



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

BELGIUM: PHASE 2

**REPORT ON THE APPLICATION OF THE CONVENTION ON
COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN
INTERNATIONAL BUSINESS TRANSACTIONS
AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY
IN INTERNATIONAL BUSINESS TRANSACTIONS**

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TABLE OF CONTENT

EXECUTIVE SUMMARY	4
INTRODUCTION	5
a) Belgium, an open economy.....	5
b) Raising awareness of corruption in Belgium	6
c) Methodology and structure of the report.....	7
A. PREVENTING AND DETECTING THE OFFENCE OF BRIBERY OF A FOREIGN PUBLIC OFFICIAL.....	8
1. Preventing the bribery of foreign public officials.....	8
a) Awareness raising and preventive measures in the public administration.....	8
b) Organisational preventive measures in the commercial sector	11
2. Detecting acts of bribery of foreign public officials and related offences	14
a) Reporting by private individuals or the business community.....	15
b) Disclosures by the public service.....	17
B. PROSECUTION OF THE OFFENCE OF ACTIVE BRIBERY OF A FOREIGN PUBLIC OFFICIAL AND RELATED OFFENCES	21
1. The conduct of public proceedings	21
a) Instituting public proceedings.....	21
b) Structures that support public proceedings	23
c) Forms of evidence and investigative techniques.....	27
d) Mutual legal assistance granted by Belgium in transnational bribery cases	29
2. Proving the offence of bribery of a foreign public official	32
a) Offences partly committed on Belgian territory or outside it	32
b) Elements of the offence of bribery of a foreign public official.....	34
3. Liability of legal persons.....	36
a) Factual imputation and imputation of intent.....	37
b) Subsidiaries	39
C. SANCTIONING THE OFFENCE OF ACTIVE BRIBERY OF FOREIGN PUBLIC OFFICIALS AND RELATED OFFENCES	40
1. Convictions and sentences handed down for acts of corruption	40
a) Applicable sanctions and their determination by the judges.....	40
b) Convictions and sanctions handed down by Belgian courts	41
c) Confiscation of property	44
2. Sanctions for laundering the proceeds of bribery of foreign public officials.....	46
3. Persons found guilty of accounting and tax offences.....	47
a) Prosecution of accounting offences	47
b) Enforcement of the non-deductibility of undue payments to foreign public officials	48
RECOMMENDATIONS	51
ANNEX 1: LIST OF ABBREVIATIONS.....	54
ANNEX 2: CRIMINAL SANCTIONS APPLICABLE TO THE OFFENCE OF BRIBING FOREIGN PUBLIC OFFICIALS.....	56
ANNEX 3: CONVICTIONS SINCE 1995	57

ANNEX 4:	PERTINENT LEGAL PROVISIONS (EXTRACTS).....	59
ANNEX 5:	LIST OF INSTITUTIONS VISITED DURING THE ON-SITE VISIT	66
ANNEX 6:	COMPOSITION OF THE EXAMINING TEAM.....	68

EXECUTIVE SUMMARY

1. The Phase 2 Report on Belgium by the Working Group on Bribery evaluates Belgium's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Overall, the Working Group finds that Belgium has made commendable efforts in this regard. For example, as of the date of the evaluation, four cases of possible foreign bribery were either under preliminary inquiry or under investigation. Nevertheless, the Working Group has noted some problems and recommended that some areas could be strengthened. In particular, the Group found that Belgian law allows under certain conditions the tax deductibility of undue advantages given to public officials. The Working Group considers it a matter of fundamental importance that Belgium expeditiously adopt a general ban on the deductibility of benefits of all kinds provided to foreign public officials, and notes that this issue was previously signified to Belgium during the Phase 1 review in 1999.

2. The Group also stressed Belgium's obligation to provide for an autonomous definition of the notion of foreign public official in order to cover the full scope of the application of the Convention. In the same vein, the Group recommended that Belgium take remedial legislative measures in order to ensure the full effectiveness of Belgium's extraterritorial and universal jurisdiction over foreign bribery offences committed outside Belgium.

3. Belgium should also provide increased support to those involved in criminal prosecution (police, prosecutors and examining magistrates) to ensure that they have the capacity necessary to ensure that the offence of bribery of foreign public officials is effectively prosecuted. In this regard, the Group notably recommended the creation of a specialised service for the prosecution of economic crime. In order to improve detection and prosecution of offences, the Group also suggested that Belgium consider imposing an obligation on auditors to report to the prosecuting authorities any suspicions of bribery detected, in cases where the management organs of the company have failed to act after being notified.

4. The Report also highlights positive aspects of Belgium's fight against transnational bribery. For instance, Belgium recently amended its legislation to facilitate the confiscation of the bribe or the proceeds of bribery, including confiscation of assets derived from bribery or connected with it. Belgium has also strengthened the investigative methods available to magistrates in cases of serious crime, including foreign bribery. Furthermore, the Belgian authorities are devoting particular attention to the subject of criminal liability of legal persons and have embarked on a major review of the existing law, which should encompass the problems encountered when applying that law to cases of transnational bribery.

5. The Report, which details the findings of experts from Argentina and Switzerland, was adopted by the OECD Working Group along with recommendations. Within one year of the Group's approval of the Phase 2 Report, Belgium will report to the Working Group on the steps that it will have taken or plans to take to implement the Working Group's recommendations, with a further report in writing within two years. The report is based on the laws, regulations and other materials supplied by Belgium, and information obtained by the evaluation team during its on-site visit to Brussels. During this visit, which lasted for five days in January 2005, the evaluation team met with representatives of several Belgian government agencies, the private sector and civil society. A list of these bodies is set out in an Annex to the Report.

INTRODUCTION

a) *Belgium, an open economy*

6. Belgium today is among the world's most open economies, measured in terms of the value of foreign trade in relation to GDP: in 2003, its exports stood at 66% of GDP, having almost doubled over the previous ten years. The rapid growth in Belgian exports (around 5 to 8% per annum between 1997 and 2000) meant that in 2003 it was ranked 12th among worldwide exporting countries, and 10th among the OECD countries, despite the fact that the Kingdom of Belgium has a mere 10 million inhabitants.

7. Most of Belgium's export trade is with its neighbouring countries, i.e. Germany (17%), France (17%), the Netherlands (13%) and the United Kingdom (9%). 21% of Belgian exports go to other countries in the European Union. Outside Europe, other world regions account for about a quarter of Belgian exports: 10% of total exports go to Asian countries and 6% to the Americas, with Africa representing less than 2%. The major goods exported are chemicals (16%), transport equipment (15%) and machinery (14%), which together amount to about half the export trade in terms of value. The trade in precious stones and precious metals for which Belgium has a worldwide reputation represents only about 6% of total exports.¹

8. Given the role Belgian businesses play in international trade, the implementation of the OECD Convention into Belgian domestic law by the Corruption Repression Act of 10 February 1999 was especially significant. For very many Belgian businesses, international trade is almost their lifeblood: some sectors of industry, such as car manufacturing, radio and television equipment and telecommunications, not to mention textiles, are more than 85% dependent on foreign orders.² Belgium's standing in terms of foreign direct investment (FDI) is equally strong: according to OECD statistics, in 2002 Belgium was placed 10th out of the OECD countries.

9. These figures show the extent to which Belgian companies and their foreign subsidiaries are exposed to markets where the payment of hidden commissions is sometimes solicited. The profile of some of the cases currently under inquiry (*information*) or investigation (*instruction*) at the time of the Phase 2 examination of Belgium bears this out. While, at the time of the examination of Belgium, there had not yet been any convictions for bribery of foreign public officials as defined in the OECD Convention, there were a number of cases at the inquiry or investigation stage involving facts falling within the scope of the Convention and its domestic implementing legislation.³

10. In one of these cases, which arose out of findings made during searches carried out in the course of another ongoing investigation in Belgium, it came to light that important commission payments of several million euros had been made in connection with a contract for the resale of military equipment involving, among others, the Belgian State, a foreign State, and a Belgian enterprise. Another case,

¹ Figures for 2003. Source: National Bank of Belgium, National Accounting Institute, Foreign Trade Statistics, Quarterly Bulletin 2004-III.

² Source: *INS – Service Public Fédéral Economie, PME, Classes Moyennes et Energie*: <http://statbel.fgov.be/figures/d72-fr.asp>

³ The inquiry (*information*) is carried out under the authority and under the direction of the competent public prosecutor, and is the phase of gathering information on offences and those committing them, collecting evidence and compiling all the material necessary to institute a prosecution (Criminal Investigation Code, Article 28bis, para 1).

triggered by disclosures made by the European Union Anti-Fraud Office, OLAF, involved a European Commission official, not of Belgian nationality, suspected of having received various financial advantages or advantages in kind for having supplied privileged and confidential information to foreign private companies some of which had correspondent entities in Belgium. Here, a judicial investigation was opened and the active briber placed in preventive detention in end-2003. In a third case, also concerning the bribery of a European official, this time by a national of an EU member State who acted as a lobbyist for an African State, the alleged briber was made the subject of a judicial investigation begun in 2004.

11. In all, based on the data forwarded to the OECD examining team by the Central Office for Corruption Repression (*Office Centrale pour la Répression de la Corruption*, or OCRC), there were at least three cases involving the offence of bribery of foreign public officials under inquiry or investigation at the time of the Phase 2 examination of Belgium.⁴ In addition to these, at least three cases of money laundering were being investigated or were the subject of judicial inquiries at the time of the Belgian examination that might have involved bribery of foreign public officials.

b) *Raising awareness of corruption in Belgium*

12. Since the mid-1990s, the corruption of public officials became a major topic of public debate in Belgium, both in the media and in the political arena. Awareness of the problem stemmed from a spate of scandals in the mid-1990s involving the bribery of Belgian public officials and the financing of political parties through “backhanders” obtained through this corruption.

13. In 1994 the “Agusta-Dassault” affair hit the headlines, with the revelation that backhanders paid as part of arms contracts had been used for the covert financing of political parties, and this led to the indictment of senior Belgian politicians as well as the resignation of three ministers and the then Secretary-General of NATO. In the same year, a parliamentary commission of inquiry published a report, which attracted enormous media attention, on corruption in the Belgian police force. In 1995 and 1997 Belgium was rocked by two other major affairs, which brought to light corruption among civil servants in the meat production and veterinary controls sector. The issue of corruption was raised again in 1997 by the parliamentary commission of inquiry set up to look into the Dutroux case, a paedophilia scandal that shook Belgian society to its foundations and laid bare some malfunctioning of the Belgian police and court systems.

14. This series of scandals, coming one after the other, resulted in the people of Belgium becoming conscious of the problem of corruption in their country and the need for reform, and this is borne out by the Corruption Perception Indexes compiled by the NGO Transparency International during the latter half of the 1990s: in 1999, Belgium was ranked 29th place, jointly with Namibia. The growing awareness in Belgium of the problem of corruption meant that it was explicitly mentioned in a government agreement of July 1999, which contained separate items dealing with the fight against corruption and other relevant measures including the adaptation of the existing legislation. In 2000, the government adopted a Federal Plan for Security and Penal Policy that identified as one of its priorities the fight against corruption in its various manifestations.

