the related natural and legal persons. In cases where a company incurs liability solely because of the intervention of an identified natural person, "only the person who committed the more serious offence may be convicted". The construction of this sentence leaves open the possibility of exonerating a company of criminal liability where it manages to prove that an identified natural person "committed the more serious offence". During on-site discussions, the prosecutors said that in practice they prosecute the natural person as perpetrator and the legal person as co-perpetrator. The Belgian authorities also asserted on several occasions that this clause applied only to unintentional offences. In *Judgment 6 – Army false invoices*, however, the court held that the more serious offence was not committed by the three legal persons indicted, as a result of which they were acquitted. As noted above, the bills currently before the Belgian parliament recognise the problems posed by this mutually exclusive liability, which plays off liability between legal and natural persons, and therefore seek to eliminate it by repealing article 5(2). It remains to be seen whether and in what form an amendment may be passed. In addition, the question of the attribution of the element of intent remains, even if the paragraph is repealed (see section (iii) below).

29. Furthermore, article 5 also states that "if the known natural person committed the fault knowingly and willingly, he/she can be convicted at the same time as the legal person that is liable"; which again suggests a causal link between the company's liability and that of the individual. In *Judgment 3 – Police vehicle recovery*, the legal person (ordered to pay a fine of EUR 11,000 at first instance) was entirely acquitted by the Antwerp Court of Appeal because it had been prosecuted "solely for the natural person's actions or failure to act".²⁵ This case seems to exemplify the problem of the mutually exclusive liability in the current legal rules governing the criminal liability of legal persons in Belgium.

(iii) Attribution of the intentional element of the offence

30. The Phase 2 report raised the issue of attribution of the liability of legal persons, finding that uncertainty about the element of intent in the law seemed to hinder its enforcement. Article 5 CP does not make reference to the natural persons or corporate bodies which may cause the company to incur liability. The Phase 2 report cites preparatory work which seems to suggest a uniform method of attribution based on the intent of "management".²⁶ As there is no definition of "management", many interpretations are possible. The Working Group therefore recommended that Belgium clarify, within the framework of the bill being drafted at the time, the attribution of the mental element for the intentional offence of foreign bribery, in order to facilitate prosecution (Recommendation 4(d)). At the time of the Phase 2 Written Follow-Up Report, adopted in January 2008, the Belgian authorities presented a bill to reform the legal liability of legal persons which was designed to allay the concerns expressed by the Working Group in

²⁵ Antwerp Court of Appeal.

²⁶ See [Phase 2 Report on Belgium](#), paras. 128-131.

Recommendation 4(d).²⁷ While waiting for the new provisions to come into force, the Working Group considered that the recommendation had not been implemented.

31. Since the Phase 2 Written Follow-Up Report, and according to Belgium's answers to the Phase 3 questionnaire, the bill disappeared following the fall of the Belgian government in 2010. The Belgian authorities note that it is hence for the courts to refer to ordinary law in order to determine how to attribute intent. The question of attribution of the criminal liability of a French company and a Dutch company were considered in *Case 1 – EU cereals subsidies*. The court found that the French company incurred liability because "practices of bribery and breach of professional secrecy were instituted by the highest level of command." In contrast, with regard to the Dutch company, the court made a detailed analysis of the behaviour of the natural person charged and of "the question whether [his] behaviour could be considered the expression of that of the company which employed him and whether its intention was indistinguishable from [his]". According to Belgium's answers to the Phase 3 questionnaire, by referring to ordinary law "[the court] will base [its judgment] *inter alia* on the attitude of the *de jure* or *de facto* corporate bodies. However, the legal person may incur liability from the actions of staff or officers where they have consented to commit the offence within the framework of a general policy of the enterprise or a certain unspoken acquiescence". This interpretation of Article 5 CP raises questions about practice in accordance with Annex I(B) of the 2009 Recommendation, which recommends a separation between the liability of the natural person and that of the legal person. Annex I(B) also recommends a flexible approach to the attribution of liability to the legal person, which should cover situations where a person with the highest level managerial authority offers the bribe or authorises it to be offered or fails to prevent such an offer, including through a failure to implement a compliance programme. Apart from the above-mentioned bills tabled by Belgian members of parliament in the Senate and the Chamber of Representatives, there is no government initiative at present to pursue the process of reforming the legal framework for the criminal liability of legal persons begun in 2008.

(iv) *Jurisdiction over legal persons, in particular for the actions of their subsidiaries*

32. Article 1 of the Convention requires Member countries to ensure that a legal person cannot avoid responsibility by using intermediaries, including related legal persons, to offer, promise or give a bribe to a foreign public official on its behalf. The Phase 2 report noted that in the event of a bribery offence committed by a subsidiary in another country, the parent company would incur liability only under the traditional rules of participation in a crime and that a parent was not liable *per se* for the actions of its subsidiaries.²⁸ Yet in its answers to the Phase 3 questionnaires, Belgium asserts that it can exercise its jurisdiction where a legal person has participated in an offence, at least one constituent element of which occurred in Belgian territory, "in particular participation in a criminal association". Belgium provided only one example of a conviction of a parent company for the acts of its subsidiaries: *Case 1 – EU cereals subsidies*, where the French parent was convicted under article 5 CP for the acts of its subsidiary in Belgium. The subsidiary was not sanctioned. During the on-site visit, the Belgian authorities indicated that jurisdiction to prosecute parent companies for the acts of their foreign subsidiaries was established under article 10*quater* CIC and not article 5 CP. The dual criminality requirement in article 10*quater*, paragraph 2 could pose a problem with regard to jurisdiction over subsidiaries located in certain countries that do not have criminal liability for legal persons or certain countries which have opted for administrative or civil liability of legal persons (see Section 1.b. above on extraterritorial jurisdiction).

²⁷ "Having been approved by the Council of Ministers on 31 March 2006, the draft reparation bill was submitted to the Council of State, which gave its opinion on two separate occasions, 17 May and 6 June, after the bill had been amended. The draft bill was put before the Federal Parliament on 19 February 2007", [Phase 2 Written Follow-up Report](#), p. 31.

²⁸ See [Phase 2 Report on Belgium](#), para.132.

(v) *The exemption from criminal liability granted to certain public legal persons*

33. The final paragraph of article 5 CP exempts certain categories of legal person from criminal liability, a principle confirmed by the Constitutional Court in a judgment of 10 July 2002. As for which Belgian public enterprises benefit from the exemption, the Belgian authorities refer to a non-exhaustive list of public legal persons at federal level set out in article 1.3 of the Law of 22 July 2003 and provided after the on-site visit. For the most part, the list cites agencies responsible for distributing and managing public finances, such as insurance, pensions and social security, which would be very unlikely to be involved in international business transactions. Public companies like Belgacom, a major Belgian telecommunications operator, could therefore incur liability for foreign bribery offences committed in their interest. As noted in Section A.4 above concerning the Belgian economy, public enterprises also exist at a regional level, operating in the energy and water sectors, including on international markets. After the on-site visit, Belgium provided a single example of a regional enterprise incurring criminal liability, which did not involve the foreign bribery offence.²⁹ The examiners did not receive a copy of the judgment and are therefore not sure that a public entity has been convicted under article 5 CP to date.

b. *Application of the liability of legal persons in practice*

34. At the time of the Phase 2 report, with the exception of two minor cases of domestic bribery and concealment, no legal person had been convicted of a bribery offence. Concerning the application of article 5 to Penal Code offences other than bribery, the Phase 2 report noted that many judgments related to unintentional breaches of labour and environmental laws. However, Belgium said that it was difficult to provide information on convictions of legal persons under article 5 CP in the absence of a central register of criminal records for legal entities, already envisaged at the time of the Phase 2 evaluation but still in the planning stage at the time of the Phase 3 evaluation. Nonetheless, the Belgian authorities provided seven court judgments concerning various cases of public and private bribery and accounting offences. There was no judgment relating to foreign bribery offences committed by Belgian legal persons. The level of sanctions imposed in these cases is considered in Sections 3 and 4 below on sanctions and confiscation. Otherwise, Belgian legal persons are the subject of investigation and, in some instances, prosecution for foreign bribery offences in five pending cases.³⁰

35. In *Case 1 – EU cereals subsidies*, the Belgian authorities did not prosecute the subsidiary, active in Belgium, of the French company involved "because of the lack of interest that it would have represented." While congratulating Belgium on this first conviction of (foreign) legal persons for foreign bribery, the examiners are disappointed that the law enforcement authorities did not prosecute the subsidiary involved in the case. A third company was acquitted of a charge of criminal association because this type of offence does not apply to legal persons. According to the Brussels Court of Appeal judgment, following the consistent case law of the Court of Cassation, the offence requires an association of natural persons. The examiners are concerned that this judicial stance could prevent effective prosecution of legal persons in the event of pacts or conspiracies to bribe foreign public officials by commercial groups or a number of separate companies.

²⁹ The RTBF (Radio Télévision Belge Francophone) was convicted on appeal in 2010 and ordered to pay a token EUR 1 fine for "lack of objectivity and defamation."

³⁰ *Case 2 – EU property transactions; Case 3 – EU consulting firms; Case 5 – EU IT contracts*. For a detailed description of these cases, see Section A.6 above on cases of foreign bribery involving Belgian legal or natural persons.

c. Application of the settlement procedure to legal persons

36. Under Article 216bis CIC, Belgian public prosecutors can offer a settlement, including in bribery cases. Circular COL 6/2012 of 30/05/2012 of the College of General Prosecutors on extended settlement procedures states that Article 216bis CIC applies to both natural and legal persons.³¹ It also states that if the settlement is proposed to a legal person, it applies solely to that person and does not affect prosecution of the natural persons involved (and vice versa). Concerning the penalties available under the settlement procedure, the Circular states that the specific penalties for legal persons set forth in Articles 7bis and 41bis CP apply in a settlement procedure. As settlement is not considered to constitute a conviction, it is not registered in the criminal record of the legal person concerned (if a criminal record were created: see Section 3 below on sanctions). As Belgium did not have any statistics on settlements at the time of the Phase 3 evaluation, it was not possible to analyse use of the settlement procedure applied to legal persons (see also Section 5.c. below on the settlement procedure).

Commentary

The lead examiners note that Belgian law on the liability of legal persons has not changed since the Phase 2 evaluation, despite the Working Group's Recommendation 4(d) to clarify the attribution of the intentional element of the foreign bribery offence. They further note that a government bill proposing amendments to that effect disappeared after the fall of the Belgian government in 2010 and that neither of the two bills to amend the legal framework for the criminal liability of legal persons recently introduced in the Belgian parliament seeks to rectify the problem. The lead examiners therefore recommend that Belgium take the necessary measures to bring the legal framework for the criminal liability of legal persons into line with the Convention and the 2009 Recommendation and thereby to implement the recommendation already made in Phase 2.

With regard to the mutually exclusive liability between natural persons and legal persons, the examiners, noting that case law shows that the principle poses a real problem in practice with the result of acquittals of legal persons, recommend that Belgium eliminate this element of the criminal liability of legal persons.

Lastly, the lead examiners note that the rules on the criminal liability of legal persons do not cover certain public legal persons. The examiners are concerned in particular about a potential exemption of local public enterprises active on international markets. They recommend that the Working Group follow-up on the application of article 5 CP to public enterprises in Belgium, at federal and local level, in order to ensure that the exemption does not prevent full enforcement of the Convention.

3. Sanctions

37. Belgian law on sanctions, especially confiscation and administrative or civil penalties, has not changed since the Phase 2 evaluation. Pecuniary sanctions for foreign bribery remain negligible, especially for legal persons. With regard to additional sanctions, the lack of a centralised database to disqualify companies convicted of foreign bribery from public procurement contracts is inconsistent with OECD and Council of Europe standards in this area.

³¹ Joint Circular No. 6/2012 of 30/05/2012 of the Justice Ministry and the College of General prosecutors at Courts of Appeal, page 8 (see (in French) <http://static.tijd.be/pdf/afkopen.pdf>). Re: Application of Article 216bis CIC, especially concerning extension of the extinction of criminal prosecution in return for the payment of a sum of money.

a. Imprisonment and fines

38. The sanctions for the bribery offence are listed in articles 247 to 249 CP for natural persons and in articles 7bis and 41bis CP for legal persons.³² In Belgium, the amount of the fine is determined by applying article 1 of the Law of 5 March 1952 as amended by the Law of 7 February 2003 (after the introduction of the euro), which increases the amounts provided by law by 50 *décimes*.³³

(i) *Natural persons*

39. The sanctions applicable to natural persons convicted of foreign bribery under articles 246(2) and 250 CP vary considerably according to the nature of the offence and the foreign public official who receives the bribe. Although the relevant provisions in Belgian law envisage cumulative sanctions (a fine and imprisonment), in practice sentencing may take the form of either alternative or cumulative sanctions. To give an example, in *Judgment 2 – Supplies and services contracts*, the court imposed a fine of EUR 27,500 or three months' alternative imprisonment on each offender. In contrast, in *Judgment 4 – Police vehicle recovery*, the court upheld the sanction imposed at first instance of six months' imprisonment and a fine of EUR 500. During the on-site visit, the Belgian authorities indicated that the courts use their power of discretion to choose between cumulative and alternative sanctions.

40. Leaving aside sanctions for bribing law enforcement authorities or bribing a public official to commit a criminal offence, the maximum terms of imprisonment (three years) and fines (EUR 300,000) are relatively mild, especially for senior managers of large companies, and are at the lower end of the scale of fines for natural persons in States Parties to the Convention. In the only case of foreign bribery concluded in Belgium to date, the maximum sanction imposed on a natural person was an 18-month suspended prison sentence and a fine of EUR 7,500 even though the bribes at issue were estimated at a total of EUR 850 000. This raises serious questions about the “effective, proportionate and dissuasive” nature (Article 3 of the Convention) of these sanctions.

(ii) *Legal persons*

41. Legal persons are liable to a maximum fine of EUR 6.6 million (for bribing law enforcement authorities or bribing a public official to commit a criminal offence) and a minimum fine of EUR 180,000 (for bribing a public official in general, most often involved in international business transactions). In the only case of foreign bribery concluded in Belgium to date, *Case 1 – EU cereals subsidies*, the two companies were ordered to pay a fine of EUR 500,000 each, whereas the maximum fine that could have been imposed in the case was EUR 5.5 million (multiplier of 40 *décimes* at the time of the offence). The amount of the fine seems all the more insignificant in that the amount of the bribes involved was estimated, in the court's judgment, at EUR 850 000, and the total amount of advantages obtained by the companies in question was approximately EUR 22 million. The application of fines on legal persons in practice seems to be neither effective nor proportionate nor dissuasive in the context of international business transactions with a potential value of many millions or even billions of euros. In the context of such contracts, risk provisions for such sanctions can easily be made and bear no relation whatsoever to the expected or actual profits.

³² See Annex 3 for a table of criminal sanctions applicable to the offence of bribery of foreign public officials, reproduced from the Phase 2 Report on Belgium.

³³ These coefficients are regularly updated, with the result that the amount of fines changes according to the date of the offence, as follows: for offences committed after 01/01/1995, 1990 *décimes* (i.e. times 200 for the amount in Belgian francs); 01/01/2002, after introduction of the euro, 40 *décimes* (i.e. times 5); 01/03/2004, 45 *décimes* (i.e. times 5.5); 01/01/2012, 50 *décimes* (i.e. times 6).

b. Additional sanctions

(i) Natural persons

42. Under articles 31 to 34 CP, the courts can order additional sanctions, such as deprivation of certain civil rights, in conjunction with the prison sentences and fines applicable to individuals. A prohibition on exercising a professional activity for a minimum period of three years and a maximum of ten years can also be ordered by the judge against an individual convicted of bribery (Royal Decree No. 22 of 24 October 1934). The lead examiners did not have the opportunity to refer to this text due to its late transmission. In practice, the courts have imposed a ten-year ban on exercising a professional activity in two cases of (non-foreign) bribery.³⁴

(ii) Legal persons

43. Under article 7bis CP, legal persons could also incur sanctions in addition to fines, such as confiscation (see Section 4 below), dissolution (article 35 CP), a ban on engaging in an activity related to the corporate purpose, closure of one or more establishments (article 47 CP) and publication or dissemination of the judgment (article 37bis CP). In order to guarantee the continuity of public services, certain additional sanctions do not apply to public enterprises and enterprises responsible for providing a public service. During the on-site visit, Belgium confirmed that there were no examples of these additional sanctions being applied in practice.

(iii) Disqualification from public procurement

44. The Phase 2 report noted that under the Law of 10 February 1999 amending the Law of 20 March 1991 on the authorisation of public works contractors, enterprises proved to have committed or to have been involved in bribery offences can be disqualified from public procurement. In 2004, the European Parliament and the Council adopted Directive 2004/18/EC, which requires the exclusion from participation in a public contract of any candidate or tenderer who has been the subject of a conviction by final judgment for corruption. In response, Belgium introduced article 20 of the Law of 15 June 2006 (amended in 2011) on public procurement and certain public works, supplies and services, which provides for the exclusion of candidates or tenderers who have been convicted of corruption.

45. Since then the Working Group has adopted the 2009 Recommendation, which recommends that laws and regulations should permit the suspension from competition for public contracts of companies convicted of bribery of foreign public officials in contravention of their national laws. Article 20 of the Law of 2011, modifying the Law of 15 June 2006 relating to public procurement and certain public works, supplies and services, authorises the King to make an exception to disqualification from public procurement “for small contracts below an amount which He shall set.” The legal framework in Belgium for disqualification from public procurement thus appears not completely consistent with the standards of the 2009 Recommendation.

46. Even if the legal framework were consistent, the problems identified in Phase 2 remain in practice: in the absence of a central register of criminal records for legal entities, it would be impossible to implement a framework for disqualification from public procurement. Belgium provided the evaluation team with a copy of a bill drafted by SPF Justice seeking to establish a central register of criminal records for legal entities. The bill provides that any criminal judgment against a natural or legal person would be entered in the central register. The agencies referred to in articles 593 and 594 CIC would have access to them. However, the authorities responsible for awarding and managing Belgian public procurement

³⁴ *Judgment 1 – Tram screens; Judgment 3 – Police vehicle recovery.*

contracts are not included in the list, which again raises the question of how convicted legal persons would be disqualified from public procurement in practice if the competent authorities cannot access the records. According to the SPF Justice representatives interviewed during the on-site visit, a feasibility study of the bill is currently in progress. SPF Justice does not know the timetable for bringing the bill before parliament or its possible passage into law. (See also Section 11 below on the possibilities for certain Belgian agencies to refuse public support for convicted enterprises).

c. Judicial sentencing

47. The Phase 2 report noted four essential factors involved in determining the sanction for bribery of foreign public officials: the gravity of the offence, the offender's legal history, the length of proceedings and duress exerted by the foreign public official.³⁵

(i) Deferment, suspension and probation

48. Under article 1 of the Law of 29 June 1964, the judge may personalise the sanction by granting the convicted person simple or probationary deferment or suspension or probation of the sentence. Belgium stated in its answers to the Phase 3 questionnaire that "non-pronouncement or non-enforcement of a sanction stems [...] from application of the Law of 29 June 1964 on deferment, suspension and probation, which applies to all offences". According to the statistics provided by the Belgian authorities, the majority of convictions for bribery between 2005 and 2012 were accompanied by simple or probationary suspension (42% of all bribery cases) and simple deferment was granted in 17% of bribery cases. While emphasising that a suspended sentence is still a finding of guilt and hence a sanction, the authorities interviewed during the on-site visit confirmed that there was no general rule in this area. A circular was in preparation at the time of writing but the exact timetable for its adoption was not known.

(ii) Reasonable time limit ('délai raisonnable')

49. Belgium mentioned another important factor in sentencing: the possibility, under Article 21^{ter} Preliminary Title CIC, for the court to (a) pronounce a conviction by a simple declaration of guilt³⁶ or (b) order a penalty less than the minimum penalty provided by law if the length of proceedings exceeds a reasonable time limit.³⁷ The notion of reasonable time limit is not defined in Belgian law. The Belgian authorities nonetheless asserted that it can be defined with reference to case law from Belgium and from the European Court of Human Rights. Given the length of time taken to conduct in-depth investigations, followed by very long lead times for setting the date of a hearing, then for reaching a judgment, linked to the lack of means and resources, coupled with the delays associated with obtaining MLA, the consideration given to these periods in the context of sentencing is a source of concern. Furthermore, according to the statistics on cases of foreign bribery provided by Belgium, the main reason why prosecutors close bribery cases is because they exceed a reasonable time limit (see also Section 5.b.(iii) below).

(iii) Duress exerted by the foreign public official

50. The Phase 2 evaluation team was also concerned by the statement of a judge who said that he took duress exerted by a foreign public official into consideration as an extenuating factor. Following their concerns about the possibility that such duress might be taken into consideration, the examiners, during the

³⁵ See [Phase 2 Report on Belgium](#), para. 136.

³⁶ If the judge orders conviction by simple declaration of guilt, the guilty party is liable for expenses and restitution, as appropriate. Special confiscation is ordered.

³⁷ See Article 21^{ter} CIC in Annex 2.

Phase 2 evaluation, recommended that Belgium prepare a Circular recalling the text and the scope of the offence of foreign bribery and the importance of seeking effective, proportionate and dissuasive sanctions in such cases. No such circular has been forthcoming. Since that time the Working Group has adopted the 2009 Recommendation, Annex I(A) of which states explicitly that "Article 1 of the OECD Anti-Bribery Convention should be implemented in such a way that it does not provide a defence or an exception where the foreign public official solicits a bribe". During the on-site visit, the Belgian authorities said that judges may, on a case-by-case basis, take into account duress exerted by the foreign public official in sentencing.

d. Sanctions imposed by the courts

(i) Natural persons

51. In *Case 1 – EU cereals subsidies*, three natural persons convicted for foreign bribery were ordered suspended prison sentences of 12 to 18 months and fines of between EUR 2,500 and EUR 7,500. As just one example is not sufficient to analyse the practice of Belgian courts in the area of financial crime, the evaluation team asked for statistics on the sanctions imposed for domestic bribery. Belgian statistics do not allow a distinction to be drawn between active bribery of a Belgian or a foreign public official. According to Belgium, 14 individuals were convicted of active bribery in 2006, 8 in 2007, 13 in 2008, 7 in 2009 and 33 in 2010. Although there was a significant increase in 2010, no statistics are available for the last two years. In the absence of information about the amount of the bribes in question and the penalties imposed, it is impossible to say whether the approach in practice is consistent with the standard of the Convention, which demands effective, proportionate and dissuasive sanctions.

(ii) Legal persons

52. In *Case 1 – EU cereals subsidies* above, two non-Belgian legal persons were convicted of foreign bribery and sentenced to a fine of EUR 500,000 each. The bribes in this case were estimated, in the court's judgment, at EUR 850 000, and the total amount of advantages obtained by the companies in question was approximately EUR 22 million. Concerning sanctions imposed on legal persons in domestic bribery cases, Belgium provided seven court judgments involving legal persons (see Section 2 above on legal persons). In *Judgment 1 – Tram screens*, two companies convicted of active and passive private bribery and sentenced to a fine of EUR 27,500; the bribes in question amounted to EUR 76,004.14. In *Judgment 2 – Supplies and services contracts*, which also involved private bribery, pronouncement of the conviction was deferred for three years; two natural persons linked to the company which paid the bribe were sentenced to a fine of EUR 27,500 or three months' alternative imprisonment, suspended for three years, and confiscation of the equivalent value of the instruments of the bribes. In its judgment the court noted that as a result of the corrupt transaction, the legal person's profits increased by around EUR 500,000 between 2004 and 2006. However, confiscation of the proceeds of the offence was not ordered. In *Judgment 4 – Police vehicle recovery*, the natural person was sentenced to a fine of EUR 2,750 and 6 months' imprisonment suspended for three years for bribing police officers, the category of bribery offence supposed to entail imposition of the most severe penalties. The company in question was ordered at first instance to pay a fine of EUR 11,000, suspended for three years; the conviction was overturned on appeal and the company was acquitted. The bribes in the case amounted to EUR 85,854. No additional sanctions were imposed on the legal persons in these three cases and the sanctions imposed on the companies in question seem insignificant in relation to the amount of the bribes at issue.

Commentary

The lead examiners are concerned that in general the sanctions which apply to the foreign bribery offence in Belgium are at the lower end of the scale of Working Group countries and consider that they are not effective, proportionate or dissuasive. The imposition of pecuniary

sanctions on natural persons (EUR 2 500 to 7 500) and legal persons (EUR 500 000) in the only conviction for foreign bribery handed down in Belgium to date seems neither effective nor proportionate nor dissuasive in the context of an international business transaction worth over 22 million euros. Furthermore, additional sanctions which could have a more dissuasive effect, such as disqualification from public procurement, seem difficult to apply in practice, due to the lack of effective access by agencies in charge of the attribution and management of Belgian public procurement contracts to convictions of legal entities. The examiners therefore recommend that Belgium increase the level of sanctions applicable to natural persons, and especially to legal persons, for bribery of foreign public officials in international business transactions, so that sanctions are effective, proportionate and dissuasive in compliance with Article 3 of the Convention. The lead examiners further recommend that the Belgian authorities carry out their current plans to introduce a criminal record for legal entities as soon as possible and make it accessible to the authorities responsible for awarding and managing Belgian public procurement contracts.

The lead examiners are concerned about the almost systematic imposition of suspended sentences in corruption cases, which affects the effective, proportionate and dissuasive nature of sanctions. They are also concerned by the consideration given, at the sentencing stage of foreign bribery cases, to factors such as exceeding a "reasonable time limit" shorter than the limitation period, and duress exerted by the foreign public official. They recommend that Belgium promote a choice of effective, proportionate and dissuasive sanctions when drafting the circular on this point, and take steps to raise awareness among prosecutors and judges.

4. Confiscation of the bribe and of the proceeds of bribery

53. The legal framework for confiscation in Belgium has not changed since Phase 2.³⁸ Although the legal provisions seem consistent with the standards of the Convention, they are not applied satisfactorily in practice.

a. Legal framework

54. Articles 42 and 43 CP provide for compulsory confiscation of the instrument and proceeds of criminal offences in Belgian law (including foreign bribery). Article 43*bis* CP provides for confiscation of assets of equivalent value. Article 43*ter* CP provides for the extraterritorial enforcement of special confiscation orders. Extended confiscation of material benefits is possible once the person in question has been found guilty of specific offences (including bribery). Confiscation of the proceeds or material benefits transferred to a third party is possible in application of a Court of Cassation judgment of 29 May 2001. Confiscation is also possible in the framework of a settlement under article 216*bis* CP. The General Prosecutors' circular on application of this article states that "prosecutors may include in their proposal both items, already seized or not, which are liable to compulsory or optional confiscation, and material benefits resulting from the offence".³⁹ The prosecutors interviewed during the on-site visit said that in this context it is more a question of the "voluntary surrender" of what would have been confiscated if there had been no settlement.

³⁸ See [Phase 2 Report on Belgium](#), para. 134.

³⁹ Joint Circular No. 6/2012 of the Justice Ministry and the College of General Prosecutors at Courts of Appeal, p. 15.

b. Confiscation in practice

55. According to Belgium's responses to the Phase 3 questionnaires, the Central Office for Seizure and Confiscation (*Office central pour la saisie et la confiscation*, OCSC) has not made any seizure or confiscation in connection with foreign bribery. In most cases, confiscation of the instrument and proceeds of bribery in Belgium focuses on the recipient and the assets of the bribed public official. In *Case 1 – EU cereals subsidies*, for example, assets of equivalent value were confiscated following an accounting study. In this case, the advantages procured were not goods or sums of money but various benefits in kind. The Court of Appeal ordered special confiscation under articles 42 and 43 CP of EUR 99,819.13, EUR 39,892 and EUR 403,144.68 against the bribed official. However, the judgment does not specify whether the confiscation was linked to the foreign bribery offence, since several offences were involved.

56. In their response to the Phase 3 questionnaire, the Belgian authorities noted the need for a specific financial investigation and expert assessment in cases implying quantification of the proceeds of bribery. In *Judgment 2 – Supplies and services contracts*, the court ordered only value-based confiscation of the goods which constituted the instrument of the bribe. In contrast, despite reference to an increase of around EUR 500,000 in the profits of the company as a result of the advantages obtained by paying the bribes, the court did not order confiscation of that sum, i.e. the proceeds of the active bribery offence.

c. International cooperation in confiscation matters

57. The Law of 20 May 1997 covers confiscation of the proceeds of criminal offences following requests from non-EU countries. Under article 2, however, execution of a confiscation request is always subject to the existence of a treaty between Belgium and the requesting State on the basis of reciprocity. The Law of 5 August 2006 incorporates the principle of mutual recognition of judicial decisions in criminal matters between EU Member States into Belgian law. In the absence of statistics on seizure and confiscation by the Belgian law enforcement authorities in foreign bribery cases following requests from other countries, it is not possible to evaluate the implementation of this framework for cooperation in confiscation matters.

d. Awareness-raising

58. According to the prosecutors interviewed during the on-site visit, an awareness-raising day on the importance of confiscation was organised in November 2011 as part of a training session on bribery for prosecutors and judges, investigating magistrates and police officers. This awareness-raising initiative has not been repeated since then and is not part of the law enforcement authorities' ongoing training programme. Nevertheless, the Belgian authorities said during the on-site visit that these instructions were due to be taken up again shortly in a circular for prosecutors from the College of General Prosecutors.

Commentary

The examiners are disappointed that they did not have an opportunity to examine statistics on confiscation in practice of the instrument and proceeds of bribery offences. Consequently, they recommend that the Belgian authorities maintain such statistics so that a more detailed evaluation of the effectiveness of the system for confiscation in Belgium can be conducted. The examiners underline the importance of confiscation in foreign bribery cases wherever possible, especially in a Belgian context where criminal sanctions alone are not effective, proportionate or dissuasive. They therefore recommend that Belgium make full use of the confiscation measures available in the law to ensure that its law enforcement authorities routinely consider confiscation of the instrument and the proceeds of bribery of a foreign public official.

Despite preliminary efforts to raise awareness of seizure and confiscation among law enforcement authorities, much more work needs to be done to train prosecutors and judges in order to improve the implementation of seizure and confiscation, especially of the proceeds of active bribery of foreign public officials. The examiners recommend that Belgium continue its initiatives to provide more training for the law enforcement authorities in this area, including by issuing a circular.

5. Investigations and prosecutions relating to the foreign bribery offence

59. In Belgium, investigations and prosecutions of foreign bribery are generally a matter for the federal authorities, although the Brussels prosecutor's office and federal criminal police also handle a certain number of foreign bribery cases. A wide range of resources are available under the Code of Criminal Procedure for the investigation of foreign bribery. Moreover, the law enforcement authorities work entirely independently and decisions relating to investigation or prosecution are not subject to considerations prohibited by Article 5 of the Convention, as confirmed by those interviewed during the on-site visit.

60. The major difficulties encountered by the law enforcement authorities in their investigations and prosecutions of foreign bribery cases do not therefore stem from the legal framework but from serious problems of resources and priority given to the fight against corruption. Despite the increase in the number of cases referred to them, in particular due to Belgium's jurisdiction in EU fraud cases, the resources of the authorities tasked with investigating and prosecuting foreign bribery continue to dwindle. This lack of priority is also reflected in the new National Security Plan 2012-2015 approved by the Belgian Cabinet, which leaves bribery out of the list of priority criminal matters despite protests from the police and the judiciary, and even though it was included in the previous plans for 2008-2011 and 2004-2007 (see Section 10.a. below). The lack of resources has a strong impact on the duration of investigations, prosecution and even judgments, often resulting in the closure of cases or judgments finding that the case has exceeded a reasonable time limit, or even discharge or acquittal due to expiry of the limitation period. Priority is clearly given to cases referred by OLAF, which conducts its own inquiries and partly investigates cases before referring them to the Belgian law enforcement authorities, which are anything but proactive in foreign bribery cases stemming from other sources.

a. Institutional capacities for investigating and prosecuting foreign bribery

(i) The police

61. As explained in more detail in the Phase 2 report, the federal police conduct investigations in foreign bribery cases under the direction of prosecutors or investigating magistrates.⁴⁰ In bribery cases, including foreign bribery, prosecutors and investigating magistrates are mainly assisted by the OCRC within the Economic and Financial Crime Directorate of the federal police. At local level, this role is fulfilled by the 27 district departments under the responsibility of the federal police, the largest of which have their own specialist federal investigators working with small anti-corruption units or in finance sections. Prosecutors and investigating magistrates are free to choose which police department will carry out their investigations.⁴¹ In practice, however, prosecutors and investigating magistrates alike generally call on the OCRC, since it has the best-qualified people and can call upon the logistical support of their colleagues specialising in financial crime. Discussions during the on-site visit confirmed that most cases of

⁴⁰ See in particular the reference to the Royal Decree of 3 September 2000 on the jurisdiction of the federal criminal police and, more generally, the [Phase 2 Report on Belgium](#), paras. 74-79 for more detailed information about the role of the Belgian police in bribery cases.

⁴¹ Articles 28ter, 48duodecies and 56, para. 2 CIC.

foreign bribery are handled at police level by the OCRC (*Cases 2, 3, 4 and 5* mentioned in Section A.6. above on foreign bribery cases). It is generally the Brussels federal criminal police which handle foreign bribery cases where the OCRC is not in charge (*Cases 1, 6, 9 and 10*), in a section which deals almost exclusively with cases of economic and financial crime.

62. Because of the scale of demands from local prosecutors and investigating magistrates, the OCRC introduced a procedure for accepting cases based on criteria laid down in the College of General Prosecutors' circular of March 2002, since the extra workload meant that the Office could not handle all cases.⁴² If cases are not referred to the OCRC or if it is unable to accept certain cases, the investigation is carried out by the relevant district departments. However, where the OCRC turns down a case because of its workload, it often offers to assist the district department to which the case is assigned.⁴³

63. The responses to the Phase 3 questionnaire report a flagrant lack of human and material resources within Belgian law enforcement agencies, including the OCRC, underlined many times during on-site discussions with representatives of the police, the prosecution service, judges, civil society and private-sector lawyers. The OCRC is responsible not only for complex foreign bribery cases but also for all cases relating to fraud and corruption in EU institutions referred by OLAF (see section (iii) below on OLAF cases). As no provision was made for the latter class of cases when the OCRC was set up, the OCRC representatives said it already meant that resources were 10-15% short. They also said that staffing levels at the OCRC were falling steadily, from 120 investigators in 2001 to fewer than 60 by the end of 2013 and only 50 or so in 2014. The OCRC tempered its remarks by saying that the lack of human resources mainly affected domestic bribery cases. However, it also affected lead times for investigations and resulted in cases exceeding a "reasonable time limit" (see discussion below), even in foreign bribery cases.

64. Apart from these worrying figures, the representatives of law enforcement agencies also said that changes in recruitment procedures could have a strong impact on the expertise of the OCRC. Under the new recruitment system introduced in 2001, it is no longer possible to recruit at a sufficiently interesting level and salary to attract experienced professionals, such as specialist engineers or public procurement experts. As the specialists engaged before the 2001 reform gradually retire, the technical expertise available within the OCRC is being depleted.

65. The police representatives said that the material resources available to them were also insufficient. There was a shortage of computers and the budget was too limited to allow for a sufficient number of missions abroad, though they are often necessary in the framework of international letters rogatory, a common feature of foreign bribery investigations. The OCRC considered that the reduced budget made it harder to carry out investigations, with sometimes incomplete results adversely affecting the quality of investigations and the chances of obtaining a conviction. It also affected the capacity of staff to take part in ongoing training.

(ii) *Prosecutors*

66. In Belgium, the criminal prosecution of economic and financial offences, of which foreign bribery is one, mainly falls within the jurisdiction of the 27 prosecutors' offices serving the courts of first instance in the different judicial districts, and the 5 general prosecutors' offices at the Courts of Appeal.

⁴² The key criterion laid down in the 2002 Circular is the complexity of the inquiry, which can be determined from three groups of non-cumulative criteria: the nature of the act or acts under investigation (scope, repercussions), the nature of special investigative measures (inquiries into assets, investigations of persons with immunity or requiring particular investigative techniques), and the geographical range of special investigative measures.

⁴³ See [Phase 2 Report on Belgium](#), para. 78.

However, since the creation of the federal prosecutor's office in 1998, this office has been given concurrent jurisdiction particularly over offences which cover a number of jurisdictions or have an international dimension.⁴⁴ This provision potentially applies to the offence of bribing foreign public officials and related offences.

67. With regard to coordination between local prosecutors' offices and the federal prosecutor, local and general prosecutors must advise the federal prosecutor of any offence potentially falling within his jurisdiction, including foreign bribery.⁴⁵ The federal prosecutor then decides whether the local prosecutor, general prosecutor or he himself should bring the prosecution.⁴⁶ In practice, most foreign bribery cases are handled by the federal prosecutor (*Cases 1 to 5* – see Section A.6. above on foreign bribery cases). The Brussels prosecutor's office and, on appeal, the general prosecutor's office at the Brussels Court of Appeal generally take up foreign bribery cases not handled by the federal prosecutor (*Cases 7, 9 and 10*).

68. In its Phase 2 report, the Working Group already noted the discrepancy between the workload and the available resources.⁴⁷ There did not appear to have been any noticeable improvement at the time of the Phase 3. The representatives of the federal prosecutor's office and of the general prosecutor's office at the Brussels Court of Appeal noted that the location of European institutions in Belgium and the Belgian authorities' jurisdiction in matters of fraud related to EU interests significantly increased the workload of both prosecutors and police. Staffing levels at the general prosecutor's office at the Brussels Court of Appeal remained unchanged between 1997 and the end of 2012, when two prosecutors for the general prosecutor's office at the Brussels Court of Appeal were appointed under article 18 of the Law of 31 December 2012 on various provisions in the area of justice (*Moniteur belge*, 31 December 2012). The lead examiners did not have the opportunity to refer to this text due to its late transmission. Nonetheless, the remit of the prosecutor's offices and the resulting caseload are ever-increasing. Moreover, the Brussels prosecutors' office has not had a full complement of staff for many years, with a shortfall of 20-30% of prosecutors at any given time. This means that cases are inevitably prioritised. Prosecutors report that files are closed in half to two-thirds of the cases that reach the prosecutors' office (all offences included).