15. The level of awareness seems to have fallen off since then. There have been tragic and highly publicised crimes committed, involving armed attacks and children disappearing and being murdered, which in the view of most Belgians have removed the fight against corruption to a lower level of priority in terms of the tasks facing the government. Public debate has been concentrated on ways of combating organised crime, prostitution, drug trafficking and organised tax fraud rather than corruption in general. As

⁴ Data from the OCRC might be incomplete, as this department of the judicial police is not the only body making inquiries into cases of bribery of foreign public officials.

evidence of this, the fight against corruption no longer featured among the priority objectives of the police services during the period 2003-2004, contrary to what was set forth in the National Security Plan drawn up by the government in 2002. The fight against corruption was reinstated as a police priority in the National Security Plan for 2004-2007, approved by the government in March 2004. The fact that Belgium moved from 29th to 17th place – equal with the United States and Ireland – in the Transparency International Corruption Perception Index, might be taken as reflecting a feeling that the situation in Belgium with regard to corruption had improved, or alternatively as the result of there having been less media focus on corruption cases in Belgium in recent years, thus producing a much lower perception of corruption as a problem, on the part of those taking part in the survey.

c) *Methodology and structure of the report*

16. The purpose of this report is to study the structures put in place by Belgium in order to enforce the laws and rules implementing the Convention, to assess how these are applied in practice, and to monitor Belgium's compliance in practice with the 1997 Revised Recommendation. It draws on the replies given by the Belgian authorities to the general and specific Phase 2 Questionnaires, and the interviews with the government experts, representatives of the business community, lawyers, accounting professionals and financial intermediaries, and representatives of civil society met during the on-site visit which took place from 10 to 14 January 2005 (see the list of institutions interviewed, annexed to this report) as well as a study of the relevant laws and research carried out independently by the lead examiners and the Secretariat.

17. The first part of this report looks at the mechanisms in place in Belgium, in both the public and private sectors, for preventing and detecting offences of bribery of foreign public officials, and examines ways in which those mechanisms could be made more effective. The second part considers the effectiveness of the mechanisms for prosecuting acts of bribery of foreign public officials and related offences involving money laundering, accounting practices and tax. The third part of the report deals with the punishment of persons convicted of acts of bribery of foreign public officials and related offences. Finally, at the end of the report are some specific recommendations offered by the OECD Working Group on Bribery, relating to prevention and detection and to prosecution and sanctions. This section also raises some questions that, in the opinion of the Working Group, deserve to be followed up or re-examined in the course of further work on this issue.

A. PREVENTING AND DETECTING THE OFFENCE OF BRIBERY OF A FOREIGN PUBLIC OFFICIAL

1. Preventing the bribery of foreign public officials

18. The OECD Convention acknowledges the fact that there is more to the fight against bribery of foreign public officials than simply the judicial aspect. Bribers often take advantage of flaws and loopholes in some of the rules, as well as the lack of administrative controls, to commit their acts. At the end of the 1990s, the Belgian public authorities realised the importance of an integrated approach including both judicial and administrative measures in winning the fight against bribery of their own public servants. This is true of domestic bribery, and it applies with equal force to transnational bribery.

a) Awareness raising and preventive measures in the public administration

i) Raising awareness in Belgian public administration of the existence of the offence

19. The legislative and organisational reforms undertaken during the past decade bear witness to the attention the Belgian government has devoted to fighting corruption. The importance attached to it is clearly reflected in two out of three National Security Plans (the Federal Security and Penal Policy Plan of 31 May 2000, covering the period 2001-2002, then the National Security Plan for the period 2004-2007); the adoption on 10 February 1999 of a law on the repression of bribery, domestic and international; the new prohibition on tax deductibility of commissions paid overseas by businesses in order to obtain or retain public procurement contracts or administrative authorisations; the addition in 1999 of a new clause, specifically aimed at bribery, excluding access to Belgian public procurement contracts; the insertion, also in 1999, of measures whereby government-supported export credits may be forfeited for bribery; and, finally, the creation of a special federal police department to handle complex bribery cases, the Central Office for Bribery Repression (OCRC).

20. While these legislative measures address both the phenomena of domestic bribery of Belgian public officials and international bribery, the focus of the approach has been on the public interest of the Belgian State, the probity of its civil servants and the integrity of its public contracts; thus the fight against international bribery has taken the back seat in respect of the stated objectives of the public authorities. There are several examples to support this observation: successive National Security Plans which, with the exception of the first, identify only domestic corruption as a Belgian security priority; the emphasis given in these plans or in ministerial directives, when setting policing priorities, to fighting corruption in the context of the award and execution of Belgian public contracts; the general prohibition in the tax laws of deductibility of "secret" commissions paid to Belgian civil servants and constituted authorities while deductibility is allowed for some that are paid in connection with export contracts; and the mandate given to the Ministers for Public Service, the Budget and Justice to devise a preventive approach to corruption, which the public authorities view as needing to be based essentially on the modernisation of Belgian public administration and the recasting of financial controls⁵.

21. Clearly, the priority given to the problem of domestic corruption can have an impact on whether or not the organs of public administration take notice of the bribery of foreign public officials. There is an obvious risk here for the way in which judicial investigations are carried out: given the general philosophy of government policy with regard to the fight against corruption, the examiners are afraid that these investigations will focus only on the bribery of Belgian public servants at the expense of transnational bribery. The risk is obvious in other sectors, too, for example as to the implementation of the clause barring enterprises from being awarded public procurement contracts on grounds of bribery: the priority given by

⁵ Ministry of Justice, Federal Plan for Security and Detention, Draft 80.

the authorities to fighting corruption in the awarding of *Belgian* public contracts might lead the contracting authorities to concentrate solely on preventing that type of bribery, unaware that it was the legislator's intention also to exclude businesses convicted of involvement in acts of bribery of public decision-makers abroad.

22. Ambiguity in the legislator's intentions, coupled with the absence of any specific, targeted, measures for raising awareness on the part of the administrative and other public bodies charged with applying the Belgian law implementing the OECD Convention in national law, could also have an impact on how priorities for action are decided. There is an obvious risk here for the way the Belgian tax authorities might apply the legal prohibition in the Criminal Code of bribery of foreign public officials, given, on the one hand, that tax law allows deductibility, as professional expenses, of some secret commissions paid abroad in order to "combat foreign competition" (see, *infra*, paragraphs 161-168 of the report), and on the other, that the administrative commentaries intended to serve as guidelines for tax officials applying the law refer only to the terms on which they may accept as deductible expenses commissions paid in connection with exports, without reference to the general prohibition, in Belgian criminal law, against paying bribes to public officials in foreign markets.⁶ Every year, applying these tax law provisions, the Belgian tax authorities allow on average four Belgian businesses to deduct bribes paid abroad from their tax declaration.

23. In the view of the lead examiners, stepping up the campaign of awareness raising in these government sectors should, from now on, be among the urgent priorities of the Belgian authorities. One step, though not the only one, would be to issue a circular explicitly clarifying Belgium's position on the general prohibition, under Belgian criminal law, on granting any advantage to a foreign public official, and its commitment, under the OECD Convention, to refuse deductibility in respect of bribes paid to foreign public officials. By contrast with the circular that was being drawn up at the time of the Phase 2 examination of Belgium, such a circular should be addressed to all tax officials, not only to those officers belonging to the central administration responsible for examining requests for deductions.

Commentary:

The examiners recognise the efforts made by Belgium to raise awareness of the problem of corruption, but regret that priority is given to domestic bribery. They recommend that the Belgian authorities step up their efforts from now on by engaging in raising awareness of the offence of bribery of foreign public officials among all departments and bodies involved.

ii) Administrative preventive measures

24. The policy direction taken by the public authorities on preventing the bribery of foreign public officials and the implementation of that policy depends as well, among other things, on the staffing, resources and capacity of the various agencies, departments and authorities responsible for carrying it out. As sufficient means are not available, there is a risk that the signal given by the Belgian parliament in 1999, when the OECD Convention was transposed into national law, and later by the government, at the time of the first National Security Plan, might not have any real effect. It is vital that the stated objectives are matched by resources, legal and regulatory as well as human.

25. There was a noticeable imbalance between the declared objectives and the resources available in the field of export guarantees offered by such bodies as the *Office national du Ducroire* (the public agency responsible for export credit insurance) and FINEXPO to cover the risks faced by their clients in certain

⁶ Art. 58 al. 2 of the Income Tax Code and Commentaries 58/3 (1) to the Income Tax Code. Concerning the conditions for granting deductibility of secret commissions paid abroad, see the section on repression of taxability of improper payments to foreign public officials in the third part of the present report.

foreign markets. Aside from the fact that Belgium's adherence to the OECD Action Statement on Bribery and Officially Supported Export Credits did not have the effect of prompting all the Belgian agencies operating in this area⁷ to change their policy accordingly, the only two bodies with the explicit legal capacity to refuse and withdraw guarantees on the grounds of breach of the criminal law on bribery of foreign public officials – Ducroire and FINEXPO – have insufficient means at their disposal. The result is that very little is being done in practice to implement preventive measures.

26. It emerged from the discussions with representatives of these two bodies that the Ducroire and FINEXPO personnel were satisfied with the mere declaration by the exporter when filing his request for export credit insurance that the subject contract was not tainted by any acts sanctioned under the Criminal Code: no prior analysis is done of the risks of bribery in the markets concerned, or of the export contract covered by the guarantee. What is more, these two bodies have such limited means available that they are not in a position to make preliminary inquiries when they themselves receive allegations – sometimes explicit – that their clients are engaging in corrupt practices after the contract is signed. Nor are there even any procedures in place enabling them to check whether the candidate business has previously been convicted of bribing public officials. The representatives of the *Ducroire* took the view that no such procedure was necessary, given the size of the country: they would always hear about any conviction. In the view of representatives of the Ducroire, no such procedures are needed, given the small size of the country: FINEXPO and the Ducroire would in any event hear about a conviction. Even so, an undertaking dated and signed by companies submitting applications to FINEXPO/Ducroire to comply with criminal law anti-corruption provisions would have a considerable dissuasive effect: the threat of suspension or refusal of coverage, or the risk of seeing their names on a blacklist, would be powerful deterrents for companies dependent on exports.

27. A similar observation can be made with regard to the implementation of the laws and regulations introduced in 1996 and 1999 to disqualify from Belgian public contracts businesses that are shown to have committed, or been involved in, acts of bribery, in particular of foreign public officials, or have been made the subject of a verdict “having the effect of *res judicata* with respect to any offence affecting their professional ethics”. The disqualification of a business determined to have bribed a foreign public official from eligibility for public contracts or public subsidies can be a highly effective preventive measure, as it could be a formula for inducing businesses to adopt concrete anti-bribery measures. But as none of the measures are in place to enable this disqualification to be implemented, its deterrent effect will in practice be minimal. In the view of the lead examiners, an official judicial record for legal entities, as was contemplated by a law in draft at the time of the examination of Belgium in Phase 2, could be useful in disqualifying businesses with convictions for corruption.