(iii) *The jurisdiction of the Belgian federal prosecutor's office in European cases originating from an OLAF referral*

69. Under article 144*bis*, para. 2, indent 2 and 144*quater* of the Judicial Code, the federal prosecutor is responsible for coordinating public proceedings and ensuring international cooperation. Consequently, OLAF notifies acts constituting fraud against EU interests to the federal prosecutor's office. The jurisdiction of the Belgian federal prosecutor's office in cases referred by OLAF is set out in a College of General Prosecutors circular.⁴⁸ According to the Belgian authorities, the circular determines how complaints which OLAF decides to refer to Belgium are processed (apparently, quite a heavy caseload) by offering OLAF a one-stop shop and staff duly organised and trained in the subject so that OLAF does not have to cover the various local districts. According to the circular, OLAF notifies the federal prosecutor's office of acts constituting fraud against EU interests. A copy of the OLAF request is also sent for information to the assisting prosecutor in financial, economic and tax matters. OLAF and Belgium share jurisdiction in this way because the European Community has its headquarters in Belgium.

⁴⁴ Article 144*ter*, para. 1, indent 3 of the Judicial Code.

⁴⁵ *Ibid.*, para. 2.

⁴⁶ See [Phase 2 Report on Belgium](#), paras. 65-66 for more detailed information about the structure of the prosecution service.

⁴⁷ *Ibid.*, paras. 70-73.

⁴⁸ Circular COL 9/2003 of the College of General Prosecutors at Courts of Appeal.

70. In the case file transmitted to the Belgian authorities, OLAF sets out the facts together with a legal analysis and a provisional definition of the offence. The federal prosecutor then decides to (a) initiate public proceedings him or herself, or (b) not initiate proceedings or defer his or her decision, or (c) delegate his or her powers or assign a prosecutor from the federal prosecutor's office to the local prosecutor's office. The federal prosecutor's office must give OLAF the name of the person handling the case.⁴⁹ During the on-site visit, the prosecutors referred to a 2011 memorandum from the federal prosecutor's office stating that it was taking charge of OLAF investigations and would no longer be redistributing cases to local prosecutors' offices (although the evaluation team was not given a copy of the memorandum).

71. Despite the scope of their mandate, unique in a Working Group Member country, neither the federal prosecutor's office nor the OCRC, which generally assists it in these cases, has been given any specific human or financial resources to take account of the additional workload. Belgium's responses to the Phase 3 questionnaire also cite the example of the Mons district, where only one investigating magistrate in four is willing to take on OLAF cases, adding that he "seems to be overwhelmed by the number of investigations assigned to him". Furthermore, the Belgian law enforcement authorities and the OLAF officials present during the on-site visit noted that Belgium has to assume the costs of MLA in cases involving bribery of European officials at EU permanent missions in countries outside Europe, which account for a significant portion of its budget.⁵⁰

72. The OLAF officials interviewed during the on-site visit said that ten cases a year on average are referred to the Belgian authorities (all offences included) and that few of them involve Belgian nationals or companies. Discussions with representatives of the federal prosecutor's office confirmed that most bribery cases handled by the Belgian prosecution service were of a transnational nature, involving European officials and natural or legal persons in various countries outside Belgium. To date, of all the foreign bribery cases referred by OLAF, only one, *Case 1 – EU cereals subsidies*, had resulted in a conviction, upheld on appeal on 6 May 2013. The case involved a Belgian national and the subsidiary, active in Belgium, of a French company. As noted above, however, the subsidiary involved in the case was not named a defendant. The Belgian authorities justified the decision not to prosecute on the grounds of a lack of resources.

(iv) *Judges and investigating magistrates*

73. There is no office which specialises in investigating bribery cases, nor are there any federal investigating magistrates to complete the federal structure in the police and prosecution service. Investigating magistrates develop skills in investigating and prosecuting foreign bribery cases by working on them. According to Belgium's responses to the Phase 3 questionnaire, investigating magistrates have been given some training on the bribery offence.

74. The lack of resources available to Belgian investigating magistrates had already been pointed out in Phase 2, together with the consequences on the time taken to process certain cases, resulting on occasion in expiry of the limitation period.⁵¹ The situation has hardly improved since then, according to the prosecutors and investigating magistrates interviewed during the on-site visit. Only four financial investigating magistrates out of 22 are currently assigned to the Brussels prosecutor's office, and they must also spend at least 18 days a year investigating non-financial cases.

⁴⁹ *Ibid.*, p. 4.

⁵⁰ *Ibid.*, p. 37.

⁵¹ *Ibid.*, paras. 80-86.

75. When cases come to trial, the financial criminal division of the Brussels court of first instance hears most foreign bribery cases. Only four judges (out of a full complement of ten) are assigned to the court, which deals with all cases of economic and financial crime in Brussels. According to the representatives of law enforcement agencies and the private sector interviewed during the on-site visit, these resources are vastly insufficient to handle the caseload. The courts are overloaded and lead times for hearings are getting longer and longer. According to the interviewees, the justice system for “ordinary” (non-financial) cases works very well. In contrast, it is common in economic and financial matters, including foreign bribery cases, for four or five years to elapse between conclusion of the investigation and a criminal court hearing.⁵² This has a number of consequences:

- public proceedings often become time-barred because of the overload and backlog of cases in the court system as a whole, not least because neither the initial judgment nor an appeal suspends the limitation period (see section d. below on the limitation period);
- a case which exceeds a "reasonable time limit" implies a reduced penalty or even a declaration of guilt without sanction (see Section 3 above). Moreover, the prosecution service can take a discretionary decision to close a case on the same grounds;
- long lead times for trials also weaken the action of the prosecution service, since it is common, when four or five years elapse between conclusion of the investigation and a case coming to trial, for the prosecutors assigned to the case to have moved on. In cases involving economic and financial crime, including foreign bribery, it is difficult for their successors, themselves overworked, to successfully take up these complex cases again;
- the backlog of cases prevents judges from receiving training which they themselves deem necessary. In that regard, the judges interviewed during the on-site visit said that there was little training available in economic and financial matters but that in all events their workload prevented them from attending.

(v) *Independence and factors prohibited by Article 5*

76. As in Phase 2, the prosecutors and judges interviewed during the Phase 3 on-site visit emphasised the extensive constitutional and legal guarantees they enjoy in order to ensure that the justice system remains independent of any interference or pressure and confirmed that they had not in practice been subjected to any influence in current or completed foreign bribery cases. The factors prohibited by Article 5 of the Convention are not allowed in Belgium. However, the Justice Minister of Justice can order prosecutions which the prosecution service would have considered inexpedient (the minister's positive power of injunction) and impose criminal policy guidelines.⁵³ Under article 143*quater* of the Judicial Code, the Minister of Justice "issues guidelines on criminal policy, including investigation and prosecution policy, after having sought the opinion of the College of General Prosecutors". The College comprises all general prosecutors at Courts of Appeal.

⁵² Belgium explained that this lapse of time is due to the "resolution of proceedings" phases: where a judicial investigation has been ordered, the investigating jurisdiction is required to rule on the existence of sufficient charges to justify bringing a case to trial before the criminal court. Additional investigative measures may be requested during this procedure, by injured parties or by the accused or persons cited in the indictment, which means that the prosecutor has to draw up a new bill of indictment and the case has to be re-examined by the investigating jurisdiction. This phase may last several months or even years.

⁵³ Article 151 of the Constitution.

Commentary

The lead examiners are seriously concerned about the flagrant lack of resources of the Belgian authorities responsible for investigating, prosecuting and adjudicating foreign bribery cases, and about the grave repercussions on the capacity to open investigations, the length of proceedings, the time-barring of proceedings and the rapidity with which the reasonable time limit is exceeded. They further regret that the remit of the federal prosecutor's office in cases referred by OLAF is not matched by additional human and financial resources. They find that this particular mandate, and the resulting workload, adversely affects the capacity of the federal prosecutor's office to investigate and prosecute other cases of bribery of foreign public officials. The lead examiners therefore recommend that Belgium take urgent measures to ensure that sufficient human and material resources are made available to the judicial and law enforcement authorities so that they can effectively investigate, prosecute and adjudicate foreign bribery cases.

Lastly, the lead examiners recommend that Belgium develop training relating to the specific features of foreign bribery for its authorities responsible for investigating, prosecuting and adjudicating such cases.

b. Investigation and prosecution

(i) Opening foreign bribery investigations

77. As illustrated by ongoing foreign bribery proceedings, the vast majority of foreign bribery cases involving Belgian bribers originate in referrals from OLAF. This situation results from an agreement between the EU and Belgium whereby Belgium undertakes to prosecute cases of fraud which harm the interests of the EU. Leaving aside this formal agreement, it became apparent from discussions with representatives of the police and the prosecution service that these cases are in fact easier to process in an overall context of very limited resources and the lack of priority given to the fight against economic and financial crime. During the on-site visit, OLAF representatives said that their preliminary investigations meant that cases were already relatively far advanced when they reached the Belgian prosecution service. OLAF also continued to assist the Belgian authorities during their investigations, which was greatly appreciated in view of the already excessive police workload. In contrast, the Belgian authorities pointed out that there was still sometimes a great deal of work to do after OLAF had referred the case and that OLAF's role once the Belgian authorities had taken over was limited to providing expert evidence for an ongoing investigation.

78. However that may be, it is hardly surprising that OLAF cases should be given priority and that the investigating and prosecuting authorities should show little inclination to take up foreign bribery cases stemming from less robust and certainly less obviously helpful sources. During the on-site visit, two cases involving allegations of bribery of foreign public officials by Belgian persons were mentioned in which Belgium had not opened an investigation or even contacted the countries where the passive bribery offences were tried, even though some of them were Parties to the Convention. The representatives of the prosecution service said that they did not wish to encroach on another country's affairs and that, in the absence of any referral from the foreign authorities, they had no intention of taking up such cases merely on the basis of press reports. Another affair mentioned during the on-site visit concerned a Belgian company implicated in a case of foreign bribery of a public official of a country which was not a Working Group member. The Belgian authorities were unaware of the case at the time. In May 2012, the public official was convicted of receiving bribes and sentenced to 29 years' imprisonment and the confiscation of 31.9 million patacas (USD 3.99 million) and his shares in the subsidiary of the Belgian company. At the time of writing, the case was the subject of a certain amount of media coverage in the public official's country of origin, since he was involved in numerous corruption cases and the executive director of the

Belgian company was on trial for bribery and money laundering at the same time, before the court of first instance of the country in question (see Section 9.a on MLA).⁵⁴ Although these developments took place after the on-site visit it is astonishing that the Belgian authorities were not aware of them. Leaving aside the Belgian authorities' complete unawareness of this case involving a Belgian national, it highlights the absence of any reporting of foreign bribery allegations by Belgian embassies and diplomatic missions abroad (see Section 10.a(i) on the role played by Belgian diplomatic missions abroad in reporting foreign bribery allegations involving Belgian companies).

79. Even more astonishing is the failure to open investigations in connection with certain letters rogatory addressed to Belgium. In their responses to the Phase 3 questionnaire, the Belgian authorities mentioned three MLA requests (two from non-States Parties to the Convention and one from a State Party), expressly mentioning possible bribery by Belgian persons of public officials from the requesting countries. Although there had been a positive response to these requests, they had nonetheless not led to the opening of investigations in Belgium. The law enforcement authorities explained that it would require the commitment of too many resources in sometimes remote regions, and in cases that were too complicated. After the on-site visit, the Belgian authorities said that the main reason for their policy of not opening investigations on the basis of information obtained during passive MLA was that "the requesting law enforcement authority is already in charge of the whole issue". This is not necessarily the case, especially where the purpose of an MLA request is to seek the necessary evidence in criminal proceedings for passive bribery against a public official in the requesting country, where the briber is not the subject of the proceedings and is thus liable to escape justice. Moreover, the Belgian authorities signalled their reluctance to open a parallel investigation in Belgium on the grounds that there would be a risk of disclosing confidential information and interfering in the ongoing investigation in the other country. Article 4(3) of the Convention states that "when more than one Party has jurisdiction [...] they shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution". According to the Belgian authorities, the requesting country would have to take the initiative of such bilateral or multilateral consultation before they would consider opening an additional investigation in Belgium. This lack of initiative and consultative approach on the part of the Belgian authorities in the context of MLA in bribery cases raises the question of Belgium's compliance in practice with its obligations under the OECD Convention. The lack of initiative and consultative approach taken by the Belgian authorities with regard to active MLA put into question Belgium's fulfilment of its obligations under the OECD Convention (see Section 9.a on MLA).

(ii) *Investigative techniques*

80. As mentioned in the Phase 2 report, a wide range of investigative techniques is available to the authorities under Belgian criminal law.⁵⁵ It is therefore not so much a lack of tools that causes foreign bribery investigations to succeed or fail as the lack of sufficient human and material resources to make use of them.

81. In practice, the Belgian authorities indicated that they relied on various methods in foreign bribery investigations, including search and seizure on the premises of the natural or legal persons

⁵⁴ See *Sessão acalorada em contradições* (in Portuguese) 27/06/2013, Macao Court (<http://jtm.com.mo/local/sessao-acalorada-em-contradicoes>); *TO procura consultor da Waterleau* (in Portuguese) 02/07/2013, Macao Court (<http://jtm.com.mo/local/a-procura-consultor-da-waterleau>), *Govt keeps a stake in Waterleau*, (<http://macaubusinessdaily.com/Politics/Govt-keeps-Ao-stake-Waterleau>) 03/07/2013; *Industrial park's sewage plant contract extended*, 27/08/2013 (<http://macaubusinessdaily.com/Politics/Industrial-park%E2%80%99s-sewage-plant-contract-extended>).

⁵⁵ See [Phase 2 Report on Belgium](#), paras. 87-90.

involved, arrest warrants, observation of suspects and the interception of communications. Information is also frequently obtained from banks and the tax authorities and does not seem to pose any problem.

(iii) *Discretion to prosecute*

82. Whichever authority has jurisdiction (local or federal prosecutor's office), its actions will be governed by the principle of prosecutorial discretion.⁵⁶ The reasons for closing a file might be the lack of identified perpetrators or insufficient evidence, but other criteria exist for the exercise of prosecutorial discretion, laid down by the general prosecutors in each jurisdictional district under guidelines setting out priorities for prosecution. It is not possible for persons who have reported an alleged offence to the prosecution service to appeal against a decision to close the case. Prosecutorial discretion is limited in two ways: the injured person can join the criminal prosecution, thereby setting a prosecution in motion (infrequent in foreign bribery cases), or the general prosecutor and the Minister of Justice may order a prosecution (see Section 5.b.v. above).

83. Prosecutors therefore have extensive discretion to close cases, of which they frequently avail themselves in economic and financial crime cases. Apart from the two foreign bribery cases closed without further action, mentioned earlier in this report, the responses to the Phase 3 questionnaires mentioned many other cases, especially of money laundering with a suspected predicate bribery offence (sometimes passive), closed on the grounds of "insufficient investigative resources" or "the existence of other priorities in the prosecution policy". This illustrates yet again the extent to which the lack of human and material resources undermines the Belgian authorities' capacity to effectively prosecute and sanction complex cases of economic and financial crime, including foreign bribery.

84. A number of cases are also closed because they exceed a "reasonable time limit". This principle is generally also taken into consideration during sentencing, since Article 21^{ter} Preliminary Title CIC states that "if criminal proceedings exceed a reasonable period of time, the judge may pronounce a conviction by a simple declaration of guilt, or may order a penalty less than the minimum penalty provided by law" (see also Section 3 above). In a certain number of cases, prosecutors pre-empt the courts by considering that a trial is unlikely to have a successful outcome because proceedings have exceeded a reasonable time limit. Here again, the excessive workload of the authorities specialising in economic and financial crime means that a reasonable time limit is often exceeded because investigations and proceedings take too long.

Commentary

The lead examiners are seriously concerned about the very passive attitude of the Belgian law enforcement authorities, who seem unwilling to take up foreign bribery cases unless they are formally reported. As such, they are disappointed at the failure to open investigations in several cases of foreign bribery involving Belgian companies and nationals. They therefore recommend that Belgium take a more proactive stance by collecting information from a range of sources in order to improve enforcement of the offence of bribery of foreign public officials involving Belgian natural or legal persons. The examiners are disappointed at the Belgian authorities' policy of not opening investigations on the basis of information stemming from MLA requests and are seriously concerned by the fact that Belgium does not make full use of its jurisdiction in foreign bribery cases. By restricting its role to merely granting MLA, without ever initiating proceedings for foreign bribery offences brought to its attention through such requests, despite having jurisdiction over the Belgian nationals involved, Belgium does not fulfil its obligations under the OECD Convention. They therefore recommend that the Belgian

⁵⁶ Article 28^{quater}, para. 1 CIC.

authorities investigate information about foreign bribery disclosed in the context of international cooperation. They also recommend that Belgium take the necessary measures to make foreign bribery a priority of its criminal justice policy.

As emphasised earlier, the lead examiners are also concerned about the repercussions which the lack of resources have on effective and efficient enforcement of the offence of foreign bribery. They encourage Belgium to ensure that foreign bribery cases are not closed on the grounds of insufficient investigative resources, lack of priority or exceeding a reasonable time limit solely because investigations, proceedings and judgments take too long.

c. Settlement

85. Prosecutors may also decide to use the settlement procedure provided for in article 216bis CIC as an alternative to bringing a prosecution. Introduced in 1984, the procedure has been extended since the Phase 2 evaluation. It now applies to any offence which, by the prosecutor's estimation, does not merit a principal penalty of more than two years' imprisonment or a heavier sentence and does not involve serious bodily harm. The Belgian authorities added that prosecutors may make this estimation even for offences carrying a maximum penalty of 15 to 20 years' imprisonment, pursuant to article 80(3) CP, under which maximum prison sentences can be replaced if there are extenuating circumstances. Thus, foreign bribery offences could be the subject of a settlement. The procedure applies to both natural and legal persons. Although strictly speaking confiscation is not authorised in a settlement procedure, the prosecutor may nonetheless demand "voluntary surrender" of goods or their financial equivalent which could have been confiscated had there been no settlement.

86. Prosecutors may propose a settlement at any time during proceedings as long as a final judgment has not been reached, including in the event of an appeal to the Court of Cassation and where an investigating magistrate has already been assigned to the case. The criterion for sentencing under the settlement procedure is not the penalty set by law but the penalty which the court would impose if it were to order conviction for the offence committed, giving consideration where relevant to extenuating circumstances or to proceedings exceeding a reasonable time limit. The investigating magistrate may issue a non-binding opinion to the prosecution service providing information about the state of the investigation. The investigating magistrate may not under any circumstances express an opinion on the expediency or otherwise of bringing a prosecution or proposing a settlement. The terms of the settlement are not disclosed; it does not constitute a sanction and is not registered in criminal records.

87. The College of General Prosecutors issued a circular in 2012 concerning use of article 216bis.⁵⁷ Containing a textual analysis of the clauses of the article, it clarifies the point that the settlement procedure applies to both natural and legal persons. Where economic and financial offences are concerned, the circular indicates that "in principle all economic, financial and tax offences may fall within the scope of article 216bis", but that "the prior consent of the general prosecutor with territorial jurisdiction is required, both for the proposal and for the final conclusion of a [settlement] pursuant to article 216bis, para. 2." A copy of the court order ascertaining termination of proceedings must be transmitted to the Prosecutor General. In contrast, the circular does not give any more precise guidelines on the circumstances in which it may or may not be expedient to use the settlement procedure. Each prosecutor's office seems to operate according to its own rules. For example, a representative of the Liège prosecutor's office interviewed during the on-site visit stated that in his jurisdiction, settlement was not proposed to a person already convicted. The circular is due to be reviewed in 2014, once some experience has developed in relation to the practical application of the extended settlement procedure.