28. The strictness of the preventive measures with regard to money laundering stands in contrast with the situation just described. In order to make it easier to prevent and detect money laundering operations – including laundering of the proceeds of bribery of foreign public decision makers – the Belgian legislature has imposed far-reaching duties of vigilance on those professions whose position makes them vulnerable to be used as vehicles for money laundering. Not only is there a duty to identify the party claiming a right to the funds, the beneficial owner, and the origin of the funds themselves, but also a duty to retain information concerning the identity of their clients, including occasional clients, and the transactions carried out. The scope of the preventive regime put in place in Belgium by the Act on Preventing the Use of the Financial System for Money Laundering of 11 January 1993 (as amended) is very broad. Aside from the entire

⁷ There are several actors in this field: at the federal level, there are the *Office National du Ducroire* and FINEXPO, both public bodies, and the Belgian International Investment Company (*Société belge d'Investissement International BMI-SBI*), which is subject to private law though the State has a controlling majority. At regional level, the most important are the *Agence Wallonne à l'Exportation* (AWEX) for Wallonia, *Bruxelles Export* for the Brussels region, and *Export Vlaanderen* for Flanders.

Belgian finance and banking sector, it covers professions that do not, strictly speaking, belong to that sector: notaries, court bailiffs, company auditors, external accountants and tax advisers, chartered accountants and tax accountants, and also lawyers, art dealers, real estate agents, diamond traders, etc.

29. Central to the Belgian system of money laundering prevention is an independent administrative authority under the control of the Ministers of Justice and Finance, the Financial Information Processing Task Force (CTIF), which, with the authorities responsible for preventive controls, contributes to the proper implementation of the due diligence obligations. Made up of experts in finance and acting under the direction of a judge on assignment from the public prosecutor's office, its function, apart from receiving and analysing suspicious activity declarations from the financial institutions and professions subject to the Act – and, in cases where examination of the information converts an initial suspicion into serious evidence of money laundering, referring it to the legal authorities – is to ensure that the financial institutions and professions subject to the duty of vigilance implement it correctly in the absence of any other authority exercising preventive control. In order to assist these bodies in taking the right steps to comply with their obligations of prevention of money laundering, the Task Force compiles typologies, including scenarios where the proceeds of bribery of foreign public officials are laundered, and indicators of money laundering that are then reproduced in the internal guidelines of these institutions and professions. The Task Force also determines the manner in which the supervisory authorities of the bodies concerned sanction breaches of the duty of vigilance.⁸

Commentary:

The lead examiners recommend that Belgium review the principles and procedures in force in all bodies and authorities responsible for awarding public subsidies, public contracts and other advantages granted by the public authorities so as to ensure that the measure disqualifying companies determined to have bribed foreign public officials from such advantages is applied as effectively as possible. Further, the examiners invite the Belgian authorities to set up a mechanism that would allow information to be circulated about companies convicted under Articles 250 and 251 of the Criminal Code, for example by the creation of a separate record of convictions for legal entities, distinct from the one for individual persons.

b) *Organisational preventive measures in the commercial sector*

i) The internal compliance policies of Belgian companies

30. Belgian businesses were relatively active in the way they responded to the issue of corruption at the time of the major scandals that occurred in Belgium in the 1990s; some of them have adopted codes of conduct and internal anti-corruption policies dating from that time on. Since then, by contrast, “the soufflé has fallen flat”, to borrow the expression used by one of the participants the examining team met. Thus the recent Belgian Corporate Governance Code, issued on 4 December 2004 and intended for adoption by Belgian businesses, does not contain any reference to bribery, the risk of bribery, or preventive measures to be taken in the light of those risks.⁹ Likewise, the book published by the International Chamber of

⁸ In Belgium, a financial institution that fails to comply with its obligation to make a declaration of suspicious transactions to the CTIF is not liable to criminal sanctions, except in the case where that institution is itself an accomplice in, or co-author of, money laundering. Breaches of the duty of vigilance are punishable only administratively, by the supervisory authorities. When the Task Force finds that there has been a breach of the 1993 Act, it informs the supervisory authorities so that they can take the necessary steps, and in particular impose administrative sanctions. The supervisory authorities must inform the Task Force of the final sanctions they hand down.

⁹ The new Belgian corporate governance code is the product of a joint initiative of the Banking, Finance and Insurance Commission, Euronext, and the Belgian Business Federation. The document is available on the website <http://www.corporategovernancecommittee.be/library/documents/final%20code/CorpGov-FR5.pdf>.

Commerce about corporate practices in the fight against corruption¹⁰ seems to have generated only limited interest among the Belgian business community. According to one person met during the on-site visit, the same is true of the Global Compact (especially its tenth principle, dealing with the fight against corruption), launched in 1999 by the United Nations.¹¹

31. This sudden awareness of the problems of corruption arising out of past scandals happened before the Belgian law prohibiting transnational bribery came into force, so there is no certainty that businesses have grasped the full dimensions of the problem and the need to change the way they do business in foreign markets. The examiners also noted a certain tendency to regard transnational bribery as primarily someone else's problem; several of those interviewed made the remark that Belgian businesses are for the most part very small, and many of the larger Belgian companies have become the subsidiaries of foreign groups. Having become subsidiaries, some major Belgian companies wait for the group headquarters to give the lead in matters of corporate ethics and anti-corruption policy, a dependency that is not always a positive thing in the views of some. One representative of a major corporation acknowledged that his company was often confronted with the problem of bribery in foreign markets. Like many large international corporations, it had adopted a code of conduct, setting out clear rules and identifying in detail the situations where there was risk: gifts, entertainment expenses, travel, sponsorship, hiring, customer relations, etc.

ii) Preventive measures in the small and medium-sized enterprises

32. A characteristic of the commercial and industrial sector in Belgium is the enormous number of small and medium-sized enterprises. It is these, in practice, that make up the fabric of the Belgian economy. Many of them are involved in international transactions of a growing scale, sometimes in countries where there is an acknowledged risk of corruption.

33. In general, the SMEs in Belgium appeared to have a lower level of awareness of the actual problem of corruption in foreign markets. The representatives of these businesses who spoke to the examining team indeed stated in general terms that they did not tolerate bribery, and that some of them had taken steps to publicise the new Belgian and foreign laws on transnational bribery within their companies. However, it seems that the real nature of the problem is only rarely raised in the daily business operations. Although the SMEs consulted were present in foreign markets with high levels of corruption, they said that they had never been faced with the problem of a foreign public official soliciting an undue advantage, or at least that they were not aware of this having happened. Similarly, the directors and managers of the SMEs interviewed could not point to specific cases where internal consultations had taken place as to what was the appropriate conduct when faced with situations where bribery could occur.

34. Within SMEs in Belgium, there thus appears to be only a low level of internal communication on the subject of transnational bribery. These businesses seem to rely on their small size to ensure that messages are communicated, even on subjects as sensitive as bribery. In this environment, it appears probable that the subject remains taboo, which makes the management's task of effectively policing these practices more haphazard. In the view of the examiners, the Belgian authorities should take appropriate measures to stimulate a more frank and open dialogue on these issues within SMEs in Belgium.

35. The SMEs that spoke to the examining team said that they did not consider that codes of ethics were appropriate for businesses of their size, and that they had other ways of ensuring that the company abided by principles of good corporate governance and ethics. One medium-sized business stated that it had no charter or code, but that the company chairman regularly emphasised the importance of business

¹⁰ F. Vincke and F. Heimann, eds., *Fighting Corruption: A Corporate Practices Manual*, ICC: 2003.

¹¹ See <http://www.unglobal.compact.org>

ethics in speeches or internal notes. While the examiners acknowledge that codes of conduct are not necessarily the appropriate solution in all cases, they believe that these codes can provide the opportunity to raise the subject in a more concrete manner, and progress beyond the level of general statements. They can also make it possible for detailed policies to be put in place that, provided they are implemented in practice, can reduce the risk that the company's employees will engage in bribery. The same results could be achieved by more flexible methods of communication, but these still need to be systematic and detailed in order to be credible and effective.

36. In a general sense, the businesses recognised that the management of outside agents used by the company in foreign markets is of vital importance in the fight against corruption. One SME insisted that the long-term nature of the relationships it had with most of its agents tends to reduce the risks; however, aside from clauses in its contracts prohibiting bribery, it could not show any specific procedures for approving the choice of a new agent or managing the relationship once in place. By contrast, one large company has put complex systems in place that apply, in principle, to every contract with a new outside agent or co-investor, which means that, where outside agents are concerned, the code goes much further than a mere contractual clause prohibiting bribery. This code requires a number of factors to be analysed, including the characteristics, reputation and business network of the potential agent and its management. It stipulates that payments must be proportionate to the service rendered, made by cheque or bank transfer, and not made to countries or territories identified by the FATF as uncooperative. The company stated that failure to comply with the code could be sanctioned by the usual means available under employment law, ranging from a reprimand to dismissal. It endeavours to ensure that the practices prescribed or prohibited by the code can be verified during an audit. However, it did not provide any information concerning the number of sanctions that had been imposed or procedures commenced with a view to ensuring that the code was effectively enforced.

37. Even in the case of businesses with a code of conduct or a highly developed system of internal communication regarding the issue of transnational bribery, criminal liability often plays a vital role in the internal dialogue. A manager in the legal department of one large Belgian company pointed out that the introduction of criminal liability had allowed him – and still allowed him – to gain the attention of some of the other managers to the issue of corruption. This manager acknowledged that his company, like others, was in a phase of “cultural change”, that the rules were difficult to apply in some countries, and that they did meet with a certain amount of resistance. He admitted that the sales force did not always see the point in pursuing such policies, especially when faced with competitors who were not subject to the same rules; the fact that this was now a matter of criminal law had “changed the agenda” at this level in the company. In some cases, he noted that some employees had to be replaced in order to bring about change in attitudes and behaviour. In addition to criminal liability, the requirements imposed by both national and multilateral financing agencies and bodies when granting financing, or the national export agencies, could play a major role in how Belgian companies behaved in major international contracts.¹²

iii) The awareness-raising role of business federations

38. It appears that the Belgian business federations play an equally limited role in the fight against bribery of foreign public officials. Admittedly, the Belgian Business Federation (FEB) publicised the law on bribery when it was adopted in 1999; also, it has published a number of editorials in its newsletter, and organised a seminar to which businesses and business federations were invited. However, since then, it has not taken any further steps to keep businesses informed about the problem and how to combat it.

¹² However, as the second part of this report shows, the legal liability of companies in Belgium seems to be too uncertain in its application to have a significant impact in this area; concern about personal liability or liability under foreign laws appears to be stronger.

39. Another federation, representing the business community in the regions, stated that its role was limited to advising businesses about the level of corruption in certain countries on the basis of information it obtained from the Belgian embassy in the relevant country: it does not provide any information about ways to deal with the problem. One federation representing a particular industry sector that the examining team met seemed to have no proactive policy; all it had done was to send a letter to the members of the Federation at the time the law was enacted. Generally speaking, the business federations take the view that, given that corruption in foreign markets is a sensitive subject, and that it is not the role of the federations to interfere in a particular commercial relationship, advising should remain the business of lawyers. That said, the lawyers who spoke to the examining team stated that it was relatively rare for them to be consulted by Belgian businesses on issues of corruption, especially on policies for prevention.