⁵⁷ Joint Circular No. 6/2012 of 30/05/2012 of the Ministry of Justice and the College of General Prosecutors at Courts of Appeal. See (in French) static.tijd.be/pdf/afkopen.pdf.

88. The Belgian authorities interviewed during the Phase 2 evaluation said that use of the settlement procedure was marginal in practice, especially in economic and financial cases. The lack to date of statistics on the use of settlement by type of offence prevents any precise analysis of developments in the use of the procedure. However, the impression left during the Phase 2 evaluation was confirmed in the Phase 3 discussions, with representatives of the prosecution service explaining that they made little use of it. It was also time-consuming and would not therefore necessarily be regarded as advantageous in relation to conventional proceedings, although the prosecutors acknowledged that they sometimes turned to the settlement procedure in order to save cases from becoming time-barred or exceeding a reasonable time limit. Lawyers interviewed during the on-site visit said that Belgian companies tended to hold out to the end, preferring to take cases to trial.

89. While the lack of statistics means that it is not possible to establish with certainty the number of bribery cases in which a settlement has been reached, the authorities nonetheless referred to one case in July 2011 involving passive bribery, money laundering and criminal association where a settlement of EUR 22.5 million had been concluded with natural persons. The representatives of the prosecution service said that they were not aware of any settlement concluded with legal persons in bribery cases, though a first settlement procedure involving several legal persons in a case of relatively small-scale domestic bribery was pending at the Charleroi prosecutor's office at the time of the on-site visit.

90. Discussions during the on-site visit uncovered uncertainties as to the Belgian authorities' capacity to respond to MLA requests if they concerned a case concluded by a settlement. Some prosecutors thought that it should not pose a problem, whereas others considered that documents relating to the settlement could probably not be transmitted. It would appear that Belgium has not actually received any such assistance request (see also Section 9 below).

Commentary

The lead examiners acknowledge the flexibility offered by the possibility of settlement, a procedure recently extended in Belgian law. However, they regret that Belgium is not able to provide statistics on sanctions imposed under the settlement procedure by type of offence, which would have permitted a more pertinent analysis of application of the settlement procedure in practice, and recommend that Belgium maintains these types of statistics in future.

The lead examiners consider that where a foreign bribery case is concluded by a settlement, the most important elements of the settlement should be disclosed, to ensure greater transparency, raise awareness and increase confidence in Belgium's enforcement of the foreign bribery offence. They recommend that Belgium make public, as necessary and in compliance with the relevant rules of procedure, the most important elements of settlements concluded in foreign bribery cases, in particular the main facts, the natural or legal persons sanctioned, the approved sanctions and the assets that are surrendered voluntarily. Given that the procedure had not been used in foreign bribery cases at the time of this report, and that there was little statistical information about its use in connection with other economic offences, the examiners further invite the Working Group to follow-up:

- (i) the practical application of settlement in foreign bribery cases, in order to ensure the foreseeable and transparent nature of the procedure; and*
- (ii) the sanctions imposed in the context of the settlement procedure.*

d. Limitation period

91. The limitation period for active bribery of a foreign public official in Belgian law is five years.⁵⁸ The period starts to run as of the date on which the offence is committed or, in the event of a series of offences, the date of the last one.⁵⁹ Limitation of public proceedings is interrupted by acts of investigation or prosecution, which initiate a new period of equal length, though this period cannot be suspended or interrupted again.⁶⁰ Thus, the maximum limitation period for foreign bribery can never exceed ten years. Neither MLA requests – where several years may sometimes elapse before an answer is forthcoming – nor judgments at first instance or on appeal can suspend the limitation period beyond ten years. The Belgian authorities said that an appeal to the Court of Cassation suspends the limitation period from the date of the appeal until pronouncement of the judgment. However, given the extremely long lead times for hearing cases at first instance and on appeal, the likelihood that these would be appealed to the Court of Cassation before public proceedings were time-barred remains very small.

92. The representatives of prosecutors and judges interviewed during the on-site visit all felt that the ten-year period ought to be sufficient and that it was not reasonable to make the accused wait any longer. Although these arguments have merit, the backlog of cases in the Belgian judicial system causes very long lead times for investigations, proceedings and judgments in foreign bribery cases. Moreover, defence lawyers have no hesitation in using delaying tactics to ensure that prosecutions run out of time. As a result, it is not uncommon to see cases involving economic and financial crimes time-barred. The pending foreign bribery cases mentioned in Section A.6 above run a real risk of running out of time. *Case 2 – EU property transactions*, in which a date for trial at first instance has still not been set, will be time-barred in 2015, while the limitation period for *Case 3 – EU consulting firms*, still under investigation, will expire in 2016.

93. Expiry of the limitation period also has an effect on the use of confiscation. In *Case 1 – EU cereals subsidies*, the prosecutor's office said that it had not sought confiscation of the proceeds of the offence from the accused legal persons because the time needed to quantify the benefit would raise an additional risk of expiry of the limitation period (the risk being already real and serious in the case). In contrast, the instrument of the bribe (the amount of the bribes) has been confiscated from the public official in the case. The European Commission and the French paying agency have brought a third party civil damages claim in order to recover the proceeds of the offence, i.e. the advantages obtained by the companies convicted in the case (see Section 4 on confiscation of the instrument and proceeds of the bribe).

Commentary

The lead examiners are very concerned about the large number of foreign bribery cases liable to be statute-barred in the coming years. They recall that Article 6 of the Convention requires "an adequate time for the investigation and prosecution of this offence". They note that the drastic overloading of the police and prosecution service, coupled with the backlog of cases in the court system, means that there is no assurance at present that foreign bribery cases will be concluded before the limitation period expires, and consider that this casts serious doubt on Belgium's enforcement of the Convention as a whole. The lead examiners therefore recommend that Belgium urgently take all necessary measures to extend the possibilities for suspending the limitation period to allow adequate time for foreign bribery investigations and

⁵⁸ Article 21, Preliminary Title of the CIC.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, article 22.

prosecutions. They encourage Belgium to evaluate the resources available to prosecute and try foreign bribery offences in a timely manner.

6. Money laundering

94. Although Article 7 of the Convention states that the predicate offence of bribery of a foreign public official is established "without regard to the place where the bribery occurred", foreign bribery-related money laundering is punishable in Belgium only subject to the requirement of dual criminality. Moreover, despite the important role played by the Belgian financial intelligence unit (CTIF) as a source of bribery cases, Belgium stated that no conviction had been pronounced for foreign bribery-related money laundering by a Belgian individual or enterprise. Efforts to raise awareness among reporting professions of bribery of foreign public officials as a predicate offence of money laundering also need to be stepped up.

a. The offence of money laundering

95. The provisions for sanctioning foreign bribery-related money laundering have not changed since the Phase 2 evaluation. Under article 505 CP, the offence of money laundering applies regardless of the predicate offence which generated the laundered advantages. Bribery of foreign public officials is therefore a predicate offence to money laundering. In addition, self-laundering is also an offence in Belgian law. The Financial Action Task Force (FATF) report and the Phase 2 report noted that Belgium had adopted a broad conception of the definition of money laundering, with the result that at the time of the Working Group and FATF evaluations in 2005, there were no major obstacles to prosecutions for money laundering.⁶¹

96. Article 7 of the Convention requires each Party to make money laundering a criminal offence where the predicate offence is foreign bribery, "without regard to the place where the bribery occurred". Under article 505 CP, the dual criminality condition is not explicitly required in order for the predicate offence of money laundering to be committed in Belgian law. However, the FATF report, drawing on a judgment of the Tongres Criminal Court,⁶² noted that "Belgium applies the principle of dual criminality and will not prosecute money laundering resulting from an action committed in another country which is not an offence in that country".⁶³ Belgium said that this case law had not been overturned since then. This means that if foreign bribery takes place in a country where it is not a criminal offence, the predicate offence to laundering the proceeds of foreign bribery would not be committed in Belgian law. During the on-site visit, however, the CTIF representatives said that it was not necessary to establish a predicate offence and that 20% of cases from the CTIF that went to trial resulted in convictions for money laundering only, without the court having established any link with a specific predicate offence. Only the presumed unlawful nature of the origin of the funds was taken into consideration.⁶⁴

b. Detection and reporting of suspicions of foreign bribery-related money laundering

(i) Reports received and transmitted by the CTIF

97. The CTIF received 21,000 suspicious transaction reports from the companies, professions, financial and non-financial authorities referred to in the Law of 11 January 1993 preventing use of the

⁶¹ See [Phase 2 Report on Belgium](#), paras. 28, 61, 158-161; Third Mutual Evaluation Report on Anti-Money Laundering and Combating Terrorism, Belgium, paras. 126 and 128, p. 42.

⁶² Tongres Criminal Court, 16 November 2001.

⁶³ Third Mutual Evaluation Report on Anti-Money Laundering and Combating Terrorism, Belgium, 2005, para. 112 and footnote on p. 46.

⁶⁴ [CTIF Annual Report 2012](#), p. 32.

financial system for money laundering, the financing of terrorism and proliferation. A large number of entities are subject to a reporting requirement: in addition to the entire financial and banking sector, it extends to designated non-financial professions.⁶⁵ The list was extended in 2004 to include dealers in diamonds. Seventy-eight per cent of suspicious transaction reports submitted to the CTIF in 2012 came from bureaux de change and credit institutions; few and in some cases virtually no reports come from non-financial professions.⁶⁶

98. Although the number of cases referred to the prosecution service by the CTIF in which bribery was the predicate offence increased steadily until 2011, it slowed in 2012. Such cases accounted for less than 1% of all cases referred to the prosecution service by the CTIF.⁶⁷ Seventy-four cases of money laundering in which the *a priori* predicate offence was bribery were forwarded by the CTIF to the law enforcement authorities between 1993 and the end of 2011.⁶⁸ Since the Phase 2 evaluation in 2005, ten cases linked to bribery of public officials have been referred to the federal prosecutor's office. However, when the Belgian authorities talk of bribery of public officials they include Belgian public officials, public officials of international organisations located in Belgium and foreign public officials. They said that these cases mostly involved politically exposed persons, mostly of foreign nationality and/or residing abroad, most of them from Africa or Central or Eastern Europe. It is not possible from this explanation to clearly distinguish cases involving suspicions of money laundering where the predicate offence would be bribery of a foreign public official by a Belgian company from cases where the predicate offence is bribery of a Belgian public official or a European official. None of these cases has resulted in a conviction for foreign bribery-related money laundering by a Belgian individual or company.⁶⁹

(ii) *Preventive measures enabling the detection of foreign bribery offences*

99. Preventive measures that apply to transactions involving politically exposed persons (PEPs) can play an important part in the detection of foreign bribery offences. The FATF considered in 2005 that Belgium had developed a very comprehensive set of measures applicable to PEPs. At the time of the FATF evaluation, measures for the implementation by designated non-financial enterprises and professions of requirements relating to PEPs had not been defined. Following the FATF's recommendations, Belgium is taking steps to ensure that designated non-financial enterprises and professions introduce such implementing measures.⁷⁰ The Belgian authorities said in their responses to the Phase 3 questionnaires that foreign PEPs were involved in many cases of money laundering and that between 2010 and 2012 the CTIF had sent the law enforcement authorities 16 cases involving PEPs in which foreign bribery was believed to be the predicate offence to money laundering.

⁶⁵ Real estate agents, notaries, bailiffs, company auditors, external accountants and tax advisers, chartered accountants and tax accountants, lawyers, art dealers, security companies (money couriers) and casinos..

⁶⁶ See (in French) [CTIF Annual Report 2012](#), pp. 7 and 10.

⁶⁷ 1,506 cases (all offences) were forwarded to the prosecutors' offices of the various judicial districts in 2012. Whereas only four cases of laundering with bribery as a predicate offence were referred in 2009, the number rose to 23 in 2011 but fell back to 15 in 2012. See [CTIF Annual Report 2011](#), pp. 5 and 26, and [CTIF Annual Report 2012](#), p. 25.

⁶⁸ The Belgian authorities said that the cases linked to bribery forwarded to the law enforcement authorities by the CTIF mainly involved bribery of Belgian public officials and, to a lesser extent, private bribery.

⁶⁹ See [CTIF Annual Report 2012](#), p. 95. 66.67% of cases forwarded in connection with bribery were the subject of a judicial investigation in 2012, 26.67% were closed and 6.66% were made available to a foreign authority.

⁷⁰ Third Mutual Evaluation Report on Anti-Money Laundering and Combating Terrorism, Belgium, 2005, para. 15, p. 9 and para. 28, p. 12 (French only).

(iii) *Awareness-raising*

100. Reporting professions are the subject of measures to raise awareness of financial transactions liable to be linked to bribery. Part of the CTIF's annual report is devoted to bribery as a predicate offence to money laundering and to PEPs. However, the focus is on the laundering of the proceeds of passive bribery, while foreign bribery is not mentioned at all.⁷¹ No other measures appear to have been taken to raise awareness of foreign bribery as a predicate offence to money laundering among entities subject to a requirement to report suspicious transactions. As the Belgian authorities said that the CTIF forwards a number of cases to the prosecuting authorities in which foreign bribery is believed to be the predicate offence, it would have been instructive to have been given more information about the indicators taken into consideration in order to detect foreign bribery as a predicate offence, typologies and the training given to professions subject to a reporting requirement and to members of the CTIF.

Commentary

The lead examiners note that article 505 CP does not impose a dual criminality condition on the predicate offence to money laundering in order for that offence to have been committed in Belgian law. However, they consider that Belgian case law, in recalling the principle of dual criminality for the predicate offence, raises the issue of compliance with Article 7 of the Convention. The lead examiners therefore invite the Working Group to follow-up the application in practice of the offence of money laundering where foreign bribery is the predicate offence in order to ensure that the money laundering offence can be prosecuted and sanctioned "without regard to the place where the bribery occurred".

The lead examiners welcome the active part played by the CTIF as a source of bribery cases and note the increase in the number of cases forwarded by the CTIF to the prosecution service in which bribery is believed to be the predicate offence, even though the number remains generally rather low. They note in particular the small number of suspicious transaction reports from non-financial professions. The lead examiners consequently recommend that Belgium step up its measures to raise awareness of the detection of facts that may constitute foreign bribery among the professions, including non-financial professions, subject to the requirement to report suspicious transactions.

7. Accounting Requirements, External Audit, and Corporate Compliance and Ethics Programmes

101. Belgium has a range of accounting offences and legal requirements for external auditors. As found during the Phase 2 evaluation, however, there is a persistent absence of convictions for accounting offences, partly due to the prosecuting authorities' inaction in this sphere. Similarly, external auditors are not required to report suspicions of bribery of foreign public officials to the relevant authorities, independent of the company. Only large international companies are aware of the issue of establishing compliance systems, mainly on account of the risks of prosecution in the United States or the United Kingdom.

a. Accounting offences and their application

(i) *Accounting offences and sanctions*

102. Belgian law relating to accounting offences has not changed since the Phase 2 evaluation. The Companies Code (*Code des sociétés*, CS) defines accounting offences such as forgery and the use of

⁷¹ See [CTIF Annual Report 2012](#), pp. 94-97.

forged documents in annual financial statements (article 127) and non-compliance with the rules relating to the preparation of annual and consolidated financial statements (article 126). Both offences are punishable by five to ten years' imprisonment and a fine. The offence of unlawful certification or approval of accounts (article 171) is punishable by a fine or imprisonment for one month to one year in addition to a fine if the offence is committed with fraudulent intent.⁷²

(ii) *Enforcement in practice*

103. The Phase 2 report found virtually no convictions for accounting offences, together with a very small number of cases in which company managers were accused of such offences. At the time of the Phase 2 evaluation, there had been no conviction on the grounds of omissions from or falsification of books, records, accounts or financial statements for purposes of bribing Belgian or foreign public officials.⁷³ The Working Group therefore recommended that Belgium draw the attention of prosecutors to the importance of vigorously pursuing accounting violations that could conceal the giving of a bribe to a foreign public official (Recommendation 5(a)). In the Written Follow-Up Report, the Working Group considered that the recommendation had been implemented, following Belgium's efforts to draft and disseminate a College of General Prosecutors circular on the subject and launching an official programme of ongoing training for prosecutors.

104. Although these measures were acknowledged in the Written Follow-Up Report, there have still been virtually no convictions. Since 2003, there have been only 13 cases (of which the final outcome is not known) relating to forgery of civil or commercial documents by private individuals and three cases involving infringements of the Companies Code. The Belgian authorities said that accounting offences are often prosecuted secondarily in other cases relating, for example, to misuse of corporate assets or offences committed by senior managers. Nevertheless, on the basis of statistics provided by Belgium, there seem to have been very few cases involving such offences since 2005, namely one case of misuse of corporate assets and 34 cases involving offences committed by senior managers.⁷⁴

105. Four out of seven judgments relating to the liability of legal persons provided by the Belgian authorities involved accounting offences. *Judgment 3 – Police vehicle recovery* concerns a case where false invoices were used to conceal the bribery of a Belgian public official. The bribes paid to the police officer in the case between 2002 and 2006 amounted to EUR 85,584. The natural person involved was convicted on charges of false accounting and active bribery and given a fine of EUR 2,750 and a six-month prison sentence suspended for three years. The legal person was convicted in first instance to a fine of EUR 11,000 suspended for three years and acquitted on appeal. This example raises serious questions about the effective, proportionate and dissuasive nature of sanctions in proceedings for accounting offences, especially against legal persons.

b. External audit

(i) *Companies subject to external audit*

106. Article 92 CS sets out a general requirement to draw up annual accounts, certain categories of financial institution being excluded from the requirement. The conditions for auditing annual accounts are

⁷² The Court of Cassation has consistently held that fraudulent intent is the intent to procure illicit advantages or benefits for oneself or another, i.e. an advantage of any kind which would not have been obtained had accounting truthfulness or integrity been observed (Cass. 3 December 1973, *Arr. Cass.* 1974, 376; Cass. 13 March 1996, *Arr. Cass.* 1996, 224).

⁷³ See [Phase 2 Report on Belgium](#), para. 164.

⁷⁴ Statistics available on the prosecution service website (in French) www.om-mp.be/stat.

set out in Chapter II CS. Under article 141 CS, the requirement does not apply to commercial partnerships, limited partnerships, cooperative companies with unlimited liability, all of whose members with unlimited liability are natural persons, small companies within the meaning of article 15 which are unlisted, economic interest groupings, no member of which is himself subject to external audit, and agricultural corporations. The international audit standards issued by IFAC (International Federation of Accountants), especially the ISA 240 and ISA 250 standards,⁷⁵ have been mandatory for listed companies since 2012. For other companies, there are Belgian audit standards which are legally binding following Court of Cassation judgment of 24/05/2007. The lead examiners did not have the opportunity to refer to this judgment due to its late transmission. The judgments were not provided to the evaluation team.