40. As the examining team began to build up an overall picture, during the on-site visit, of the way in which by Belgian businesses implement the anti-bribery law, it became apparent that those finding themselves faced with issues of bribery in foreign markets had nothing to assist them apart from reminders of what was prohibited and recourse to the diplomatic representatives on the ground or to specialist lawyers. In the opinion of the lead examiners, the business federations could do more, without becoming involved in individual cases. As an example, these bodies could compile and circulate a brochure analysing how the law applies to concrete cases, such as the use of an intermediary or the giving of non-pecuniary advantages to a foreign public official, in order to illustrate the scope of the Belgian law. They could also do more in terms of informing their members about the concrete measures they could take to prevent corruption, and how to behave when faced with solicitation by foreign public officials.

Commentary:

The examiners believe that the Belgian authorities should make greater efforts to awaken the interest of businesses in Belgium in the whole question of transnational bribery, raise their awareness of the new rules, and take practical steps to help them deal with difficult situations. Given the very limited role of business federations and in this area, the examiners also recommend that the authorities take appropriate measures to incite these organisations to take a proactive, leading role in the review by businesses in particular of the management techniques they could use in combating bribery.

2. Detecting acts of bribery of foreign public officials and related offences

41. The bribing of public officials is by its nature a clandestine activity: both bribers and bribed use techniques that enable it to be covered up. The covert nature of the phenomenon alone makes it difficult to detect. While there is a special police service in Belgium – the Central Office for Corruption repression (OCRC) – this police department has no monopoly on the investigation of corruption offences and supplying cases for prosecution, nor does it have a role in receiving information relevant to suspected bribery coming from Belgian government departments such as the tax administration, the internal audit department of the administration or the Inspector of Finances, or even from the Task Force responsible for the fight against money laundering in Belgium.

42. Until now, prosecutors in Belgium have obtained files on the bribery of foreign public officials indirectly, as a result of reports mostly coming from the anti-fraud agency of the European Commission, the European Anti-Fraud Office (OLAF) and the Belgian anti-money laundering Task Force (CTIF), and sometimes through investigations initially launched into related offences but having no apparent connection to acts of bribery. There is no case in which a report was made by a government department, including the tax administration, or by quasi-governmental agencies like the Ducroire. Nor was there any file that had been opened on the basis of a report or complaint coming from an individual or from the business community. During the review of Belgium by the OECD Working Group, the Belgian authorities indicated that two cases had been reported by Belgian diplomatic missions abroad in 1999 and 2000.

a) *Reporting by private individuals or the business community*

43. The Belgian business community is not in the habit of making reports or complaints. A study on corruption in Belgium carried out by the OCRC showed that, out of a sample of 248 cases of corruption (mostly involving bribery of Belgian civil servants) filed in the five main prosecutors' offices (Antwerp, Brussels, Charleroi, Ghent and Liège) during the period from 1 January 1996 to 31 December 2000, only 2.8% (seven cases) had been opened on the basis of a report or complaint from a private enterprise. Most of these complaints came from businesses that considered themselves to have been harmed by corrupt practices in the terms of a contract or in a market that had been won by a competitor; none of them appeared to involve corrupt practices that had come to light inside the business itself.

i) *Reports of fraud by company accountants and auditors*

44. The legal and regulatory framework in Belgium is not favourable to the reporting of reprehensible practices that take place within a company. Those in the best position to detect offences committed within the business – the company accountants and statutory auditors – have little freedom to act. Professional secrecy and the duty of reserve by which they are bound forbids them from making unsolicited disclosures to the prosecutor's office of anything they may have uncovered in the course of their duties. While the representatives of the chartered accountancy and licensed tax accountancy professions confirmed to the examining team that they had detected the payment of bribes while performing their duties, all of them emphasised the risk that the contract binding them to the company for which they were performing their function would be unilaterally terminated if they were to decide on their own initiative to report this fraud to the prosecutor's office.

45. The control exercised by the auditors over the management organs of the company in the exercise of their powers, which consists mostly of detecting infringements of the law and putting corrective measures in place, is also subject to a number of limitations. In the first place, the relevant law refers only to breaches of company law and the articles of association. It does not cover breaches of other laws (tax or criminal laws, etc., with the exception of the anti-money laundering law). Second, this is not a general audit of how the business is managed: it covers only those operations capable of being reflected in the accounts, and it is only with regard to those operations that special diligence is required. As the Institute of Business Auditors has recalled in a recently-issued standard, in performing his or her function the auditor is not required to adopt particular procedures to tease out every possible irregularity for which the management would be responsible: the auditor's objective is not the detection or pursuit of "all fraud"; the audit technique need only "be capable of detecting significant alterations in the financial records arising out of fraud"¹³.

46. The purpose of the auditing of accounts, as defined in the Companies Code (CS), is thus to ensure that the accounts present a true picture of the company's financial position; detecting breaches of the Criminal Code committed by the company feature not among its objectives. In the event an auditor detects criminal offences in the form of an act of bribery, the Companies Code does not require him or her to report the breach to the board of directors or the general assembly: the obligation to alert those two bodies under Article 140 paragraph 2 of the Companies Code, or for that matter the obligation laid down in Article 144 6° of the CS to bring the offence to the attention of the shareholders in the detailed written report that is annexed to the annual accounts, concern only breaches of company law or the articles of association. Also, professional secrecy forbids the disclosure of such an act to the judicial authorities on pain of a criminal penalty (Article 27 of the Law of 22 July 1953 and Article 458 of the Criminal Code).

¹³ IRE, *Normes générales de révision* (1998), (auditing standards) paragraph 1.3.4.

47. While many corrupt practices are to be found hidden behind breaches of company law (and thence also of accounting law) – and as such would be covered by the disclosure requirements in Articles 140 and 144 6° of the CS – there is no guarantee that such misappropriations will be brought to the attention of the company’s shareholders. In fact an auditor is only bound to report breaches to the general meeting if the board of directors has been informed first, but has not taken adequate steps to remedy the breach (CS, Article 140 § 2), or where this disclosure is not such as to cause unjustified harm to the company (CS, Article 144 6°). These two provisions, which allow the auditor considerable latitude, reduce still further the likelihood of a shareholder being informed of corrupt practices in the company, and thus of his making a report or complaint against the company’s management.

ii) Reporting by the employees of the business

48. An employee who becomes aware of legal violations in his or her company may, in principle, alert one or other of the competent authorities to whom he has access, the labour inspector or the prosecutor’s office. Belgian law, however, offers scant protection to “whistleblowers”. Under the Contracts of Employment Act of 3 July 1978, employees are in fact under a duty to “refrain, for the duration of the contract and after it terminates, from disclosing confidential information concerning any matter which comes to their knowledge in the exercise of their professional activity”. While there are some court decisions dating from the 1990s holding that this duty of secrecy did not apply to certain financial infringements committed within the company, it is still not certain that an employee reporting an offence would have any protection against unfair dismissal or other forms of reprisal in the absence of an express right to “blow the whistle”.

49. The requirement of the prosecutors that a denunciation must be backed by suitable documentary evidence before a preliminary investigation can be ordered undoubtedly places a further obstacle in the path of an employee who has become aware of misappropriations and wants to alert the authorities. Showing internal business documents to the authorities could expose the employee to the risk that the company might file a complaint for misappropriation of the document, irrespective of whether it contains relevant evidence. Any reporting of an offence could also put the employee at risk of a complaint for defamatory denunciation. Finally, the distaste shown by the main trade union confederations met by the examining team to act as judge over the internal financial affairs of a business effectively rules out the possibility of the employee calling upon these organisations to protect himself against reprisals (though Belgian law does allow for the possibility, for such organisations, of bringing a civil party petition as part of the criminal proceeding).

iii) Measures taken by Belgian businesses to enable the reporting of unlawful practices

50. While both large and medium-sized enterprises that spoke to the examining team emphasised the importance of ethics in carrying on their businesses, only one of them had put internal mechanisms in place to enable an employee who had witnessed fraudulent or unlawful transactions to alert the company to what was going on. The rest relied on the fact that the employee could speak to his or her direct manager about fraudulent activities. It was said, nonetheless, that one of the consequences of the US Sarbanes-Oxley Act had been that some of Belgium’s large businesses had begun to put internal procedures in place designed to encourage whistleblowers.

51. In practice, while that American law primarily governs the ethical practices of businesses in the United States, it also applies to foreign groups that are listed on American stock exchanges, as well as to the subsidiaries of American groups worldwide. In Belgium, some companies are said to be implementing it already, by including in their charter of good business conduct methods enabling employees to make disclosures of fraud. These mechanisms were nonetheless criticised by the business representatives interviewed by the examining team, who expressed scepticism about their effectiveness and fears that they

were open to abuse. Since the one company that had put such a system in place had no practical experience to report to the examining team, the examiners were unable to form a view as to whether whistleblowers really were protected, and what the company was doing to follow up on such reports.

Commentary:

Bearing in mind the major role private individuals, especially those in the business world, could play in detecting acts of bribery of foreign public decision makers in international business transactions, the examiners strongly encourage Belgium to adopt whistleblower protection measures so that company employees can make disclosures to the prosecuting authorities without fear of being dismissed or taken to court. The examiners further recommend that the Belgian authorities clarify the requirement that auditors uncovering evidence of possible unlawful acts of bribery must inform the directors and, as the case may be, the management organs of the company, and also that they consider making it an express legal obligation for auditors to report to the prosecuting authorities any involvement of the company whose accounts they are auditing in the practice of bribery in foreign markets where the management organs of the company itself have been duly notified but have failed to act.

b) *Disclosures by the public service*

52. There is a whole series of parties in the chain of public authority in Belgium that could potentially trigger a criminal proceeding and thus compensate for the absence of individuals' disclosures and complaints. Aside from the police, these include the tax authorities and quasi-governmental agencies such as those responsible for granting export guarantees and, in general, all civil servants, who, pursuant to Article 29 paragraph 1 of the Criminal Investigation Code, have a duty to inform the prosecutor's office of any criminal or other offence of which they become aware in the course of their duties. That said, up to now, no proceedings have been instituted for bribery of a foreign public official based on information from either the tax authorities, quasi-governmental agencies or civil servants.

i) *Detection by the tax authorities*

53. The tax authorities could be a major source of detection of acts of bribery or accounting movements or other acts likely to be connected with the active bribery of foreign public officials. For acts of bribery, tax officials are obliged to inform the prosecutors directly, under article 29, paragraph 1, of the Criminal Investigation Code. For acts subject to criminal liability under tax laws or decrees, they are also obliged by paragraph 2 of the same article to bring them to the attention of the prosecutor after obtaining the authorisation of a senior official in the tax administration. Reports to the prosecutor might also come from tax officials who have knowledge of criminal acts either through tax laws or decrees, or the relevant criminal law, for example through verifying declarations submitted under article 57 CIR 92 (which allows deduction of commissions, brokerage fees, expenses, trade discounts or other gratuities, all kinds of other advantages, etc. as professional expenses), through the more general responsibilities of the tax administration to ensure that taxes are correctly calculated, or even in the course of examining a file sent to the Finance Minister by persons claiming the benefit of the special regime for secret commissions provided for in CIR 92, Article 58.

54. In order to verify the declarations made under Article 57 CIR 92, the tax authorities have a useful tool of detection: the returns submitted by companies showing commissions, brokerage fees and gratuities. A study of these returns, which are made on a special printed form with summaries attached, and compulsory for all firms every year, can help detect certain payments that are *prima facie* suspicious: those involving large amounts, those made to tax havens or recurring payments to the same payee (Article 57 CIR 92 requires the debtors to reveal the identify of the beneficiaries before deductions of professional expenses are allowed). Based on an analysis of these declarations, the company can be subjected to a more searching verification, including its accounting records (Articles 315 and 315bis, CIR 92) and information

requested from third parties (Article 317, CIR 92), with the exception of banks (Article 318, CIR 92). In investigating requests for deductions under Article 58 CIR 92, the tax authorities have, amongst other information, the names and functions of the payees of the commission.

55. However, according to the Belgian authorities, the verification of declarations submitted under Article 57 CIR 92 would not enable them to bring acts of bribery of foreign public officials to light, since no business would take the risk of making a separate application for deduction giving all the details of the commission paid, if that commission had been used to bribe an identifiable foreign public official. The same would apply when investigating requests for deductions under Article 58 CIR 92. In the view of the lead examiners, it could still happen that the public official obtained such a commission through several intermediaries or shell companies, and this, in their opinion, makes it even more important to have more systematic in-depth controls.

56. The Belgian tax authorities also have broad powers of investigation in carrying out their more general mission of accurately calculating what taxes are due. They can make on-site inspections (Article 319, CIR 92), and may require government departments and decentralised authorities, public bodies and institutions and even prosecutors and court registries to produce documents (CIR 92, Article 327, §§ 1 and 2). They can also make use of material obtained without any action on their part, such as information received from prosecutors by virtue of their obligation to inform the tax authorities of any serious evidence of tax evasion that comes to light during a criminal proceeding: between 1999 and 2003, nearly 900 reports were made to the Belgian tax authorities by prosecutors.¹⁴ In addition, since the Act of 12 January 2004 entered into force, the CTIF informs the tax administration whenever a case is forwarded to prosecutors that concerns an offence relating either to serious organised tax fraud involving complex mechanisms or using procedures with an international dimension, or to customs violations. It is likewise informed indirectly, via the judicial authorities, of all reports by the Banking, Finance and Insurance Commission (CFBA) to the prosecutors concerning “particular mechanisms” designed to facilitate tax evasion or having that effect, set up by credit institutions, insurance companies or investment companies, detected in the course of its inspections.

57. Similarly, there is nothing to stop the different departments of the Belgian tax authorities from exchanging information.¹⁵ They can also use information obtained from foreign tax authorities, primarily those in EU member countries, in which case exchange and collection of information is covered by the provisions of CIR 92 Article 338, supplemented where appropriate by bilateral administrative agreements on the exchange of information and cooperation on administrative matters. Next come tax authorities outside the EU, on the basis of international double taxation treaties: in 2002, according to the Annual Report of the Federal Public Finance Department dated September 2003, there were 256 international exchanges of information either under bilateral agreements or CIR 92 Article 338.

58. Nonetheless, although the tax authorities have broad investigative powers under the law enabling them to refer violations detected during their inspections to the prosecutors – as an example, the special tax inspectors made 71 complaints of tax violations to the various Belgian prosecutors’ offices in 2002¹⁶ – there had been no single complaint or report by the tax authorities involving a case of transnational bribery

¹⁴ Annual Report of the Federal Public Finance Department (September 2003), p. 10. Files showing acts of tax evasion involving the bribery of Belgian civil servants, for example, have been brought to its attention in the past, and tax adjustments ordered as a result.

¹⁵ As an example, pursuant to CIR 92 Article 327 § 1, a controller of taxes can ask a colleague in VAT to find out the turnover of a taxpayer whose records he is inspecting in order to check that taxpayer’s income tax declaration.

¹⁶ Annual Report of the Federal Public Finance Department 2003, p. 67. Out of 71 complaints, 21% involved money laundering and 8% false invoices and embezzlement.

at the time of the examination of Belgium, either in the course of their general mission of accurately calculating taxes, or arising out of the examination of declarations under Article 57 CIR 92, or the examination of requests for deductions under Article 58 CIR 92. Lack of awareness of the offence on the part of the tax inspectors, as well as lack of specific training on how to detect it, and contradictory political signals about criminal law and tax priorities, are clearly among the reasons for this state of affairs, along with insufficient human resources to enable the true beneficiaries of commissions to be uncovered.

Commentary:

The lead examiners recommend that the Belgian authorities draw up clear instructions for the tax authorities prescribing the verifications to be undertaken with a view to detecting possible offences of bribery of foreign public officials, and remind them of the duty incumbent on tax officials under Article 29 paragraph 1 of the Criminal Investigation Code to report to the prosecutor any offence – which includes the offence of bribery of foreign public officials – that comes to their attention.

ii) Reports and complaints made by other public bodies

59. Others in the chain of public authorities have a potential role in triggering criminal proceedings. Among these are the bodies responsible for granting export credits, Belgian diplomatic missions abroad, and the Anti-money laundering Task Force. The quasi-governmental agencies have not played any part, to date, in detecting irregularities involving bribery in foreign markets. Only the Belgian diplomatic missions and the Belgian Anti-money laundering Task Force have supplied transnational bribery cases.

60. As mentioned above, at the time of the Belgian examination, neither the Ducroire nor FINEXPO had any preliminary checks in place on the contracts covered by their guarantees, to satisfy themselves, for example, of the purpose, substance and legitimacy of some of the services falling within the contracts: only when a claim is notified do these bodies examine the contract on the basis of material evidence, but they still maintain a cautious approach to reporting suspicious facts to the prosecutor. Against this background, given the absence of measures of control, coupled with the fact that both these bodies allow commissions in the 5% range to be paid to intermediaries, the limited means available to them to investigate suspicious conduct, and the wide discretion they have as to what to report to the prosecutor, it is not surprising that they have not yet played any part in supplying the prosecutors with cases of foreign bribery.

61. By contrast, the CTIF, the Belgian anti-money laundering agency, plays a leading role in generating money laundering cases for the courts. According to statistics from the Central Office for Combating Organised Economic and Financial Crime (OCEDEFO), 90% of the cases of money laundering dealt with by the police came from reports by the CTIF.¹⁷ Since the 1993 Act came into force, over 5000 cases, or around two thirds of the suspicious activity declarations received by the Task Force, were referred to the prosecutors' office for action. Of these cases, some twelve were based on suspected laundering of the proceeds of bribery of public officials, six or eight of which involved foreign public officials. Even though the number of referrals involving suspected laundering of the proceeds of bribery might at first sight appear derisory in comparison with the total number of referrals (0.2% of the total), these files undoubtedly provide a valuable source of information for prosecutors, examining magistrates and investigators.

¹⁷ House of Representatives and Senate, *Rapport du 28 mars 2002 sur la lutte contre les pratiques de blanchiment [Report dated 28 March 2002 on the fight against money laundering]*.

iii) Public authorities and quasi-governmental agencies as originators of proceedings concerning bribery of foreign public officials

62. It became clear during the on-site visit that none of the mechanisms in place was really designed to target acts of corruption of foreign public officials. Each department or body – regardless of the level of awareness of the offence – functions according to a logic different from that aiming at its detection: i.e., serious fraud for the tax authorities and support for foreign investment and exports by Belgian firms for the Ducroire, FINEXPO, and the diplomatic missions. The diligence with which the CTIF deals with all the money laundering cases notified to it, covering the whole range of transactions, including money laundering operations that might involve bribery of foreign public decision makers, stands out as the exception.

63. That notwithstanding, these public authorities and bodies are bound by the terms of Article 29, paragraph 1 of the Criminal Investigation Code to report any crime or offence encountered in the course of their duties. In practice, the duty laid down in Article 29 of the Criminal Investigation Code has not yet been fully assimilated by the public authority officials or the staff of quasi-governmental agencies. The analysis by the OCRC of corruption in Belgium bears out the finding that very few reports of offences of bribery have been made by Belgian civil servants and authorities (a mere 10% of the 248 bribery files opened by the prosecutors of Antwerp, Brussels, Charleroi, Ghent and Liège between 1996 and 2000 came from official reports and complaints from the administration itself; 9% arose out of an individual report or complaint made by a civil servant).¹⁸

64. The fact that there are no criminal sanctions for failure to comply with the duty to report might go some way to explaining this. Added to this, where the tax authorities are concerned, is a regime on the tax deductibility of certain secret commissions that, as indicated above in this report, does not make it easy to detect acts of foreign bribery or to report them to the competent prosecuting authorities.

Commentary:

The lead examiners consider that, while the existing mechanisms for the detection by the public service of criminal offences open up a number of “points of entry” for bringing to light acts of bribery of foreign public officials, these mechanisms are not yet, as of today, capable of detecting this type of offence. For this reason, they recommend that the Belgian authorities raise the level of awareness among those persons subject to Article 29 of the Criminal Investigation Code of the importance of applying it in cases of acts of foreign bribery, as well as of the sanctions applicable for failure to comply with that provision, with the aim, in particular, of creating a flow of information; that information flow could feed into a specialised database that could be consulted by those involved in criminal prosecution (police and judicial departments) and indirectly by the public administration. Another option to increase the flow of bribery cases to the prosecutors would be to set up a task force to handle bribery, modelled on the CTIF. Such a task force could receive information from government and judicial authorities under cover of professional secrecy, manage bribery cases from the standpoint of prevention, and submit reports to the prosecutors so that criminal proceedings could be instituted.

¹⁸ OCRC, *La corruption en Belgique. Une première analyse stratégique* (Brussels, 2002), pp. 37-39.

B. PROSECUTION OF THE OFFENCE OF ACTIVE BRIBERY OF A FOREIGN PUBLIC OFFICIAL AND RELATED OFFENCES

1. *The conduct of public proceedings*

a) *Instituting public proceedings*

i) Actors in public proceedings

65. In Belgium, criminal prosecution of offences of an economic or financial nature, of which transnational 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 level of the Courts of Appeal. However, since the creation of the office of federal prosecutor pursuant to the Act of 22 December 1998, amended in June 2001, this office has been given concurrent jurisdiction with the local prosecutors particularly over offences that, for the most part, cover a number of jurisdictions or have an international dimension, as well as over offences related to them (Judicial Code, Article 144ter, §1). This provision potentially applies to the offence of bribing foreign public officials, and offences related to it. The potential conflict that might result from the office of the federal prosecutor having concurrent jurisdiction is resolved in favour of the latter, who decides whether he or the local prosecutor shall conduct the proceedings. This decision is taken in concert with the local prosecutor. In cases where the federal prosecutor has no concurrent jurisdiction, it is up to the local prosecutors to prosecute the offence.