107. According to the representatives of the Belgian Institute of Company Auditors (*Institut des réviseurs d'entreprises belges*, IRE) interviewed during the on-site visit, some 340,000 enterprises publish their accounts on the National Bank of Belgium website and 22,000 were audited by an external auditor. Despite the whole range of requirements relating to external audit, no legal person has ever incurred criminal liability for failing to comply with its accounting obligations. More worryingly, the National Bank of Belgium indicated that some 800 Belgian companies are in breach of their external audit obligations. The law enforcement authorities have been informed of the fact but nothing appears to have been done.

(ii) *External auditors' obligations in relation to detecting foreign bribery*

108. During the Phase 2 evaluation, the Working Group recommended that Belgium clarify the requirement that auditors of company accounts who uncover evidence of possible acts of bribery must inform management and, as appropriate, the corporate monitoring bodies of the company, and consider making it an express legal obligation for auditors to report to the prosecuting authorities any involvement of the company whose accounts they audit in acts of bribery in foreign markets, in cases where the auditor has duly notified the corporate bodies concerned but they have failed to act (Recommendation 3(d)). In the 2008 written follow-up report, the Belgian authorities cited the obligation on auditors to report suspicions of money laundering to the CTIF. According to the authorities, as bribery was generally tied in with money laundering, this implied that all instances of bribery were already covered by the reporting obligation. Belgium also made reference to the ISA 240 standard, and insisted on the preventive role played by auditors, who might see their access to the information needed to audit the accounts restricted by the audited entity if it feared that an auditor would have to disclose certain information. Having considered these answers, the Working Group decided that Belgium had fulfilled the requirements of Recommendation 3(d). Nevertheless, in the absence of legal changes and of a satisfactory number of reports from auditors, the examiners consider that the current legal framework in Belgium does not encourage external auditors to report accounting, tax or criminal offences.

109. According to Recommendation X.B(v) of the 2009 Recommendation, Member countries should consider requiring the external auditor to report suspected acts of bribery of foreign public officials to competent authorities independent of the company. Although articles 140 and 144 CS require auditors to report infringements of the Companies Code detected during their assignment to the company's managing body, there is no requirement to report tax or criminal offences and no provision for sanctions for failing to comply with these obligations. Among the items listed in Article 144, the auditor's report must include "a statement that s/he had no knowledge of transactions conducted or decisions taken in violation of the articles of association or this Code. Nevertheless, this statement may be omitted when disclosure of the offence would cause unjustified injury to the company, in particular because the management body has taken appropriate measures to correct the illegal situation created thereby." In contrast, under article 27 of

⁷⁵ Under the ISA 240 and ISA 250 standards, auditors must consider the possibility of fraud when auditing accounts and the possibility that significant anomalies in the accounts might arise from non-compliance with laws and regulations.

the Law of 22 July 1953 and article 458 CP, an auditor who reports an offence to the law enforcement authorities risks criminal sanctions for breaching professional secrecy.

110. With regard to money laundering, under article 5 of the Law of 11 January 1993 any suspicion of money laundering carried out with the help of money linked to bribery must be reported to the CTIF. An auditor who makes such a report does not incur any civil, criminal or disciplinary liability (article 32 of the Law of 11 January 1993). The CTIF has received 202 suspicious transaction reports from the accounting profession since 2005. However, none of these reports has been forwarded to the law enforcement authorities on suspicion of money laundering in connection with bribery of public officials. According to the CTIF, no auditor has been sanctioned by the IRE for failing to comply with the requirement to report suspicions under the Law of 11 January 1993. The CTIF has taken no awareness-raising measures to draw attention in these professions to foreign bribery as a predicate offence to money laundering (see Section 6 above).

111. Circular No. 5/2011 of the College of General Prosecutors facilitates reciprocal access to criminal and disciplinary case files between the prosecution service and the IRE.⁷⁶ The IRE representatives interviewed during the on-site visit said that prosecutors were immediately informed of any disciplinary sanctions. Between 25 and 30 instances of disciplinary sanctions imposed on auditors are sent to the prosecution service each year, out of a population of some 1,000 auditors in Belgium.

c. Internal controls, ethics and compliance

112. In Belgium, the existence of internal controls, codes of ethics or compliance programmes has no influence in principle on the attribution of criminal liability to a legal person under article 5 CP. However, certain Belgian public bodies may take into consideration the existence of internal controls, codes of ethics or compliance programmes in their decisions to grant public advantages, as with the General Administration of Customs and Excise when authorising customs or excise transactions.

113. Belgian companies' internal control, ethics and compliance systems could also be examined in connection with the extraterritorial application of the anti-bribery laws of other States Parties to the OECD Convention. That could apply, for example, in the Anheuser-Busch Inbev case currently under investigation by the Securities and Exchange Commission in the United States.⁷⁷ This legal situation requires enterprises to take a critical look at how they are organised and to examine their anti-bribery measures. The enterprises interviewed during the on-site visit which had introduced an internal controls, ethics and compliance system said that it was mainly because British and American law applied to their operations (see Section 10 below).

114. As in Phase 2, while large firms operating in Belgium have highly developed compliance programmes, there is a lack of awareness and communication within a vast majority of small and medium-sized enterprises with regard to foreign bribery. This is hardly surprising, given that major general or sector-specific business organisations, as in the diamond sector, for example, do nothing to raise awareness among their members and are unaware of the wide range of best practice guides and other resources which could help them to counter the risk of bribery, including the OECD Good Practice Guidance on Internal Controls, Ethics, and Compliance annexed to the 2009 Recommendation.

⁷⁶ Circular No. 5/2011 of the College of General Prosecutors at Courts of Appeal (see (in French) http://www.om-mp.be/extern/getfile.php?p_name=3979795.PDF). Re: Institute of Company Auditors (IRE) – Rules to follow during searches – Access to criminal case files – Notification of criminal prosecution.

⁷⁷ *Anheuser-Busch discloses India foreign corruption probe by SEC*: <http://www.bloomberg.com/news/2013-03-25/anheuser-busch-discloses-india-foreign-corruption-probe-by-sec.html>, Bloomberg, 26 March 2013.

Commentary

The lead examiners note the lack of convictions for accounting offences, partly due to prosecutors' inaction in this sphere. The few cases where sanctions have been imposed raise important questions as to whether they are effective, proportionate and dissuasive. In this regard, the examiners reiterate their Phase 2 recommendation that Belgium draw the attention of prosecutors to the importance of vigorously pursuing accounting violations that could conceal the payment of a bribe to a foreign public official.

In order to facilitate the detection of foreign bribery offences, reiterating their Phase 2 recommendation and in accordance with Recommendation X.B v) of the 2009 Recommendation, the examiners recommend that Belgium consider requiring external auditors to report suspected acts of bribery of foreign public officials to competent authorities independent of the company, such as law enforcement or regulatory authorities, and, as appropriate, ensure that external auditors who make such reports in a reasonable manner and in good faith are protected against any legal action.

Lastly, the examiners are concerned about the absence of measures taken by the Belgian public authorities to raise awareness among business organisations and in companies. The lack of understanding of the risk of foreign bribery in all sectors, with the exception of large multinational firms, greatly hinders the fight against foreign bribery in Belgium. The lead examiners recommend that the Belgian authorities, in cooperation with employers' organisations, take steps to encourage companies, especially small and medium-sized enterprises, to develop appropriate internal control and compliance systems.

8. Tax measures to combat bribery

115. The non-deductibility of bribes for tax purposes is now a clearly established principle of Belgian tax law. It is accompanied by measures to raise awareness within the administration and by training in the detection of bribery, even if the latter could be improved and made more systematic. The exchange of information between tax and criminal justice authorities does not appear to pose a problem.

a. Non-deductibility of bribes

116. The Law of 11 May 2007, which came into effect on 8 June 2007, introduced a new paragraph 24 into article 53 of the Belgian Income Tax Code (*Code des impôts sur les revenus*, CIR). This explicitly states that "advantages of any kind granted directly or indirectly to a person [...] in the context of public bribery of a person exercising a public function in a foreign State or in an organisation under public international law referred to in Article 250 [CP]" are not tax-deductible, thus ensuring that Belgium complies with its obligations under Recommendation 2009 on tax measures.⁷⁸

117. Previously, Belgium had authorised the tax deductibility of secret commissions paid by companies. The Minister of Finance could, at the taxpayer's request, authorise such payments to be considered as business expenses, provided that the commissions did not exceed normal limits and that the company paid the taxes and related charges calculated at the flat rates fixed by the Minister, which could not be less than 20%.⁷⁹

118. The tax authorities usually bear the burden of proof. Thus, if an enterprise deducts certain expenses for tax purposes, it is for the tax authorities to prove that they are not deductible. However, the

⁷⁸ See article 53, para. 24 CIR in Annex 2.

⁷⁹ See [Phase 2 Report on Belgium](#), paras. 166-173.

tax authorities interviewed during the on-site visit explained that a criminal conviction for bribery was in no way necessary for tax deductibility to be refused. Moreover, a company which sought to deduct bribes paid to a foreign public official from its taxable profits would risk not only having the bribes taxed at 309% under Article 219 CIR (see section b. below), but also having the case referred to the authorities for criminal prosecution for bribery (see section d.(i) below on exchanges of information between the tax and criminal justice authorities). The tax authorities have up to three years to ascertain tax offences in tax returns, plus an additional four years in the event of fraud. In the event of a criminal conviction, the tax authorities can reopen tax files within 12 months of the date as of which judicial proceedings can no longer be challenged or appealed.⁸⁰ On the specific question of article 53, paragraph 24 CIR, the tax authorities interviewed during the on-site visit were unable to provide statistics about the use of this article in practice to refuse deductibility.

119. Article 219 CIR states, *inter alia*, that "a separate levy is established in respect of financial advantages of any kind referred to in article 53, paragraph 24 [CIR]". The levy also applies to "advantages of any kind which constitute professional income for the beneficiaries, taxable or not in Belgium."⁸¹ It is equal to 300% of the advantages of any kind, plus an additional crisis levy, raising the overall tax rate to 309%.

120. The primary purpose of article 219 CIR seems to be not the advantages referred to in Article 53, paragraph 24 CIR, i.e. advantages prohibited under the Penal Code, but taxation of gifts, lawful per se, paid by a company to its employees. A 2010 circular from the tax authorities gives as an example any kind of advantage following an interest-free loan granted by a company to a member of staff, or the portion of rent and rental benefits reclassified on the part of the company manager as professional income. The prohibitive 300% rate would appear to have been set so that there is no incentive whatsoever for companies to subject such benefits to a separate levy rather than having them taxed in the name of the beneficiary.

121. This interpretation of the purpose of article 219 CIR, however understandable with regard to the taxation of lawful advantages paid by an enterprise to beneficiaries such as its employees, raises questions about its application to amounts which are non-deductible and, above all, prohibited by criminal law. Article 53, paragraph 24 CIR explicitly prohibits the tax deductibility of bribes. It is therefore unclear how an enterprise could be both prohibited from deducting advantages prohibited by the Penal Code paid to a foreign public official and at the same time taxed at 309% on the same advantages. The purpose of article 219 CIR applied to article 53, paragraph 24 CIR would be, where a company wrongly classifies advantages paid to a foreign public official, to be able to tax that company at 309% on the basis of those wrongly classified advantages. Article 219 would therefore be equivalent to a fine for making a false declaration.

b. Tax amnesties

122. In addition, the Law of 11 July 2013 (adopted following the on-site visit) amended Belgium's existing tax amnesty scheme which was established in December 2005.⁸² Following this modification, if previously undeclared income is declared from 15 July 2013 and no later than 31 December 2013, that income will be taxed at their normal tax rate plus 15% of the value of the declared income. No tax regularisation declaration, nor payment of levies, nor the certificate of regularisation under the programme produce any effects, if the declared income is found to be derived from offences of money laundering or

⁸⁰ Article 358 CIR.

⁸¹ See article 219 CIR in Annex 2.

⁸² Law of 11 July 2013 modifying the tax regularisation scheme and installing a social regularisation; Programme Law of 27 December 2005.

terrorist financing (amended article 123). This new legislation came to the evaluation team's attention following the on-site visit and therefore could not be discussed with representatives from the Belgian tax authorities.

c. Awareness and detection of bribery by the tax authorities

123. A number of circulars issued by the tax administration clearly explain the new rules on non-deductibility, offer tools for detection and recall the obligations to report bribery. In particular, Circular 16/2008 of 7 October 2008 recalls the conclusions of the Working Group's Phase 2 evaluation report on Belgium, the definition of foreign bribery in Belgian law and extraterritorial jurisdiction in foreign bribery cases, and the tax provisions of the 2007 Act.

124. Concerning the detection of bribes, Circular 16/2008 also addresses the practical aspects of how the tax authorities can detect bribery. It provides tax inspectors with practical tools by highlighting possible indicators of fraud or bribery and verification techniques. The Belgian authorities also stated in their responses to the Phase 3 questionnaire and during the on-site visit that the OECD Bribery Awareness Handbook for Tax Examiners had been posted on the tax authorities' intranet. The handbook has recently been revised and the new version is now available. During the on-site visit, the tax authorities also explained that new tax inspectors were given training on the subject before taking up their posts and that the detection of bribery was an item in tax inspectors' general ongoing training.

125. During the on-site visit, the evaluation team discussed the possibility of improving detection capacities, in particular on the basis of article 219 CIR. Any imposition of tax at 309% under article 219 should be subject to automatic due diligence, hence possibly enabling the detection of illegally deducted bribes. Unfortunately, the tax authorities interviewed during the on-site visit were not able to provide any statistics on how often article 219 CIR was applied in practice.

d. Exchange of tax information

(i) With Belgian law enforcement authorities

126. Under article 29 CIC, the tax authorities are required to report any criminal offence to the prosecution service.⁸³ While suspicions of tax offences must be reported through official channels before being transmitted to prosecutors, the same does not apply to suspicions of criminal offences, which may be transmitted directly without prior authorisation. Tax officials who discover a case of foreign bribery are therefore required to inform prosecutors of the fact.

127. Circular 16/2008 of 7 October 2008 mentioned above clearly recalls this obligation on tax officials and further states that "it is not for the official who reports the offence to the Crown prosecutor to define it, i.e. to state the nature of the offence (misappropriation, fraud, taking of interest, misuse of corporate assets, etc.). Whatever the definition of the offence, it is both legitimate and mandatory to report it".

128. While the lack of statistics on the real number of suspicions reported by the tax authorities to the prosecution service is regrettable, Belgium's responses to the Phase 3 questionnaire nevertheless indicate that SPF Finances is one of the most common sources of information in foreign bribery cases (whether they involve Belgian bribers or not). The tax authorities interviewed during the on-site visit estimated that around a hundred reports are transmitted a year (all offences).

⁸³ See article 29 CIC in Annex 2.

(ii) *With foreign authorities*

129. As a general rule, bilateral tax treaties and agreements on the exchange of tax information allow countries to exchange information for tax purposes but not for the purposes of criminal prosecution (such as foreign bribery). However, Belgium said that it is putting a proposal to all its partners to include the new wording of Article 26.2 of the OECD Model Tax Convention in its tax treaties. This allows for information received to be used for non-tax purposes in order to combat certain forms of financial crime such as bribery. In addition, Belgium is subject to two international instruments which allow information received for tax purposes to be shared with law enforcement authorities in order to combat bribery, *inter alia*.

- On 4 April 2011, Belgium signed (but has not yet ratified) the Protocol amending the Multilateral Convention on Mutual Administrative Assistance in Tax Matters to which Belgium has been a Party since 1 December 2000 (56 countries have already signed the Convention).⁸⁴ Article 22.4 authorises the sharing of tax information with law enforcement authorities under certain conditions.⁸⁵ At the time of the Phase 3 evaluation, the Belgian bill approving the Protocol was being examined by the Senate.
- Article 16.2 of the EU Directive on administrative cooperation in the field of taxation (2011/16/EU) also authorises this type of exchange of information.⁸⁶ The directive came into effect on 11 March 2011. Belgium stated that the Law implementing the directive was published in the *Moniteur belge* on 17 August 2013 and entered into force retroactively on 1 January 2013.

Commentary

The lead examiners welcome the efforts made by Belgium since Phase 2 to explicitly introduce the non-deductibility of bribes into Belgian law and to raise tax officials' awareness of the new law and of detection techniques. They also note with satisfaction the evident good cooperation between prosecutors and the tax authorities, although the lack of statistics means that it is not possible to evaluate the real extent or the offences to which these reports relate. They recommend that Belgium persevere in its efforts to raise awareness and train tax officials on issues specific to the detection of foreign bribery. The new OECD Bribery Awareness Handbook for Tax Examiners will provide an opportunity to further raise awareness among the tax authorities.

The lead examiners are concerned about the potential for provisions in Belgium's tax legislation (article 219 CIR and the tax amnesty) to impede the effective detection and reporting of foreign bribery by tax officials. They therefore recommend that the Working

⁸⁴ List of signatories and partners (at 27 August 2013):
www.oecd.org/tax/exchange-of-tax-information/Status_of_convention_27%20August_%202013.pdf.

⁸⁵ Under Article 22.4, "information received by a Party may be used for other purposes when such information may be used for such other purposes under the laws of the supplying Party and the competent authority of that Party authorises such use. Information provided by a Party to another Party may be transmitted by the latter to a third Party, subject to prior authorisation by the competent authority of the first-mentioned Party."

⁸⁶ Under Article 16.2, "with the permission of the competent authority of the Member State communicating information pursuant to this Directive, and only in so far as this is allowed under the legislation of the Member State of the competent authority receiving the information, information and documents received pursuant to this Directive may be used for other purposes than those referred to in paragraph 1. Such permission shall be granted if the information can be used for similar purposes in the Member State of the competent authority communicating the information".

Group follow up on the impact of these provisions on the effective prevention, detection and punishment by tax officials of bribery of foreign public officials.

9. International cooperation

130. During the Phase 2 evaluation, the Working Group expressed fears about the existence of a clause protecting "Belgium's essential interests" which would enable it to refuse to execute an MLA request. The Working Group asked Belgium to ensure that "it is clarified that invoking Belgium's essential interests to deny mutual legal assistance in cases of foreign bribery will not be influenced by the considerations mentioned in Article 5 of the Convention" (Recommendation 4(e)). In the Phase 2 Written Follow-Up Report, the Working Group found that no steps had been taken to clarify use of the clause. The Working Group also asked Belgium to simplify national procedures for providing MLA in the absence of an international agreement. In the Phase 2 Written Follow-Up Report, the Working Group considered this recommendation to have been partially implemented, Belgium having taken steps to streamline MLA procedures with regard to EU Member States.

131. According to its own explanations, Belgium does not seem to encounter any particular difficulties with relation to MLA. However, the lack of any statistics before 2013 does not permit a precise analysis of Belgian practice in this regard. The Belgian authorities are also unreactive to MLA requests which may involve active bribery by Belgian natural or legal persons, merely carrying out the requests without opening an investigation for foreign bribery in Belgium.

a. Mutual legal assistance

(i) Legal framework

132. There has been no change to MLA procedures in Belgian law since the Phase 2 evaluation.⁸⁷ However, granting of an MLA request in connection with a case of foreign bribery does not seem to have been hampered by the complexity of national procedures. Belgium cooperates with other countries on the basis of the bilateral and multilateral conventions it has ratified.⁸⁸ Outside the framework of international agreements, MLA in criminal matters is governed by the Law of 9 December 2004. No measures to simplify national procedures for providing MLA in the absence of an international agreement have been taken since the Phase 2 evaluation. SPF Justice is the central authority for international cooperation in criminal matters for requests relating to non-EU countries. Requests from within the EU are transmitted directly between law enforcement authorities. In practice, MLA seems to work better with European countries, which take advantage of the direct contacts provided for under international treaties, especially Eurojust, Europol and OLAF.