66. At the time of the examination of Belgium in Phase 2, the federal prosecutor had taken the decision to conduct proceedings himself in one of the four cases of bribery of foreign public officials then before the Belgian authorities, on the grounds that it was particularly complex and required a high degree of international mutual legal assistance. According to the magistrates in the federal prosecutor's office and the federal police representatives who met with the examining team, the federal prosecutor's office is expected, in the near future, to take a greater interest in certain cases of transnational bribery, especially those involving the bribery of European civil servants, because of its role as central contact point of with international institutions such as OLAF.¹⁹

ii) The handling of criminal proceedings

67. Whichever authority has jurisdiction, be it federal or local, its actions will be governed by the principle of prosecutorial discretion, as set forth under Article 28quater, paragraph 1, of the Criminal Investigation Code: magistrates in the different prosecuting jurisdictions, as well as the federal prosecutors, are free to decide against commencing proceedings even when the facts show that all the elements of an offence are present. Based on the information received or, as the case may be, on additional information uncovered by the police investigation conducted under the instruction of the prosecutor, the magistrate has in effect the choice under law to decide either to prosecute or to close the file.

68. Prosecution entails setting the wheels in motion so that a criminal investigation can begin. A decision to close a file means the opposite: it puts an end to any procedures that might have been commenced and results in non prosecution. 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

¹⁹ One of the responsibilities of the federal prosecutor is to facilitate international cooperation (Judicial Code, Articles 144bis and 144sexies). The circular of the *Collège des procureurs généraux* determined that the federal prosecutor was to be the central point of contact for international institutions such as OLAF. As a result, all complaints coming from OLAF addressed to the Belgian judicial authorities go through the office of the federal prosecutor, who decides whether to handle them or to refer them to the prosecutor with territorial jurisdiction, depending on their nature.

down by the general prosecutors in each jurisdictional district under guidelines setting out priorities for prosecution pursuant to Article 143ter of the Judicial Code. Prosecutorial discretion is limited in two ways: The injured person can join the criminal prosecution thereby setting a prosecution in motion and counteracting any inertia on the part of the prosecutors who were aware of the facts but who had decided not to pursue the case (this does not apply to the case of bribery of foreign public officials and other crimes and offences committed outside Belgian territory, since the law makes these the prerogative of the public prosecutor alone).²⁰ Second, the general prosecutor and the Minister of Justice may order a prosecution. By contrast, the persons or persons who reported the acts to the prosecutor have no recourse against a decision to close the file.

69. The decision to close a file is not the only prerogative enjoyed by the Belgian prosecutor in the exercise of his prosecutorial discretion. He may decide to use the alternative course to prosecution: the criminal settlement, an out-of-court procedure whereby the prosecutor offers not to proceed with the prosecution in exchange for the payment in advance of a sum of money by the alleged offender.²¹ The criminal settlement is available for all offences punishable by a fine or a term of imprisonment of no more than five years, or by both these penalties – which includes most offences of bribery of foreign public officials referred to in the Criminal Code, as well as money laundering and tax and accounting fraud – but in practice, prosecutors only make marginal use of it in minor criminal cases. All the prosecuting magistrates the examining team met said that they would not resort to a criminal settlement for a case of foreign bribery or criminal money laundering; to do so would be to invite harsh criticism from the press. Statistical data from the OCRC confirm what the examiners were told by the representatives of the different Belgian prosecutors' offices. For instance, of the 248 cases of bribery dealt with by the prosecutors in Antwerp, Brussels, Charleroi, Ghent and Liège between 1996 and 2001, only 7 (ie. 2.3%) ended in a criminal settlement.²²

iii) The framework for public proceedings

70. The organisational framework, that is, the caseload and the resources available, has a considerable influence, in Belgium, on the decision whether or not to prosecute. Prosecutors in Belgium typically make very intensive use of the resources at their disposal. For example, in the prosecutors' office in Brussels, the ten or so magistrates assigned to the financial crimes department handle some 10,000 cases each year.²³

71. One consequence of this state of affairs is that in half to two thirds of the cases that reach the prosecutors' office (all offences included), the file is closed. For example, in the Brussels prosecuting district, more than one in every two cases of financial crime is closed; this is the case for one in three tax fraud cases and almost one in three cases of receiving stolen property and money laundering. Of the 248 cases of bribery of Belgian and European civil servants that came before the prosecutors of Antwerp, Brussels, Charleroi, Ghent and Liège between 1996 and 2001, the file was closed in 144 cases (ie. close to 60%), a third of which were for reasons of discretionary prosecution.²⁴

²⁰ On this point, see the section infra on the extraterritorial jurisdiction of the Belgian courts.

²¹ The criminal settlement is not a sentence, and does not appear in the police records.

²² OCRC, *Corruption en Belgique. Une première analyse stratégique (1996-2000)*, (Brussels: Federal Police, 2002).

²³ Statistical data featured in the *Rapport final sur la criminalité organisée en Belgique*, Belgian Senate, 2002-2003 session, 27 March 2003, Senate document 2-425/2.

²⁴ *Statistique annuelle du ministère public: Recherche et poursuite des affaires pénales par les parquets près les tribunaux de 1^{re} instance – L'année 2002* : OCRC, in *Corruption en Belgique. According to Belgian*

72. In response to such a work load, the prosecutors prioritise their choices. Priorities are fixed on two levels, pursuant to the principle of subsidiarity. In the first place they are set by the Minister of Justice, who, applying Article 143ter of the Judicial Code, “issues guidelines on criminal policy, including investigation and prosecution policy, after having sought the opinion of the College of General Prosecutors”; prosecutors are directly bound to follow guidelines on criminal policy issued by the Ministry of Justice. Secondly, they are set by the chief prosecutor of the court of first instance, who, applying Article 28ter of the Criminal Investigation Code, “decides, within the framework of these guidelines, which areas of criminal activity have priority for investigation in his district”.

73. At the time of Belgium’s examination in Phase 2, while several guidelines and circulars had been issued by the Minister of Justice and the College of General Prosecutors on topics as diverse as Highway Code offences, mutual legal assistance, the division of responsibilities between the local and federal police, and criminal policy on drug-related crime, nobody had attempted to clarify and harmonise policy on criminal prosecution of bribery of foreign officials as set out in the National Security Plan for 2004-2007, thus leaving the prosecuting magistrates of different judicial districts were free to decide whether or not to prosecute according to their areas of interest, their personal degree of awareness of offences covered by the OECD Convention or, as the case may be, according to instructions and circulars issued by general prosecutors and King’s prosecutors for their judicial district. A circular along these lines sent to all the prosecutor offices could clarify in detail the governments’ stance with respect to its priorities for the prosecution of corruption of foreign officials in international commercial transactions.

Commentary

The lead examiners welcome the creation of a federal prosecutors’ office having concurrent jurisdiction with the local prosecutors in order to improve efficiency in the prosecution of certain offences, especially those relating to major economic crime, including transnational bribery. In order to ensure that the offence of bribery of a foreign public official is prosecuted effectively at all levels of the criminal enforcement system, the lead examiners recommend that the Belgian authorities formally clarify (by means of circulars or guidelines, or any other official method) their criminal policy concerning active bribery of foreign public officials.

b) *Structures that support public proceedings*

i) The impact of police work on the conduct of criminal proceedings

74. Another factor that influences criminal proceedings is the police. In the exercise of their judicial police functions, the police departments are effectively in the front line in detecting and reporting offences and offenders, because they are called upon to record complaints from the victims of crime, they uncover the commission of offences through their own initiative, and they carry out all the judicial police procedures necessary for the preliminary investigation to be opened under the prosecutor’s authority.

75. For two decades now, reforms have been underway to modernise the Belgian police force. Legislative developments led to the passing of an Act on 7 December 1998 setting up an integrated police service structured on two levels: federal and local. While at the local level, the local police are responsible for the judicial policing of matters of a primarily local nature, at the federal level, the federal police handle specialised policing activities and those that go beyond what is local. As recalled in a March 2002 circular from the College of General Prosecutors in the Courts of Appeal, the specialised federal police is responsible for offences that fall outside any one district or the Kingdom either because of their scope, configuration or repercussions, and offences of a sensitive nature requiring specialised research and

authorities, a large number of files closed for reasons of discretionary prosecution concerned “petty corruption” (i.e., by police officials or prison administrators).

investigation. A royal Decree dated 3 September 2000 specified that jurisdiction to deal with “complex” cases of bribery and major economic and financial crime lay with the federal police.²⁵

76. Within the federal police, several structures exist to handle inquiries into transnational bribery and related offences. At the central level, among all the civil servant experts in the Economic and Financial Crimes Division, there is one department in particular responsible for assisting the prosecutors with their investigations and, after the investigation is opened, the examining magistrate: the Central Office for the Repression of Bribery (OCRC). At the local level, this role is fulfilled by the 27 district judicial departments (*services judiciaires d'arrondissement*, or SJA) under the responsibility of the federal police, the “largest” of which (such as Antwerp, Ghent or Liège) have their own specialist federal investigators working with small anti-corruption units (as in Ghent) or in finance sections (as in Liège).

77. Under the terms of Articles 28ter, 48duodecies and 56, paragraph 2 of the Criminal Investigation Code, the prosecuting and examining magistrates are free to choose which police department will carry out their investigations (in complex bribery cases under the royal Decree of 2000, either the central judicial police department or a decentralised federal department). In practice, local prosecutors and investigating magistrates tend to seek the help of the OCRC in bribery cases, since it has the best-qualified people and can call upon the logistical support of their colleagues specialising in financial crime. The great demand on the OCRC from local prosecutors and investigating magistrates led to its introducing a procedure for accepting cases on the basis of criteria set forth under the Circular of March 2002 of the College of General Prosecutors referred to above, as its sixty or so field officers and inspectors are too overburdened to be able to deal with all of them.²⁶

78. For other cases, when they not are referred to the OCRC, the investigation falls to the SJAs, the decentralised federal judicial police departments. Given that certain SJAs are under-resourced (not all of them have a specialist section to deal with cases of bribery or those involving economic and financial crime), this could have an impact on the quality of the charges brought, as was recognised by some of the police officers and prosecuting magistrates who met with the examining team. However, the OCRC indicated that in the cases it could not accept for reasons of workload but that were somewhat complex, it readily offered its assistance to the decentralised district department by undertaking part of the investigation itself, with the SJA retaining the lead role.

79. On the other hand, in view of the sometimes limited capacity of certain SJAs to deal with all the criminal offences referred to them (many of which are violations of general law which the Belgian public wants to be given priority treatment), they might be inclined to make choices based on the criminal policy priorities laid down in the national security plan jointly drawn up by the Ministers of the Interior and of Justice. The latest security plan, setting out the priorities for the federal police for the period 2004-2007, does not mention *specifically* the fight against bribery of foreign public officials. The only types of bribery included as police priorities are “bribery connected with the award and execution of [...] public procurement contracts” (the security plan) and “bribery, crimes and offences of a complex nature that prejudice the interests [...] of the public service especially in the context of the development, allocation

²⁵ Royal Decree of 3 September 2000 published in the *Moniteur belge* of 23 September 2000 and Circular No. COL 2/2002 of the College of General Prosecutors in the Courts of Appeal “on the Ministerial Directive on the division of responsibilities, collaboration, coordination and integration between the local police and the federal police in matters of judicial police functions”.

²⁶ The criteria laid down in Circular no. COL 2/2002 are 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 the specific duty of investigation (inquiries into assets, investigations of persons with immunity or requiring special investigative techniques); and the geographical range covered by the specialist duties of investigation.

and use of public subsidies or the grant of authorisations, permits, approvals and certifications” (the 2002 Circular). In the view of the examiners, efforts should be made by the Belgian authorities to provide the federal judicial police with more clear indications of its policy for criminal enforcement and prosecution in the field of foreign official bribery.

Commentary:

In order to ensure effective prosecution of the offence of bribery of foreign public officials and related offences, the lead examiners recommend that the Belgian authorities issue formal reminders (in the form of circulars or guidelines, or by any other official means) to the federal police departments of the importance, in the fulfilment of their judicial policing functions, of combating international bribery, as an essential precondition for the effective enforcement of the offence of active bribery of foreign public officials. They further recommend that the Belgian authorities and the Working Group follow up on the situation so as to ensure that the human and material resources allotted to the federal police and their attribution allow for effective prosecution of complex cases of foreign bribery.

ii) The impact of investigation on criminal prosecution

80. The lack of resources experienced by the examining magistrates in Belgium is on a par with that of the local prosecutors. To take an example, the 23 examining magistrates practising in the district of the Antwerp Court of Appeal have more than 4,000 new cases referred to them each year.²⁷ Expertise in prosecuting and conducting investigations of cases of transnational corruption is learned mostly on the job as magistrates handle proceedings. According to magistrates that met the examining team, there is no specific training programme or continuing education programme for examining magistrates, or for that matter for police or prosecutors. Such continuing education as exists is not coordinated and is purely voluntary²⁸.

81. The Ministry of Justice qualified these magistrates’ views by pointing out that it organises a specific training programme under the supervision of the Superior Council of Justice, which develops and co-ordinates dedicated continuing training programmes in the economic, financial and tax fields open to all of the Kingdom’s magistrates without exception. This programme is organised over a two year period and has training modules (generally consisting of one day devoted to each theme) in all fields – including bribery and specifically bribery of foreign officials – and a day of exchange of professional experience for magistrates who are specialised or interested in economic and financial issues.

82. At the end of each training module, the Ministry of Justice sends all participants an evaluation form and asks them to evaluate all trainers and the contents of the training received. In addition, once every judicial year, the Superior Council of Justice asks all magistrates to indicate before the final version of the annual training programme is prepared any new or more in-depth training courses that they would like to see added to the programme. Furthermore, a continuing training programme in these fields is also organised by the Ministry of the Interior for the police forces (at times jointly with the Ministry of Justice). With regard to the “voluntary” nature of programmes mentioned by some magistrates, although this is the rule for all magistrates in accordance with the principle of the independence of the judiciary, the Ministry of Justice raised two important nuances in respect of this criticism: firstly, future magistrates, who must

²⁷ The number of cases referred to the Antwerp examining magistrates in 2002 was 4,681, to which must be added cases from the previous years that were still under investigation: SPF Justice, *Les statistiques annuelles des cours et tribunaux – données 2002*, p. 162.

²⁸ It was for example merely optional for the Belgian prosecutors and examining magistrates who participated in a three-day training programme in the first half of 2004 on economic and financial criminal law. The programme was organised in Brussels by the Superior Council of Justice within the framework of the European Network of Judicial Training which addressed the subject of corruption on the third day.

complete a judicial internship lasting 18 or 36 months, are required to take a number of training courses during this period, which include economic and financial training modules; secondly, all magistrates are evaluated on the basis of an evaluation model designed by the Superior Council of Justice, which includes a specific evaluation of participation in continuing training by the magistrate being evaluated.

83. The Ministry of Justice considers that although the provision of training can always be improved and broadened, it currently seems to be adequate in the fields in question. However, the fact that certain categories of magistrates repeatedly fail to participate in training of this type might be explained by the lack of legal and structural provisions aimed at giving recognition to specialised magistrates at the level of examining magistrates and trial judges and even, in some respects, within the prosecutor's office. To reduce what he described as a "deficit in the specialisation of examining magistrates", one former examining magistrate interviewed by the examining team suggested having federal examining magistrates as the necessary complement to the new federal structure set up for the police and prosecutors and fine tuning its specialist capacities in economic crime.

84. Examining magistrates told the examining team that the excessive workload of some magistrates' offices and the lack of training increase the risk of delays in handling cases and of prolonged delays due to the remand of the case (with the result that the judge on the merits takes into account the "absence of reasonable delays" in the procedure when sentencing) and in some cases can result in the acquittal of the accused because the period of limitations has expired. On this last point, although Belgian law has relaxed the rules on the limitation period to facilitate prosecution by criminal prosecutions and examining magistrates – the limitation period being 5 years for most bribery offences, which starts to run from the date of commission of the last act necessary to constitute the offence of bribery, and can be interrupted by any act of investigation or prosecution – Belgian court records show that in some bribery cases neglected for too long, the period of limitations expired, resulting in the termination of the prosecution and the acquittal of the accused.²⁹

85. In the view of the lead examiners, the Ministry of Justice could make use of the tools available within the scope of its competence – in particular the ability to set priorities for criminal policy and to provide the means to implement them – to prevent bribery cases from being statute-barred. It seemed to the lead examiners that awareness of policy in criminal matters was confined to the Ministry of Justice and the prosecutors (who are subject to ministerial directives, circulars of general prosecutors and joint directives of the Minister and the College of General Prosecutors). The policy bears the hallmarks of a high-level declaration of intent that has not reached those in the front line of criminal prosecution. The examining magistrates, who under Belgian law are independent, do not regard themselves as bound by this policy. While this is understandable from the point of view of the division of procedural roles, in accordance with the principle of the separation of powers, it makes less sense from the standpoint of prosecution objectives. This criticism seems even more justifiable when one considers that the examining magistrates interviewed by the lead examiners seemed unanimous in deploring the lack of resources to bring their investigations to a satisfactory conclusion within a reasonable time. Their complaint relates not only to staffing, but also to "logistics".

²⁹

This happened in one bribery case the facts of which went back more than fifteen years, in which in November 2003 the Brussels Court of Appeal acquitted one of the accused of a charge involving a Belgian Minister on the grounds that the period of limitations had expired. See "*Question orale au Ministre de la justice sur l'acquisition de la prescription dans une affaire de corruption*", in *Annales du Sénat* 3-22 of 27 November 2003. According to one of the magistrates in charge of the Agusta case who spoke to the examining team, the magistrates in that case had to take the decision to bring charges against only some of the possible defendants in order to keep the proceedings within manageable proportions.

86. In such respect, adequate training seems to be available. However, while the lead examiners are pleased that the Belgian government took the decision, announced in its latest federal policy statement on 12 October 2004, to set up a training institute for judiciary personnel, they consider that this training – especially in complex areas such as international corruption, international mutual legal assistance, and in planning and carrying out an investigation – should be more systematically available to everyone in Belgium involved in criminal prosecution. Such an approach would not only have the advantage of building up a fund of common practice and know-how, but it would also foster regular contacts between magistrates in charge of complex cases in Brussels and in the regions.

Commentary:

In order to ensure that the offence of bribery of foreign public officials and related offences are effectively prosecuted, the lead examiners invite the Belgian authorities to pursue a policy of adequate training for all those involved in criminal prosecution in Belgium – the police authorities, prosecuting magistrates and examining magistrates – about the offence, either separately as specialised training or through the training institute that the Belgian authorities have decided to set up. The lead examiners also recommend that the Belgian authorities establish a specialised branch to deal with economic and financial crime.

c) *Forms of evidence and investigative techniques*

i) The search for evidence in Belgium

87. Belgian criminal law admits a wide variety of types of evidence. To prove its case, the prosecution has broad powers of investigation during the preliminary investigation phase and still more during the investigation phase. These include methods designed to induce people to reveal information (interrogatories, confrontations, testimonial evidence, and the use of experts to make technical findings and examinations); methods designed to produce findings of fact (measures to ensure that evidence is discovered and preserved as searches, seizures and freezing accounts); and, finally, measures to ensure that the suspects or any persons likely to be in possession of information are present (preventive detention, release on bail, police supervision, etc.).

88. The Act of 4 May 1999 which introduced the criminal liability of legal persons also makes it possible for an examining magistrate to order provisional measures “when, in the course of an investigation, the examining magistrate finds serious indications of guilt on the part of a legal person” (Criminal Investigation Code, Article 91). These measures, designed to ensure the efficient handling of the proceeding in which the legal person is charged and the effectiveness of the penalties that the judge on the merits may impose, are of three types: suspension of any proceedings to dissolve or wind up the legal entity; the prohibition of specific transfers of property that could result in the legal entity becoming insolvent; and the demand for a surety.

89. Apart from these “traditional” means of investigation, police and magistrates in charge of bribery and money laundering cases may also resort to more sophisticated means of investigation to establish material facts. One of these is the possibility of intercepting telephone conversations, available to investigators of bribery cases since the Act of 29 November 2001 entered into force in 2002: several cases of bribery of foreign public officials under inquiry or investigation at the time of the on-site visit to Belgium had involved telephone tapping, according to the OCRC representatives who spoke to the examining team. New possibilities were also presented by the three laws adopted in 2002 to protect witnesses questioned during the proceedings (protection of witnesses under threat, long-distance hearings, and the hearing of a witness on the basis of complete or partial anonymity).³⁰ In addition, there are

³⁰ The Anonymous Witnesses Act of 8 April 2002, the Protection of Threatened Witnesses Act of 7 July 2002, and the Act of 2 August 2002 on the Taking of Statements using Audiovisual Media.

infiltration techniques, use of informers, interception of mail, and the gathering of information on bank accounts and transactions in corruption cases, as authorised by a law adopted on 6 January 2003 on particular methods of research and other means of investigation.³¹ The use of *agents provocateurs* is, however, strictly forbidden by legislation (Criminal Investigation Code, Article 47quater, paragraph. 1, for instance) and also by the case law of the *Cour de Cassation* (Cass. 7 February 1979, *Pas.*, 1979, I, p. 665).

90. The decision to improve the legal framework for special evidence-gathering techniques and the protection of witnesses under threat arose from the realisation that more needed to be done to suppress economic and financial crime and other forms of major crime. It has for many years been a priority of the Belgian government to introduce new special investigation techniques in economic and financial crime. Nonetheless, despite the strengthening of the means of evidence-gathering and investigation, there has not always been a corresponding increase in financial resources to make sure they are used fully and efficiently. This is an issue where the long-distance hearing of witnesses is concerned, as it emerged from interviews held during the on-site visit that this technique, available since 2002, had not yet been used by the prosecutors or examining magistrates in Belgium, but only by sitting magistrates.