133. Dual criminality is a precondition for MLA, whether or not Belgium is bound to the other country by an international agreement. However, the dual criminality requirement applies only to MLA requests seeking binding measures such as search, seizure and telephone tapping. Where there is no international agreement, Belgium accedes to MLA requests in criminal matters on condition that reciprocity is guaranteed.⁸⁹ The Belgian authorities said during the on-site visit that this reciprocity condition was interpreted in a relatively flexible way.

⁸⁷ See [Phase 2 Report on Belgium](#), paras. 95-101.

⁸⁸ 21 conventions or bilateral treaties are in force between Belgium and other countries.

⁸⁹ Article 4.1 of the Law of 9 December 2004.

134. The protection of "Belgium's essential interests" is a ground on which Belgium may refuse an MLA request.⁹⁰ According to the Belgian authorities, it has never formed the basis for non-execution of an MLA request relating to economic or financial crime since foreign bribery became a criminal offence in Belgian law. A representative of the federal prosecutor's office also emphasised during the on-site visit that Belgium's essential interests are not the same as the interests of Belgian private companies.

(ii) *MLA requests received by Belgium*

135. Concerning the practical exercise of MLA in foreign bribery cases, the absence of statistics meant that the Belgian authorities were unable to provide specific information about how MLA requests received and issued by Belgium are actually handled. During the on-site visit, however, the Belgian authorities said that a statistical database for MLA requests with non-EU countries had been in place at SPF Justice since 1 January 2013. This database does not include requests transmitted directly between law enforcement authorities in the EU zone because prosecutors do not inform the central authority of requests they receive directly even though they are supposed to do so. Despite the lack of statistics before 2013, the Belgian authorities identified 17 MLA requests relating to cases of bribery and fraud. Eleven of the 17 were from European countries. During the on-site visit, the Belgian authorities said they believed that Belgium had not refused to execute an international letter rogatory since the Phase 2 evaluation (all offences included).

136. The Belgian authorities were able to indicate that at least three MLA requests relating to foreign bribery cases had been executed and that a fourth was ongoing (concerning either bribery of foreign public officials by Belgian natural or legal persons or bribery of Belgian public officials by foreign nationals). The Belgian authorities also said that in two of these cases, it had taken two to three months to execute the request. However, this data is too limited to evaluate Belgian practice in the execution of MLA requests.

- The Belgian authorities had executed an MLA request received in 2010 from a country not Party to the Convention in connection with possible fraud and bribery in the management of public funds by senior officials of the country concerned, potentially involving bribery of Belgian natural or legal persons. The request did not give rise to an investigation for foreign bribery in Belgium.
- The Belgian authorities had executed missions in connection with an MLA request received in 2011 from another country not Party to the Convention. The investigation in the requesting country concerned the local director of a local non-governmental organisation which had received bribes from a Belgian company in connection with the award of a consultancy contract to the company. The request did not give rise to an investigation for foreign bribery in Belgium.
- The Belgian authorities had executed a wire-tapping measure in connection with an MLA request from a State Party to the Convention in connection with the award of a public procurement contract for the police of the country concerned. The Belgian authorities were not able to say whether Belgian natural or legal persons were involved. The request did not give rise to an investigation for foreign bribery in Belgium.
- A request from a country not Party to the Convention, received in 2013, was being executed at the time of the on-site visit. The Belgian authorities were not able to provide any further information about the request.

137. Although several of these matters refer implicitly or, in some cases, explicitly to active bribery by Belgian natural or legal persons, the Belgian authorities merely executed the MLA request without opening a foreign bribery investigation in Belgium. The Belgian authorities said after the on-site visit that it was not

⁹⁰ Article 4.2(1) of the Law of 9 December 2004.

usual practice to unilaterally open an investigation in Belgium on the basis of information obtained in connection with an MLA request in order to avoid the risk of interfering with ongoing investigations in another country. By restricting its role to merely granting MLA, without ever initiating proceedings for possible foreign bribery offences involving Belgian nationals, brought to its attention through such requests, Belgium does not fulfil its obligations under the OECD Convention. (see Section 5.b.i on the opening of investigations of foreign bribery).

138. Although Belgium is able to respond to MLA requests in connection with criminal proceedings against legal entities, it seems that it is not able to grant MLA to other States Parties to the Convention, such as Germany or Italy, where legal persons can incur civil or administrative liability, which could pose a problem with regard to enforcement of Article 9 of the Convention. The Belgian authorities said that Belgium was not party to any international assistance convention in relation to administrative matters. It is also uncertain whether Belgium would be able to execute an MLA request where a settlement had been decided in Belgium (see Section 5.c. above on settlement).

(iii) MLA requests issued by Belgium

139. In the absence of statistics, the Belgian authorities were able to cite only two MLA requests issued by Belgium in 2013 to two States Parties to the Convention in cases involving bribery of Belgian public officials. No MLA request has been issued in cases involving bribery of foreign public officials by Belgian nationals or enterprises. One Joint Investigation Team has been set up between Belgium and France, in *Case 3 – EU consulting firms*.

b. Extradition

140. There has been no change to extradition procedures in Belgian law since the Phase 2 evaluation. Belgium cooperates with EU Member States on the basis of the European Arrest Warrant Law of 19 December 2003. Outside the European Union, the customary principles of extradition apply under the Law of 15 March 1874 and on the basis of the bilateral and multilateral agreements to which Belgium is a party. In the absence of any extradition treaty between Belgium and a State Party to the OECD Convention, the Convention is the legal basis for extradition requests for bribery of foreign public officials. In the absence of any other provision, an extradition request may be made on the basis of the United Nations Convention against Corruption (UNCAC).

141. Belgium can extradite its nationals and persons residing in Belgian territory to an EU Member State on the basis of the European arrest warrant. However, Belgium may make the extradition of one of its nationals conditional on his/her return to Belgium after trial to serve any sentence imposed. Belgium does not extradite its nationals outside the European Union. In contrast, the Belgian authorities stated that in principle proceedings will be initiated where the requesting country is Party to the European Extradition Treaty or has concluded a bilateral extradition treaty with Belgium.

142. Belgium said that it had neither issued nor received any extradition request in a case of foreign bribery since 1 January 2013. However, it was not able to provide statistics on extradition requests issued or received in connection with foreign bribery cases before that date.

Commentary

The lead examiners are not able to evaluate in detail Belgium's practice in relation to the granting of MLA, in the absence of any mechanism whereby the Working Group could obtain information from other Parties to the Convention on their experience of cooperation with Belgium in response to their MLA requests.

With regard to Recommendation 4(e) of the Phase 2 evaluation, the lead examiners recommend that the Working Group follow-up on developments in order to ensure that Belgium promptly and effectively provides MLA, insofar as its laws and the relevant international instruments allow. In addition, they recommend that the Working Group follow-up on developments in order to ensure that use of "Belgium's essential interests" as an exception to obligations to provide MLA does not include considerations of national economic interest, the potential effect on relations with another State or the identity of the natural or legal persons involved, as mentioned in Article 5 of the Convention.

The lead examiners are encouraged to learn that SPF Justice created an MLA database on 1 January 2013. Despite the desire mentioned by the Belgian authorities to collect statistics on MLA outside and inside the EU, the examiners regret that the database covers only MLA requests from countries outside the EU, even though prosecutors are required to inform the central authority of any MLA requests they receive directly. They therefore recommend that Belgium take all necessary steps to keep precise statistics, including on requests from EU Member States. In addition, the examiners encourage the Belgian authorities to keep more detailed statistics on MLA requests received, sent, granted and rejected, in order to identify the proportion of such requests which concern bribery of a foreign public official.

With regard to MLA requests from countries with administrative or civil liability for legal persons, Belgium does not seem able to grant prompt and effective MLA to the other Parties for the purposes of non-criminal proceedings against legal persons to which the Convention applies. The lead examiners suggest that the Working Group follow-up on Belgium's ability to provide a wide range of measures, including search and seizure and the identification, seizure and confiscation of the proceeds of the offence, in foreign bribery cases to States under whose legal system legal persons do not incur criminal liability. They note that this is a horizontal issue common to several States Parties to the Convention.

10. Public Awareness and the Reporting of Foreign Bribery

143. Although some measures have been taken to raise awareness in the public and private sectors, for the most part they continue to focus on combating domestic bribery or corruption in general and not specifically on bribery of foreign public officials by Belgian nationals or enterprises. This finding is compounded by the absence of reports from Belgian public officials of suspicions of foreign bribery and, above all, by the lack of protection for public or private sector whistleblowers who report bribery of foreign public officials by Belgian natural or legal persons.

a. Awareness of the Convention and of the foreign bribery offence

144. During the Phase 2 evaluation, the Working Group noted that priority in Belgium was given to combating domestic bribery and feared that investigations focused only on bribery of Belgian public officials to the detriment of foreign bribery. The Phase 2 written follow-up report noted that Recommendations 1(a) and 1(b) on efforts to raise awareness of the offence of bribery of foreign public officials within Belgium's public administration and the private sector, especially among SMEs, had not been implemented and stressed that implementing them should be a priority.

145. Discussions with representatives of the private sector and civil society during the Phase 3 on-site visit confirmed that the Belgian authorities show limited interest in combating foreign bribery.⁹¹ It is not regarded as a priority of criminal justice policy in the new National Security Plan 2012-2015, despite an

⁹¹ See, for example, [Évaluation du système national d'intégrité Belgique](#), 2012, published by Transparency International Belgium, p. 22.

opinion issued by the College of General Prosecutors. This is all the more significant insofar as bribery was included in previous Security Plans. The Belgian authorities indicated that an Integral Security Framework Note was being prepared, although it was not possible to provide it to the evaluation team. On the initiative of the Minister of Justice, several measures relating to bribery were due to be included in the Note, in particular guidance to take steps to raise awareness of the negative implications of bribery at the national and international level. According to the representatives of Transparency International Belgium interviewed during the on-site visit, the Belgian authorities are generally inactive in the area of combating foreign bribery, taking measures only after Working Group evaluations. This impression that Belgium has little interest in combating foreign bribery is exacerbated by the lack of reaction from the authorities to the announcement of the closure for lack of funding of the Belgian chapter of Transparency International in the months following the on-site visit.

(i) *In the public sector*

146. At a conference⁹² on corruption in October 2010 organised by the federal criminal police for police officers, only one presentation, by a member of the OECD's Anti-Bribery Division, dealt specifically with foreign bribery. Other conferences on corruption in general have been organised at federal government level and by the Judicial Training Institute and have touched on bribery of foreign public officials.⁹³ In addition, the Belgian authorities pointed out that Circular 573 of 17 August 2007 on rules of ethics for federal government officials had been revised in 2013 and said that henceforth "any form of corruption is strictly prohibited", without giving any more details. However, the evaluation team did not have access to the circular since it had not yet been finalised.

147. Some weeks before the on-site visit, SPF Foreign Affairs sent an instruction to all heads of diplomatic missions inviting them to inform and raise awareness of the OECD Convention and the obligations arising from it following its transposition into Belgian law, among officials at their mission and Belgian companies operating in their sector. However, no report of foreign bribery allegations has been received from Belgian embassies or foreign missions since the Phase 2 evaluation. This is all the more surprising insofar as at the time of writing, the trial of a foreign public official for active and passive bribery involving a Belgian company, mentioned during the on-site visit but totally unknown to the Belgian authorities, was enjoying a certain amount of media coverage in the public official's home country. The executive director of the Belgian company was appearing before the court of first instance of the country concerned, charged with bribery and money laundering. It is therefore significant that no report has been forthcoming from Belgian embassies or foreign missions in connection with this case (see Section 5.b (i) on the opening of foreign bribery investigations).

(ii) *In the private sector*

148. Although the Belgian authorities have started to take measures to raise awareness in the private sector, the evaluation team found during the on-site visit that these limited efforts had not produced any real understanding among private sector players of the need to take measures to promote integrity and combat bribery of foreign public officials. The Belgian authorities published a brochure entitled *La corruption? Pas dans notre entreprise (Bribery? Not in our company)* in 2011 to raise awareness of the

⁹² Conference "One hundred years of fighting corruption in Belgium".

⁹³ Specifically, a seminar entitled "Excellent and Integrity in Public Procurement" was organised by TI Belgium on 27 April 2010, with the participation of the Brussels General Prosecutor's Office which presented the recommendations made by the OECD Working Group on Bribery in the context of the evaluation of Belgium. This seminar targeted all the officials from agencies in charge of the management of structural funds in Wallonia and Brussels, and a seminar on the same subject was also organised by TI Belgium targeting officials with the same competencies in Flanders.

fight against corruption in companies operating on international markets for goods and services. The brochure was published in the biannual magazine of the *Union des Classes Moyennes* (UCM), a business organisation in Wallonia. It is also available on the website of the Criminal Policy Department (*Service de la politique criminelle*, SPC) and of SPF Justice and, on its publication in 2011, on the federal government website (federal portal). However, most of the private sector representatives interviewed during the on-site visit were unaware of it. Moreover, no specific measures have been taken to raise awareness among SMEs, although they are a vital part of Belgium's economic fabric and are increasingly exposed to international environments where bribery is commonplace.

149. With regard to the more specific role played by SPF Foreign Affairs and diplomatic missions in relation to companies, the note sent to all heads of diplomatic missions invites those missions to raise awareness of the OECD Convention and the obligations arising from its transposition into Belgian law among Belgian companies operating in their sector. During the on-site visit, the Belgian authorities communicated a certain number of measures taken by diplomatic missions in response to the note. In particular, missions had contacted local branches of the Belgian Chamber of Commerce, where they existed, and e-mails had been sent to Belgian companies it had been possible to identify in the country.

150. In line with the findings of the Phase 2 evaluation,⁹⁴ Belgian business organisations continue to do almost nothing to raise awareness among Belgian companies of the risks they run in relation to foreign bribery and are not asked by the Belgian authorities to play that role. Only the Belgian national committee of the International Chamber of Commerce stands out and is active in that area. This lack of commitment on the part of business organisations was demonstrated by the fact that Belgium's leading business organisation was absent from discussions during the on-site visit despite having been invited to participate. Another organisation said that it would attend the meeting in order to find out what to say to Belgian enterprises asking for information about how much cash they could legally take into China. A representative of another business organisation also said that foreign bribery was "a difficult subject to sell to Belgian firms which feel neither concerned by nor faced with" the issue.

151. Although some companies have introduced a code of conduct or internal compliance systems, they said they had done so because of American and British laws, since Belgian companies were often subsidiaries of large groups which had their decision-making centres in countries other than Belgium.⁹⁵ The vast majority of Belgian SMEs do not have such systems, which is significant because they represent the base of Belgium's productive capacity.

Commentary

Section III of the 2009 Recommendation calls on Member States to take concrete and meaningful steps to raise awareness in the public and private sector for the purpose of preventing and detecting foreign bribery. The lead examiners acknowledge certain efforts made by Belgium along these lines. They are encouraged by certain measures taken by Belgium through its diplomatic missions abroad. Although encouraging, however, most measures to raise awareness in the public sector do not deal specifically with the issue of the risks of bribery of foreign public officials by Belgian nationals and enterprises. Belgium has still not taken any specific measures to raise awareness in its administration, especially among staff liable to play a role in detecting and reporting bribery. It is imperative that Belgium take measures to ensure that officials at embassies and diplomatic missions abroad report foreign bribery cases involving Belgian nationals and companies.

⁹⁴ See [Phase 2 Report on Belgium](#), paras. 38-40.

⁹⁵ See [Évaluation du système national d'intégrité Belgique](#), 2012, Transparency International Belgium, pp. 311-312.

The lead examiners consider that measures taken by the Belgian government to raise awareness in the private sector, and especially among SMEs, are limited. This is exacerbated by the low level of interest shown by Belgian companies in combating foreign bribery, the lack of compliance programmes within Belgian SMEs and the lack of commitment on the part of business organisations to raising awareness among companies.

The lead examiners therefore reiterate Recommendations 1(a) and 1(b) formulated by the Working Group at the time of the Phase 2 evaluation and insist on the need for Belgium to take measures to raise awareness among Belgian companies, especially SMEs, in coordination with business organisations.

b. Reporting foreign bribery

152. The Working Group found during its Phase 2 evaluation that, despite the existence of a reporting obligation on public officials, no proceedings for bribery of a foreign public official had been brought on the basis of a report from a Belgian public official and wondered about the effectiveness of such an obligation if not backed up by effective sanctions.⁹⁶ Belgium was therefore asked to remind public officials of this reporting requirement and to examine the appropriateness of instituting a comprehensive system of sanctions for non-compliance (Recommendation 3(b)). The Phase 2 Written Follow-Up Report considered that the recommendation had been partially implemented, the Belgian authorities having issued, though only to federal public officials, a circular reminding them of their reporting obligation.

153. The Belgian authorities have not taken any measures since Phase 2 to implement the recommendations addressed to them, whether to remind Belgian public officials of their legal obligation to report offences or to introduce a coherent system of sanctions. It is regrettable, for example, that SPF Foreign Affairs did not use the opportunity of the instruction sent to heads of diplomatic missions to recall the reporting requirement. Transparency International Belgium is the only organisation to have held a conference touching on the reporting requirement on public officials under Article 29, para. 1 CIC.⁹⁷ It is therefore hardly surprising that very few reports of bribery have been received from Belgian public officials since the Phase 2 evaluation.

Commentary

The lead examiners regret the lack of measures taken by the Belgian authorities to remind public officials of the provisions of article 29 CIC relating to the obligation to inform the prosecuting authorities of any offence of bribery of foreign public officials that comes to their knowledge in the performance of their functions. In addition to awareness-raising measures, Recommendation 3(b) urged Belgium to examine the appropriateness of instituting a comprehensive system of sanctions for non-compliance with this obligation. As the Belgian authorities have not done so, the lead examiners consider that Recommendation 3(b) of the Phase 2 evaluation has still been only partially implemented.

c. Whistleblower protection

154. During the Phase 2 evaluation, the Working Group found that whistleblowers in Belgium were not protected by law. The Working Group therefore recommended that Belgium adopt measures to ensure that employees who blow the whistle in bribery cases are protected (Recommendation 3(a)). This

⁹⁶ See [Phase 2 Report on Belgium](#), para. 52.

⁹⁷ Seminar of 27 April 2010 on excellence and integrity in public procurement, which discussed the article 29 CIC reporting requirement for public officials.

recommendation had not been implemented by Belgium at the time of the Phase 2 Written Follow-Up Report, the Belgian authorities having said that no measures along those lines were planned. Belgium has done nothing since the Phase 2 evaluation to extend legal protection to whistleblowers in the public or private sector who report suspected acts of bribery by private persons.⁹⁸

155. None of the systems in place at federal level and in the Flanders Region⁹⁹ offers protection to public sector whistleblowers who report suspected acts of bribery of a foreign public official by a Belgian national or company. This is all the more alarming in that the Belgian authorities said in their responses to the Phase 3 questionnaires that reports on the basis of article 29 CIC, especially with regard to bribery, however infrequent, could cause "problems" for whistleblowers or lead to reprisals against them.

156. The Law of 15 September 2013 relating to the reporting of suspected harm to integrity within a federal administrative authority by a member of its staff has entered into force (*Moniteur belge* of 4 October 2013). However, this Law is of little relevance to foreign bribery since it will not protect Belgian federal officials who report bribery of a foreign public official by a Belgian national or company. The text seeks only to confer legal protection on Belgian federal officials who report suspected harm to integrity¹⁰⁰ perpetrated within federal administrative authorities by a staff member on active service in one of them.¹⁰¹ A reporting system is set up within the federal administration for that purpose and the investigative and prosecutorial authorities are not involved in any way. Likewise, a reporting and protection system for whistleblowers involving an ombudsman exists in the Flanders Region and the Flemish Community. It allows for the reporting of abuse or offences within Flemish administrative authorities but does not cover suspicions of foreign bribery.

Commentary

The lead examiners note as positive progress the adoption by the Senate of a bill on the reporting of suspected harm to integrity within the federal administration and the protection of the public-sector whistleblower. Nevertheless, they greatly regret that the introduction and discussion of the bill did not provide an opportunity to ensure broader protection for whistleblowers, including when they report acts of foreign bribery by private persons. The lead examiners are concerned at the continued lack of a system to protect public- and private-sector whistleblowers who report suspicions of foreign bribery, despite the Working Group's recommendation in Phase 2, still not implemented. They therefore recommend that Belgium promptly take appropriate measures to protect public and private sector employees who report suspected acts of foreign bribery to the competent authorities from any discriminatory or disciplinary action.

⁹⁸ See esp. *Providing an alternative to silence: towards greater protection and support for whistleblowers in the EU*, Country report Belgium, April 2013, p. 3.

⁹⁹ The two other Communities and Regions do not have any such system.

¹⁰⁰ Suspected harm to integrity is defined in article 2 of the bill as: "the presumption: a) of performance or non-performance by a member of staff of an action which constitutes an infringement of the laws, decrees, circulars, internal rules and internal procedures which apply to federal administrative authorities and to members of their staff; b) of performance or non-performance by a member of staff of an action involving an unacceptable risk to the life, health or safety of persons or to the environment; c) of performance or non-performance by a member of staff of an action which plainly demonstrates a serious breach of professional obligations or of the proper management of a federal administrative authority; d) that a member of staff has knowingly ordered or advised the perpetration of harm to integrity as defined at a), b) and c)."

¹⁰¹ Article 3 of the bill.

11. Public advantages

157. Conviction for bribery is, in principle, a cause for disqualification from public procurement and official development assistance (ODA), although it is not certain that this includes foreign bribery. The lack of a central register of criminal records for legal entities makes disqualification from public procurement difficult to apply in practice, and the current bill purporting to create such a register, would not allow the authorities responsible for awarding public procurement contracts, ODA or export credits access to it. Due diligence measures designed to prevent foreign bribery generally seem to be more sophisticated within export credit agencies.

a. Public procurement

158. As mentioned in Section 3.b. above on additional sanctions, a number of Belgian laws contain provisions whereby operators convicted of bribery are debarred from public procurement. These laws apply at both federal and local level, although there are also some specifically regional features. The laws are the Law of 20 March 1991 (amended in 1999 and 2011) on the authorisation of public works contractors and the Law of 15 June 2006 (amended in 2011) on public procurement and certain contracts for works, supplies and services.

159. In their responses to the Phase 3 questionnaire, the Belgian authorities explained that bidders are required to produce a certificate proving that they have not been convicted of offences justifying debarment from public procurement. However, as Belgium does not have a central register of criminal records for legal entities, bidders must sign a certificate of integrity instead. The authorities responsible for awarding public contracts are not able at present to make checks with a central register. In addition, at the time of writing the bill creating a central register of criminal records would not allow access to the authorities responsible for awarding and managing public procurement contracts in Belgium.

160. With regard to other verifications, the authorities responsible for public procurement interviewed during the on-site visit said that they did not check whether bidders were included on the debarment lists of the World Bank or other multilateral development banks, nor do they take account of the existence of internal controls, ethics or compliance programmes within tendering firms when awarding contracts.

161. During the on-site visit, the authorities responsible for public procurement seemed to have little awareness of foreign bribery issues. A certain degree of confusion was even apparent with regard to the existence or otherwise of a central register of criminal records for legal entities. In contrast, those interviewed were aware of the reporting requirement incumbent on them under article 29 CIC, although they said they were not aware of any reports having been made in that context.

b. Official development assistance (ODA)

162. The Belgian Technical Cooperation (BTC), the Belgian development agency, a public law company with a social purpose within the General Directorate for Development Cooperation at SPF Foreign Affairs, is responsible for executing cooperation and administrating Belgium's ODA. Belgium indicated that it introduces anti-bribery measures into its procedures governing the awarding of contracts financed by BTC, in accordance with the 1996 Development Assistance Committee Recommendation.

163. The same rules apply to the award of contracts financed by Belgian ODA as to Belgian public procurement contracts. Bribery is thus a ground for disqualification, though the same questions arise as to whether the definition of bribery covers bribery of a foreign public official or not (see section a. above). Verification mechanisms are also the same as for authorities responsible for awarding public procurement contracts: no check with World Bank debarment lists, and no consideration given to internal controls,

ethics or compliance programmes. As for their counterparts in public procurement, there is no provision to give BTC access to the proposed central register of criminal records.

164. BTC representatives were more aware of bribery issues. During the on-site visit, they indicated that they had been given several training sessions on bribery in general, especially concerning countries which receive Belgian ODA, where the problem is particularly present. BTC representatives also organise or take part in conferences on the subject.

165. As far as detection is concerned, BTC employees are public officials and as such are under an obligation to report any criminal offence which comes to their knowledge in the performance of their functions to the prosecuting authorities, as provided in article 29 CIC. One report was made in this regard in connection with *Case 6 – Development assistance project* concerning possible fraud and embezzlement in the context of a development assistance project financed by Belgian ODA.

c. Export credits

166. Export credits and guarantees in Belgium are the responsibility of the Office du Ducroire and Finexpo. The anti-bribery procedures in place in these two agencies are the same. They include:

- informing exporters and applicants of the consequences of foreign bribery under Belgian law;
- requesting a certificate from exporters stating that they comply with anti-bribery legislation (they are not specifically asked if they have already been convicted);
- verification by the Office du Ducroire and Finexpo that exporters are not included on the debarment lists maintained by the World Bank and other multilateral development banks.

167. Concerning the consideration given to internal controls, ethics and compliance programmes, the Ducroire representatives said that they took a “comprehensive” approach to corporate social responsibility (CSR), not focusing solely on the prevention of bribery. The policy includes an annual audit visit to exporters which, since 2012, has covered CSR aspects. The representatives also pointed out that, as most of their clients are large companies; they generally already have internal controls, ethics and compliance programmes, including anti-bribery measures.

168. The Ducroire and Finexpo representatives also clarified during the on-site visit that even though the regions retain some powers in relation to foreign trade, the award of export credits and credit guarantees was the sole preserve of the Ducroire and Finexpo.

169. In terms of awareness, the Ducroire and Finexpo representatives interviewed during the on-site visit indicated that training was organised for their subscribers every two years, with all staff being invited to take part. The Office du Ducroire has cooperated with Transparency International on the problem of bribery, in particular in connection with a report on national anti-bribery measures taken by export credit agencies in 14 countries.¹⁰² On this point, the Belgian authorities said that a training session was due to be held after the on-site visit describing the anti-bribery procedures at the Office du Ducroire, though they did not say how frequently this type of training session was held.

170. Concerning the detection of bribery, the representatives of the Ducroire said that two cases of foreign bribery had been reported to them by two client companies. The cases concerned possible bribery of an official in a foreign country. The Ducroire said that it had carried out in-depth checks in both cases and that the client companies had dismissed the persons concerned. In contrast, no referral had been made

¹⁰² See [Export Credit Agency Anti-Bribery Practices 2010](#).

to the prosecuting authorities. It should be emphasised that Ducroire and Finexpo officials are not Belgian public officials and are not subject to the reporting requirement set forth in article 29 CIC.

Commentary

The lead examiners are concerned that it is still not viable in the current state of affairs for the bodies responsible for managing public funds (especially agencies responsible for public procurement, ODA and export credits) to debar in practice enterprises convicted of bribery in the absence of a central register of criminal records for legal persons. They recommend that Belgium promptly adopt the bill to establish a central register of criminal records for legal persons and further recommend that the agencies responsible for public procurement, ODA and export credits and all other public subsidies should have access to the register.

Concerning prevention, the lead examiners also recommend that measures be taken to raise awareness of foreign bribery among officials responsible for awarding public contracts.

Concerning detection, the lead examiners recommend that Belgium institute a reporting requirement for officials of the Ducroire and Finexpo, similar to the one in place for Belgian public officials.

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

171. The Working Group on bribery welcomes Belgium's efforts to bring its criminal and tax legislation in the field of anti-bribery into compliance with the Convention with the enactment of the Law of 11 March 2007. However, the Working Group remains seriously concerned with the lack of convictions for bribery of foreign public officials by Belgian nationals since the entry into force of the offence more than 14 years ago. The Group is seriously concerned by the flagrant lack of resources and by the lack of priority Belgium gives to the fight against bribery of foreign public officials by Belgian individuals and companies.

172. The Phase 2 evaluation report of Belgium, adopted in 2005, included recommendations and follow-up issues.¹⁰³ Of the 16 recommendations adopted by the Working Group in 2005, nine were considered as fully implemented at the time of the Phase 2 Written Follow-Up Report on Belgium in 2008. Three recommendations were considered to be partially implemented. Four recommendations were not implemented.

173. Based on the findings in this report on Belgium's implementation of the Convention and 2009 Recommendation, the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow up the issues identified in Part 2. The Working Group invites Belgium to make a written report on measures taken to implement recommendations 2, 3(a), 3(b), 3(d), 4(a), 4(b), 6 and 13(a) in one year (i.e. October 2014). The Working Group also invites Belgium to submit a written follow-up report on all recommendations and follow-up issues in two years (i.e., October 2015).

¹⁰³ See Annex 1 of this report.

1. Recommendations of the Working Group

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery

1. With respect to Belgian jurisdiction over the foreign bribery offence, the Working Group recommends that Belgium promptly raise awareness among the Belgian federal police, and especially the OCRC, of the existence of the extraterritorial jurisdiction of Belgian law in cases of foreign bribery [Convention, Article 4.2; 2009 Recommendation, V.].
2. With respect to the liability of legal persons, the Working Group recommends that Belgium, take the necessary measures to bring its legal framework into compliance with the Convention and 2009 Recommendation, as already recommended in Phase 2, (i) by clarifying the attribution of the intentional element of the foreign bribery offence and (ii) by eliminating the element of mutually exclusive liability between the natural and legal person [Convention, Article 2 ; 2009 Recommendation, Annex I.B.].
3. With respect to sanctions for foreign bribery and confiscation, the Working Group recommends that Belgium:
 - a) Increase the level of sanctions applicable to natural persons [Convention, Article 3];
 - b) For legal persons, (i) increase the amount of applicable fines, and (ii) carry out their current plans to introduce a criminal record for legal entities as soon as possible which would enable the practical application of additional sanctions of debarment from public procurement [Convention, Articles 2 and 3];
 - c) Ensure that penalties imposed in practice in foreign bribery cases are effective, proportionate and dissuasive, and take steps to raise awareness among prosecutors, in particular in the framework of the ongoing drafting the circular on this point [Convention, Articles 2 and 3]; and
 - d) In relation to confiscation, make full use of the confiscation measures available in the law to ensure the application of effective, proportionate and dissuasive sanctions and, in this context (i) to ensure that its law enforcement authorities routinely consider confiscation of the instrument and the proceeds of bribery of a foreign public official; and (ii) continue its initiatives to train prosecutors and judges provide training in order to improve the implementation of confiscation, especially of the proceeds of active bribery of foreign public officials [Convention, Article 3].
4. With respect to investigations and prosecutions of foreign bribery cases, the Working Group recommends that Belgium:
 - a) Give the necessary priority to the fight against foreign bribery, in particular (i) by urgently making available adequate human and material resources to the judicial and law enforcement authorities so that they can effectively investigate, prosecute and adjudicate cases in which foreign bribery is committed by Belgian nationals or companies, and (ii) by making foreign bribery a priority of its criminal justice policy [Convention, Article 5; 2009 Recommendation, V. and Annex I.D.];
 - b) Take a more proactive stance in foreign bribery cases, in particular by investigating information about foreign bribery disclosed in the context of international cooperation and not

waiting for a formal referral before opening an investigation [Convention, Articles 5 and 9; 2009 Recommendation, V. and Annex I.D.];

- c) Take all necessary measures to ensure that foreign bribery cases are not closed on the grounds of insufficient investigative resources, lack of priority or exceeding a ‘reasonable time limit’ solely because investigations, proceedings and judgments take too long [Convention, Article 5; 2009 Recommendation, V. and Annex I.D.]; and
 - d) Develop training for law enforcement authorities on the specific aspects of foreign bribery investigations and prosecutions [Convention, Article 5; 2009 Recommendation, V. and Annex I.D.].
5. With respect to settlement, the Working Group recommends that Belgium make public, as necessary and in compliance with the relevant rules of procedure, the most important elements of settlements concluded in foreign bribery cases, in particular the main facts, the natural or legal persons sanctioned, the approved sanctions and the assets that are surrendered voluntarily [Convention, Articles 1, 2, 3 and 5].
 6. With respect to the limitation period the Working Group recommends that Belgium urgently take all necessary measures to extend the possibilities for suspending the limitation period to allow adequate time for foreign bribery investigations and prosecutions [Convention, Article 6].

Recommendations for ensuring effective prevention, detection, and reporting of foreign bribery

7. With respect to statistics on the implementation of the Convention, the Working Group recommends that Belgium maintain detailed statistics on (i) investigations, prosecutions, closing of cases and convictions for the foreign bribery offence; (ii) sanctions; including in the framework of confiscation and settlement, imposed in foreign bribery cases; (iii) MLA requests received, sent, granted and rejected, in order to identify the proportion of such requests which concern bribery of a foreign public official, including in relation to requests from EU member countries [Convention, Article 3 and 9].
8. With respect to anti-money laundering, the Working Group recommends that Belgium step up its measures to raise awareness of the detection of facts that may constitute foreign bribery among the professions, including non-financial professions, subject to the requirement to report suspicious transactions [Convention, Article 7].
9. With respect to accounting requirements, external audit and corporate compliance and ethics programmes, the Working Group recommends that Belgium:
 - a) Draw the attention of prosecutors to the importance of vigorously pursuing accounting violations that could conceal the payment of a bribe to a foreign public official [Convention, Article 8];
 - b) Consider requiring external auditors to report suspected acts of bribery of foreign public officials to competent authorities independent of the company, such as law enforcement or regulatory authorities, and, as appropriate, ensure that external auditors who make such reports in a reasonable manner and in good faith are protected against any legal action [2009 Recommendation, X.B(v)]; and

- c) In cooperation with business organisations, take steps to encourage companies, especially small and medium-sized enterprises, to develop appropriate internal control and compliance systems [2009 Recommendation, X.C(i) and Annex II].
10. With respect to tax-related measures, the Working Group recommends that Belgium persevere in its efforts to raise awareness and train tax officials on issues related specifically to the detection of foreign bribery [2009 Recommendation, VIII; 2009 Tax Recommendation].
 11. With respect to raising awareness of the foreign bribery offence, the Working Group recommends that Belgium:
 - a) Persevere in its efforts to raise awareness within its administration, treating more specifically the question of the risk of bribery of foreign public officials by Belgian nationals and companies, and in particular among officials in SPF Foreign Affairs and public procurement authorities, and other officials likely to play a part in the detection and reporting of acts of transnational bribery, and those coming into contact with Belgian businesses operating abroad [2009 Recommendation, III.(i) ; Phase 2 Recommendation 1(a)]; and
 - b) Take the necessary measures, in cooperation with business organisations, to raise awareness of Belgian companies, and particularly SMEs, of the offence of bribery of foreign public officials [2009 Recommendation, III.(i), (iv) and (v); Phase 2 Recommendation 1(b)].
 12. With respect to reporting acts of foreign bribery, the Working Group recommends that Belgium:
 - a) Remind all public officials, including officials at Belgian overseas missions, of their obligation under Article 29, paragraph 1 of the Criminal Investigation Code to inform the Prosecutor's Office of any offence of bribery of foreign public officials that comes to their knowledge in the performance of their functions, and examine the appropriateness of instituting a comprehensive system of sanctions for non-compliance with this obligation [2009 Recommendation, IX.(i) and (ii); Phase 2 Recommendation 3(b)]; and
 - b) Promptly take appropriate measures to protect public and private sector employees who report suspected acts of foreign bribery to the competent authorities from any discriminatory or disciplinary action [2009 Recommendation, IX.(i) and (iii)].
 13. With respect to public advantages, the Working Group recommends that Belgium:
 - a) Ensure that, in the framework of the bill to establish a central register of criminal records for legal persons, the agencies responsible for public procurement, ODA and export credit and all other public subsidies, have access to this register [Convention, Articles 2 and 3.4; 2009 Recommendation, XI.(i), (ii) and XII.]; and
 - b) Put in place a reporting requirement for officials of the Ducroire and Finexpo, similar to the one in place for Belgian public officials [2009 Recommendation, XII; 2006 Export Credit Recommendation].

2. Follow-Up by the Working Group

14. The Working Group will follow up the issues below as case law and practice develop:

- a) The exercise of Belgium's extraterritorial jurisdiction in foreign bribery cases and in particular the application of the distinction based on the origin of the bribed foreign public official [Convention, Article 4.2];
- b) The application of the regime for corporate liability for foreign bribery to federal and local public enterprises, in order to ensure that the exemption of certain public entities from the application of criminal law in this area does not prevent full enforcement of the Convention [Convention, Article 2];
- c) The practical application of settlement in foreign bribery cases, in order to ensure the predictable and transparent nature of the procedure and that the sanctions imposed in the context of the settlement procedure are effective, proportionate and dissuasive [Convention, Articles 3 and 5];
- d) The application in practice of the offence of money laundering where foreign bribery is the predicate offence in order to ensure that the money laundering offence can be prosecuted and sanctioned "without regard to the place where the bribery occurred" [Convention, Article 7];
- e) Belgium's ability to respond to MLA requests, to ensure (i) that Belgium promptly and effectively provides MLA, insofar as its laws and the relevant international instruments allow; (ii) that use of the exception of "Belgium's essential interests" as an exception to obligations to provide MLA is made in accordance with the obligations of Article 5 of the Convention; and (iii) that Belgium can provide prompt and effective MLA to States whose legal systems do not have criminal liability for legal persons [Convention, Article 9]; and
- f) The impact of provisions in article 219 CIR and the Law of 11 July 2013 on the effective detection and reporting of foreign bribery by tax officials [2009 Recommendation III (iii); 2009 Tax Recommendation II].

ANNEX 1 – PHASE 2 RECOMMENDATIONS AND EVALUATION OF THEIR IMPLEMENTATION BY THE WORKING GROUP IN 2008

Phase 2 Recommendations	2008 Working Group evaluation
<i>Recommendation on efforts to raise awareness of the offence of bribery of foreign public officials</i>	
1. With respect to awareness-raising efforts to promote the OECD Convention and prosecution of the offence of bribery of foreign public officials under Belgian anti-corruption law, the Working Group recommends that Belgium:	
(a) develop its efforts to raise awareness of the offence of bribery of foreign public officials within the administration and in the quasi-governmental sector, particularly for those employees likely to play a part in the detection and reporting of acts of transnational bribery, and those coming into contact with Belgian businesses exporting or investing abroad, as well as with the Belgian public (Revised Recommendation, Section I).	Not implemented
(b) take the necessary measures, in cooperation with the professional organisations and sectors of the economy concerned, to increase private sector awareness of the offence of bribery of foreign public officials, and to promote and assist in the implementation of preventive organisational measures within businesses present in foreign markets (Revised Recommendation, Sections I and V C. (i)).	Not implemented
<i>Recommendation on prevention of bribery of foreign public officials</i>	
2. With respect to other measures of prevention, the Working Group recommends that Belgium:	
(a) examine the principles and procedures in force in all the bodies and authorities responsible for granting public subsidies, public procurement contracts or other advantages awarded by public authorities, in order to ensure that there is a fully efficient system for refusing such advantages to enterprises determined to have bribed foreign public officials (Revised Recommendation, Sections II v) and VI).	Partially implemented
<i>Recommendation on detection of bribery of foreign public officials</i>	
3. With respect to detection, the Working Group recommends that Belgium:	
(a) adopt measures to ensure that employees who in good faith denounce suspected acts of bribery are given effective and adequate protection so that they can report those acts to the prosecuting authorities without fear of being dismissed or taken to court (Revised Recommendation, Section I);	Not implemented
(b) remind public officials, through a circular or other means, of their obligation under Article 29, paragraph 1 of the Code of Criminal Procedure to inform the prosecuting authorities of any offence of bribery of foreign public officials that comes to their knowledge in the performance of their functions, and examine the appropriateness of instituting a comprehensive system of sanctions for non-compliance with this obligation (Revised Recommendation, Sections I and II(v));	Partially implemented
(c) prepare a circular as soon as possible for all tax officials, reminding them of the general prohibition, under criminal law, on giving any kind of advantage to a foreign public official (Convention, Article 1; Revised Recommendation, Section IV);	Implemented
(d) clarify the requirement that auditors of company accounts who uncover evidence of possible acts of bribery must inform management and, as appropriate, the corporate monitoring bodies of the company, and consider making it an express legal obligation for auditors to report to the prosecuting authorities any involvement of the company whose accounts they audit in acts of bribery in foreign markets, in cases where the auditor has duly notified the corporate bodies concerned but they have failed to act (Convention, Article 8; Revised Recommendation, Section V iv));	Implemented
(e) set up multidisciplinary coordination among the different judicial and police departments, accompanied by a memorandum of understanding with the public services, with regard to the control and detection of bribery of public officials (Revised Recommendation, Section I).	Implemented
<i>Recommendation on the investigation and prosecution of bribery of foreign public officials</i>	
4. With respect to prosecution and sanctions, the Working Group recommends that Belgium:	

(a) formally clarify, by circulars or any other official means, its criminal policy with regard to active bribery of foreign public officials, to encourage police and prosecutors to systematically seek to establish the liability of persons suspected of having committed the offence (Revised Recommendation, Section I);	Implemented
(b) carry out an adequate training policy for those involved in criminal proceedings (police, prosecutors and examining magistrates) for the offence and establish a specialised branch to deal with economic and financial crime cases (Revised Recommendation, Section I; Annex to the Revised Recommendation, Paragraph 6);	Implemented
(c) define an autonomous notion of foreign public official that fully complies with the requirements of the Convention and, with the same aim, take remedial legislative measures to ensure the full effectiveness of Belgium's extra-territorial and universal jurisdictions over bribery of foreign public officials committed outside Belgium (Convention, Article 1; Phase 1 Evaluation; Convention, Articles 4 and 5);	Implemented
(d) clarify, within the framework of the bill currently being drafted to amend the law concerning the criminal liability of legal persons, how the mental element is imputed for the intentional offence of transnational bribery, in order to facilitate prosecution (Convention, Articles 2 and 3; Revised Recommendation, Section I);	Implemented
(e) ensure, as part of the ongoing reform of mutual legal assistance in criminal matters, on the one hand, that simplified national procedures are introduced for active and passive mutual assistance in the absence of an international agreement (Convention, Article 9); and, on the other hand, that it is clarified that invoking Belgium's essential interests to deny mutual legal assistance in cases of foreign bribery will not be influenced by the considerations mentioned in Art. 5 of the Convention.	Partially implemented
<i>Recommendation on sanctions for bribery of foreign public officials and related offences</i>	
5. With regard to sanctions, the Working Group recommends that Belgium:	
(a) draw the attention of prosecutors to the importance of vigorously pursuing accounting violations that could conceal the payment of a bribe to a foreign public official (Convention, Article 3 ; Revised Recommendation, Section V A) iii);	Implemented
(b) consider, either as part of the revision of the law on criminal liability of corporations or by any other means, the disqualification by law from public procurement of enterprises that are convicted of bribery of foreign public officials, (Convention, Article 3; Revised Recommendation, Section VI ii));	Implemented
(c) introduce expeditiously into Belgian tax law a general prohibition on the tax deductibility of any kind of advantage given to a foreign public official (Phase 1 Report; Revised Recommendation, Sections II vii) and IV).	Implemented
<i>ISSUES FOR FOLLOW-UP BY THE WORKING GROUP</i>	
6. The Working Group will follow up on the issues listed below, in light of evolving practice, in order to check:	
(a) whether the current definition of bribery under Article 246 of the Criminal Code specifically covers the giving of an advantage (Convention, Article 1);	
(b) whether the treatment of the offence of bribery of a foreign public official confirms that the notion of the exercise of the official functions of a public official is broadly conceived (Convention, Article 1);	
(c) whether the human and material resources allotted to the federal police and their attribution allow for effective prosecution of complex cases of foreign bribery (Revised Recommendation, Section I).	

ANNEX 2 – RELEVANT LEGISLATION

Penal Code

Article 5

All legal persons are criminally liable for offences that are intrinsically connected with the attainment of their purpose or the defence of their interests, or for offences that concrete evidence shows to have been committed on their behalf.

When a legal person is liable solely because of the intervention of a known natural person, only the person who committed the more serious offence may be convicted. If the known natural person committed the fault knowingly and willingly, he can be convicted at the same time as the legal person that is liable.

The following are deemed to be legal persons:

1. momentary associations and associations in which one or more persons have an interest in operations managed by other persons in their own name;
2. companies referred to under Article 2, paragraph 3 of the coordinated laws on commercial companies, as well as commercial companies in the process of incorporation;
3. companies or partnerships regulated by the Civil Code that have not taken the form of companies or partnerships regulated by the Commercial Code.

The following are not deemed to be legal persons criminally liable for purposes of the application of the present article: the federal State, regions, communities, provinces, emergency service zones, pre-zones, Brussels and its suburbs, municipalities, multi-district zones, intra-local territorial organs, French community Commission, Flemish community Commission, joint community Commission and public centres for social welfare.

Article 7bis

The penalties applicable to offences committed by legal persons are:
for all criminal offences:

1. a fine;
2. special confiscation; the special confiscation set forth in Article 42, paragraph 1 ordered against public legal persons may apply only to assets liable to seizure under civil law;

for serious offences:

1. dissolution; this may not be ordered against public legal persons;
2. prohibition on carrying on an activity relating to the corporate purpose, with the exception of activities which provide a public service;
3. closure of one or more establishments, with the exception of establishments where activities which provide a public service are carried on;
4. publication or dissemination of the judgment.

Article 41bis

Paragraph 1. The fines applicable to criminal offences committed by legal persons are:
for serious offences:

- where the law provides for life imprisonment: a fine of two hundred and forty thousand to seven hundred and twenty thousand euros;
- where the law provides for imprisonment and a fine or one only of those penalties: a minimum fine of five hundred euros multiplied by the number of months corresponding to the minimum prison sentence, given that the amount may not be less than the minimum fine for the offence; the maximum amounts to two thousand euros multiplied by the number of months corresponding to the maximum prison sentence, given that the amount may not be more than double the maximum fine for the offence;

- where the law provides only for a fine: the minimum and maximum are those provided by law for the offence;

for petty offences:

- a fine of twenty-five to two hundred and fifty euros.

Paragraph 2. In order to determine the penalty as set forth at paragraph 1, the provisions of Book I apply.

Article 246, paragraph 2

The act of proposing, whether directly or through intermediaries, an offer, promise or advantage of any kind to a person exercising a public function, either for himself or a third party, in order to induce him to act in one of the ways specified in Article 247 shall constitute active bribery.

Article 250

When the bribery referred to in Articles 246 to 249 concerns a person who exercises a public function in a foreign State or in a public international organisation, the penalties will be those laid down in these provisions.

Code of Criminal Procedure

Article 21 of the Preliminary Title

Except with regard to the offences defined in Articles 136*bis*, 136*ter* and 136*quater* of the Penal Code, proceedings may no longer be brought after ten years, five years or six months as of the day on which the offence was committed, according to whether the offence is a felony, a misdemeanour or a petty offence. [...]

Article 21*ter* of the Preliminary Title

If criminal proceedings exceed a reasonable period of time, the judge may pronounce a conviction by a simple declaration of guilt, or may order a penalty less than the minimum penalty provided by law. [...]

Article 22 of the Preliminary Title

The limitation of proceedings shall be interrupted only by acts of investigation or prosecution carried out within the period determined by Article 21. A new period of equal length shall begin as of such acts, even with regard to persons not involved in them.

Article 10*quater*

Paragraph 1 Any person who has committed, outside Belgian territory:

1. an offence referred to in Articles 246 to 249 of the Penal Code;
2. an offence under Article 250 of the same Code, when the person exercising a public function in a foreign State or in a public international organisation is Belgian or when the public international organisation for which the person is exercising a public function has its headquarters in Belgium,

is liable to prosecution in Belgium.

Paragraph 2 Any Belgian, or any person whose principal residence is on the territory of the Kingdom and who, outside that territory, is guilty of an offence set forth in Article 250 of the Penal Code may be prosecuted in Belgium, on condition that the offence is punishable under the legislation of the country where it was committed.

Article 29

Any constituted authority, any public official or officer who, in the exercise of his duties, becomes aware of a crime or misdemeanour must report it immediately to the [Crown prosecutor] for the jurisdiction in which the crime or misdemeanour was committed, or in which the [accused] may be found, and must provide to the prosecutor any pertinent information, records or documents.

Notwithstanding the foregoing, officials of the income tax administration, the value-added tax administration, the records and land registry, the special tax inspection administration or the corporate and profits tax administration may not, without the authorisation of their regional director, report to the Crown prosecutor criminal deeds that are punishable under the terms of tax legislation and their implementing decrees.

The regional director referred to at paragraph 2 or the public official he appoints may, in the context of combating tax fraud, consult with the Crown prosecutor on practical cases. The Crown prosecutor may prosecute criminally punishable offences which come to his attention during the consultation. Consultation may also take place on the Crown prosecutor's initiative. The relevant police authorities may take part in the consultation.

Income Tax Code

Article 53, paragraph 24

The following do not constitute business expenses: [...]

commissions, brokerage fees, trade or other discounts, occasional or other fees, bonuses, all kinds of other payments and advantages which are awarded directly or indirectly to a person:

- a) in connection with public bribery in Belgium as referred to in Article 246 of the Penal Code or private bribery in Belgium as referred to in Article 504*bis* of the same Code;
- b) in connection with public bribery of a person exercising a public function in a foreign State or in a public international organisation, as referred to in Article 250 of the same Code.

Article 219

A separate levy is established with regard to the expenses referred to in Article 57 and the advantages of any kind referred to in Article 31, paragraph 2, indent 2 and Article 32, paragraph 2, indent 2 which are not justified by the production of individual vouchers and a summary statement, and with regard to concealed profits not found among the company's assets and the financial advantages of any kind referred to in Article 53, paragraph 24.

The levy is equal to 300 per cent of such expenses, advantages of any kind, financial advantages or concealed profits.

The reserves referred to in Article 24, paragraph 1, indents 2 to 4 are not deemed to constitute concealed profits.

This levy does not apply if the taxpayer can prove that the amount of the expenses referred to in Article 57 or the advantages of any kind referred to in Article 31, paragraph 2, indent 2 and Article 32, paragraph 2, indent 2 is included in a return filed by the beneficiary in compliance with Article 305. Where the amount of expenses referred to in Article 57 or the advantages of any kind referred to in Article 31, paragraph 2, indent 2 and Article 32, paragraph 2, indent 2 is not included in a return filed by the beneficiary in compliance with Article 305, the levy does not apply if the amount is included in a tax demand established with the beneficiary's consent and in his name within the time limit referred to in Article 354, paragraph 1.

**ANNEX 3 – CRIMINAL SANCTIONS APPLICABLE TO THE OFFENCE OF BRIBING
FOREIGN PUBLIC OFFICIALS¹⁰⁴**

Nature of the offence ¹⁰⁵	Natural persons			Legal persons			
	Fine in € (m=million)	Imprisonment	Additional penalties Loss of rights or disqualification from public procurement	Fine in € (m=million)			
Article 247 – Ordinary law, public officials in general							
247, para. 1: Proper act	600 to 60,000	6 months to 1 year	Article 33 CP Optional	Downgrading, suspension or withdrawal of contractor's accreditation for public works Optional	18,000 to 660,000		
		600 to 150,000			6 months to 2 years	18,000 to 1.65m	
247, para. 2: Improper act	600 to 150,000	6 months to 2 years			18,000 to 1.65m		
	600 to 300,000	6 months to 3 years			18,000 to 3.3m		
247, para. 3: Serious criminal offence committed by the official	600 to 300,000	6 months to 3 years			18,000 to 3.3m		
	3,000 to 600,000	2 to 5 years			72,000 to 6.6m		
247, para. 4: Influence	600 to 60,000	6 months to 1 year			18,000 to 660,000		
	600 to 150,000	6 months to 2 years			18,000 to 1.65m		
Article 248 – Police officers and members of the prosecution service							
248, para. 1: Proper act	600 to 120,000	6 months to 2 years			Article 33 CP Optional		18,000 to 1.65m
	600 to 330,000	6 months to 4 years					18,000 to 576,000
248, para. 2: Improper act	600 to 300,000	6 months to 4 years					18,000 to 576,000
	600 to 600,000	6 months to 6 years	18,000 to 864,000				
248, para. 3: Serious criminal offence committed by the official	600 to 600,000	6 months to 6 years	18,000 to 864,000				
	3,000 to 1.2m	2 to 10 years	72,000 to 1.44m				
Article 249 – Judges, jurors, arbitrators and assessor judges							
249, para. 1: Arbitrator	600 to 300,000	1 to 3 years	Article 33 CP Optional				36,000 to 432,000

¹⁰⁴ The amount of fines applies to offences committed as of 1 January 2012.

¹⁰⁵ Note: the text in the second line for each offence refers to sanctions that apply in cases of a corruption pact.

	3,000 to 600,000	2 to 5 years		72,000 to 6.6m
249, para. 2: Juror or associate	3,000 to 600,000	2 to 5 years		72,000 to 6.6m
	3,000 to 600,000	5 to 10 years	Article 32 CP Optional	180,000 to 1.44m
249, para. 3: Judge	3,000 to 600,000	5 to 10 years		180,000 to 1.44m
	3,000 to 600,000	10 to 15 years	Article 31 CP Automatic	360,000 to 2.16m

ANNEX 4 – PARTICIPANTS DURING THE ON-SITE VISIT

Government and public agencies

- Belgian Development Agency
- Foreign Trade Agency
- Financial Intelligence Unit
- Economic and Financial Crimes Directorate
- Office du Ducroire
- Finexpo
- Central Office for the Repression of Corruption
- Central Office for Organised Economic and Financial Crime
- Statistical analysts at the College of General Prosecutors
- Central Office for Seizure and Confiscation
- Buildings Agency
- European Anti-Fraud Office (OLAF)
- Federal Public Service Prime Minister's Office
- Federal Public Service Justice
- Federal Public Service Foreign Affairs
- Federal Public Service Budget and Management Control
- Federal Public Service Finance
- Federal Public Service Economy, SMEs, Self-Employed and Energy
- Flemish Community

Judiciary

- Court of Cassation
- College of General Prosecutors
- Investigating magistrate, Federal Prosecutor's Office
- Prosecutor's Office at Brussels Court of Appeal
- Prosecutor's Office at Mons Court of Appeal
- Prosecutor's Office at Liège Court of Appeal

Private sector

Private enterprises

- BATS
- Carmeuse
- FN Herstal
- KBC
- Kroll Advisory Solutions
- Siemens
- UCB
- Arcelor Mittal

Professional and business organisations

- Antwerp World Diamond Centre
- Agoria
- Belgian-Chinese Economic and Commercial Council
- International Chamber of Commerce
- Union des Entreprises de Bruxelles

Legal professions and universities

- HoGent, Onderzoeksteam GaPS
- De Broeck, Van Laere & Partners

Accountants and auditors

- IFA
- Institut des Réviseurs des Entreprises
- Triforensic

Civil society and media

- Transparency International Belgium
- MO Magazine

ANNEX 5 – LIST OF ABBREVIATIONS AND ACRONYMS

ABD	<i>Agence Belge de Développement</i> [Belgian Development Agency]
BTC	Belgian Technical Cooperation
Cass.	<i>Cour de cassation</i> [Court of Cassation]
CIC	<i>Code d'instruction criminelle</i> [Code of Criminal Procedure]
CIR	<i>Code des impôts sur les revenus</i> [Income Tax Code]
CP	<i>Code pénal</i> [Penal Code]
CS	<i>Code des sociétés</i> [Companies Code]
CTIF	<i>Cellule de Traitement des Informations Financières</i> [Financial Intelligence Unit]
DRC	Democratic Republic of the Congo
EC	Council of the European Union
EU	European Union
EUR	Euro
FATF	Financial Action Task Force
FDI	Foreign direct investment
FEB	<i>Fédération des Entreprises Belges</i> [Belgian Business Federation]
GDP	Gross domestic product
IFAC	International Federation of Accountants
IRE	<i>Institut des Réviseurs d'Entreprises</i> [Institute of Company Auditors]
ISA	International Standards on Auditing
JIT	Joint Investigation Team (<i>Équipe commune d'enquête</i>)
MLA	Mutual legal assistance
OCRC	<i>Office Central de Répression de la Corruption</i> [Central Office for the Repression of Corruption]
OCSC	<i>Office Central pour la Saisie et la Confiscation</i> [Central Office for Seizure and Confiscation]
OECD	Organisation for Economic Co-operation and Development
ODA	Official development assistance
OLAF	European Anti-Fraud Office
PEP	Politically exposed person
SFPI	<i>Société Fédérale de Participation et d'Investissement</i> [Federal Holding and Investment Company]
SMEs	Small and medium-sized enterprises
SPC	<i>Service de la Politique Criminelle</i> [Criminal Policy Office]
SPF	<i>Service Public Fédéral</i> [Federal Public Service]
UCM	<i>Union des classes moyennes</i> [Middle Class Union]
UNCAC	United Nations Convention against Corruption
UNCTAD	United Nations Conference on Trade and Development
USD	American dollar
WGB	Working Group on Bribery