Commentary:

The lead examiners welcome the efforts made by Belgium to strengthen the investigative means available to magistrates in cases of major economic crime, including transnational corruption. However, these efforts can only be achieved if adequate financial resources are forthcoming. As a result, the lead examiners recommend that every effort be made to give the police authorities, prosecutors and examining magistrates the means, in terms of human and material resources, to unravel the complexities frequently encountered in transnational bribery cases and related offences.

ii) Obtaining evidence from abroad

91. Generally speaking, it is impossible to grasp all aspects of cases of economic and financial crime coming before the Belgian courts – especially those that reveal corruption of foreign public decision-makers – without real cooperation from other States. Belgium is a party to some fifty bilateral and multilateral agreements on mutual legal assistance in criminal cases.³² Of these, the European Convention on Mutual Legal Assistance in Criminal Matters of 1959 and the 1990 Convention Implementing the Schengen Agreement (Schengen Implementing Agreement) are in the forefront in terms of practical importance because of the very large, and mostly European, flow of mutual assistance in which Belgium is involved (averaged over a year, European Union countries represent more than 90% of the mutual assistance files dealt with by Belgium).

92. Since the Belgian anti-bribery law came into force, Belgium has sought the help of the judicial authorities in a number of foreign States with cases showing evidence of international bribery, in particular

³¹ The Act of 6 January 2003, like that of 7 July 2002, is based on the principles of subsidiarity and proportionality: special methods can only be used if needed to establish the facts where other means of evidence gathering are not enough (an assessment made *a priori* and *in the abstracts* by the magistrate in charge of the case, who is responsible for authorising use of these methods).

³² Since the anti-bribery laws entered into force in 1999, Belgium has signed new agreements on mutual legal assistance in criminal cases, among them the Convention on Mutual Legal Assistance in Criminal Matters between the Member States of the European Union, signed in Brussels on 29 May 2000, together with its two Protocols signed on 16 October 2001 in Luxembourg and on 8 November 2001 in Strasbourg; the Convention between the Kingdom of Belgium and the Kingdom of Morocco on Mutual Legal Assistance, signed in Brussels on 26 June 2002; and the Convention on Mutual Legal Assistance in Criminal Matters between the government of the Kingdom of Belgium and the government of Hong Kong, a Special Administrative Region of the People's Republic of China, signed in Brussels on 20 September 2004.

the case concerning the resale of military equipment to a foreign State, in which letters rogatory were sent to the judicial authorities in the United States, Luxembourg, Switzerland and other countries. While cooperation generally works well, with most States that are signatories of the OECD Convention on Combating Bribery of Foreign Public Officials, some of the OCRC representatives who spoke to the examining team complained of the sluggishness in executing international letters rogatory in certain major financial centres that had been used to set up the financial structures in these cases.

93. The slowness of mutual assistance has another cause, however: the formality that still prevails in the processes for sending requests and returning the documents. Aside from requests made under a treaty providing for direct exchanges of documents between judicial authorities, examining magistrates must send their requests for mutual assistance through diplomatic channels, via the Royal prosecutor (*procureur du Roi*), the general prosecutor, the Belgian Ministry of Justice, the Ministry of Justice of the recipient State, and that country's judicial authorities (Article 7 of the Mutual Legal Assistance Act of 9 December 2004). Documents produced in execution of letters rogatory are sent back by the same route. Added to this is the time taken in the recipient country, which, because of the in-depth nature of the investigations that are usually necessary in cases of financial complexity, is rarely less than several months, according to the replies given by the SPF Justice to the Phase 2 questionnaire.

Commentary:

The lead examiners note that the formality that still prevails in mutual assistance tends to prolong the procedures, with the risk of hindering the search for evidence abroad. They therefore invite the Belgian authorities to take advantage of the legislative momentum aimed at improving mutual legal assistance to take measures designed to simplify the procedures for sending and returning documents in the case of requests made by Belgium for international assistance that are not covered by any agreement.

d) *Mutual legal assistance granted by Belgium in transnational bribery cases*

94. Not only do Belgian magistrates seek the help of third countries in order to complete their investigations, but they are also asked by foreign magistrates to assist them with inquiries into bribery and related offences having ramifications in Belgium. While the statistical tools currently available to departments of the Ministry of Justice do not provide a complete picture, a quantitative study made during the evaluation of Belgium by the Council of the European Union on mutual legal assistance shows that, at the end of the 1990s, Belgium received around 1,200 requests every year for mutual assistance, all offences included, not counting those sent directly from one judicial authority to the other pursuant to a treaty. According to the same study, in 1998-1999, 25 cases of mutual legal assistance involved acts of bribery.³³

i) The legal framework for mutual legal assistance in criminal matters

95. Until the adoption by Belgium on 9 December 2004 of an Act on International Mutual Legal Assistance in Criminal Matters, which came into force on 3 January 2005, Belgium had no framework law setting out general rules for judicial cooperation in criminal matters. In the absence of any treaty framework governing the granting of mutual legal assistance, it was granted or refused at the discretion of the executive on the basis of Article 873 of the Judicial Code, which provides that, where there is no international agreement, international letters rogatory (CRIs) may only be executed with the prior authorisation of the Minister of Justice. The 9 December 2004 Act was the first attempt to introduce

³³ Council of the European Union, *Rapport d'évaluation de la Belgique concernant l'entraide judiciaire et les demandes urgentes de dépistage et de saisie /gel des biens* (Brussels, 16 May 2000).

general rules on mutual legal assistance in criminal matters into Belgian law to cover situations where Belgium has to work with countries with which it does not have a mutual legal assistance treaty.³⁴

96. Today mutual legal assistance is mainly based on five approaches: the first is the Benelux Treaty which links Belgium, Luxembourg and The Netherlands; the second is the fifteen countries in the Schengen area;³⁵ the third consists of members of the Council of Europe to which the European Convention on Mutual Legal Assistance applies; the fourth is the States with which Belgium has entered into a bilateral treaty; and the fifth is made up of States with which Belgium has no treaty and to which assistance is given on an *ad hoc* basis under Belgian domestic law, in particular Article 11 of the Extradition Act of 15 March 1874 (searches and seizures), the International Cooperation Act of 20 May 1997 (the carrying out of seizures) and, since 3 January 2005, the Law on international mutual legal assistance.

ii) Grounds for refusal and appeal

97. Where a convention or a bilateral agreement exists, the grounds on which a request may be refused are set out in that instrument. The grounds for refusing a request for assistance in a criminal matter which falls outside the scope of an international legal instrument on mutual legal assistance between Belgium and the requesting State are now mainly governed by the 9 December 2004 Act.

98. The main reason that requests are denied is that they would harm “Belgium’s essential interests”, as provided in the reservations Belgium made to the Strasbourg Convention, the Benelux Treaty and the Schengen Implementing Agreement, in the 20 May 1997 Act dealing with international cooperation in seizure and confiscation, and in Article 4, paragraphs 1 and 2 of the Act of 9 December 2004. On the other hand, a request for assistance in tax matters is no longer a valid ground for refusing requests made by countries that are parties to the European Convention on Mutual Legal Assistance in Criminal Matters of 20 April 1959, since the recent transposition into Belgian law of the Additional Protocol of 17 March 1978, with effect from 1 June 2002. Previously, requests for assistance relating to tax offences could be turned down by Belgium pursuant to Article 2 b of the Convention, which allows a Party to refuse a request for mutual legal assistance in a tax violation case where it could damage the essential interests of the country.³⁶

99. On the question whether the “public policy” clause in the 9 December 2004 Act could be used as a basis for refusing a request for mutual assistance relating to cases involving sensitive markets or scrutiny of prominent high-level foreign politicians, the Belgian authorities replied that this had never been used as a reason for denying a request for mutual assistance regarding an offence involving economic or financial crime. However, the examining team did not receive a clear answer as to what would happen if there were an appeal on the grounds of “the essential interests of Belgium”, since the Act does not provide any specific procedure for cases where one party alleges that carrying out the request would violate Article 4 paragraph 2 of the Act. The examiners consider that this procedural loophole must be filled in view of the

³⁴ As is pointed out in the preamble (*Chambre des Représentants de la Belgique*, Doc. 51-1278/1, 12 July 2004), the Act mainly consists of an adaptation into Belgian law of the Convention of 29 May 2000 on Mutual Legal Assistance in Criminal Matters between the Member States of the European Union. The opportunity was taken to lay down certain basic principles on this kind of assistance, which go beyond the scope of the implementation of the EU Convention. However, the Act does not aim to set out a complete body of rules on international legal cooperation. That work is being done by the SPF Justice.

³⁵ Aside from Belgium, these countries are: Austria, Denmark, Finland, France, Germany, Greece, Iceland, Italy, Luxembourg, The Netherlands, Norway, Portugal, Spain and Sweden.

³⁶ Although Belgium had signed the Additional Protocol to that Convention on 11 August 1978, which thenceforth excluded the possibility of refusing legal assistance for tax violations, until 2002, Belgium remained the only country not to have given its approval of the Protocol.

possibility that a defence strategy could prevent mutual assistance being granted in complex and sensitive bribery cases.

100. No request or mutual legal assistance may be refused when it seeks production of banking records. Indeed, banks and their staff cannot use professional secrecy as a basis for information requested by a foreign judicial authority. A systematic search for bank accounts opened in Belgium by an individual or a legal person can be made by applying to the Banking Association, who will circulate judicial orders of this kind to every bank in the country. Lastly, now that the criminal liability of legal persons has been introduced into Belgian law by the Act of 4 May 1999, Belgium can no longer refuse requests for legal assistance concerning legal entities.

101. Generally speaking, there is no appeal against the execution of CRIs. While the exequatur, which is mandatory in order to execute foreign letters rogatory (except within the Benelux States) requiring search or seizure, is subject to appeal to the court or chamber of indictment, whose decision may be appealed on legal grounds (*en cassation*) this possibility – as the representatives of the SPF Justice interviewed by the examiners pointed out – is only theoretical because there is no notification of the procedure. As to Article 11 of the Extradition Act of 14 April 1874, which allows the owner or third party in possession of the goods seized to appeal in order to obtain restitution, this option, according to the Ministry of Justice, is very rarely used in practice. Lastly, the Belgian courts have taken the view that the interim measures in criminal cases (“*référé pénal*”), introduced by the so-called Franchimont Law of 12 March 1998, which opened up the possibility for any injured party to appeal against a judicial order, does not apply to international mutual assistance.³⁷

iii) Mutual legal assistance in practice

102. Subject to the fact stated earlier in this Report that the lack of resources seemed to prevent magistrates from executing CRIs within a reasonable time-frame, the Belgian authorities are clearly preoccupied with improving the mechanisms for international mutual legal assistance needed for winning the fight against economic and financial crime. It emerged from interviews conducted by the examining team during the on-site visit that the same level of attention is devoted to carrying out requests from other States: CRIs are handled with the same degree of diligence by the examining magistrates as domestic letters rogatory. The Belgian authorities also readily give their approval for visits by foreign authorities (magistrates or police) with knowledge of the case, in order to ensure that the request for assistance is dealt with as efficiently as possible.

103. That said, though Belgium in general seems to give readily its judicial cooperation, the formality that still surrounds mutual assistance could produce long delays, undermining its efficiency in practice. Where a request is made to Belgium for passive assistance, perhaps to permit a search, it would have to pass through several stages before reaching the examining magistrate and then to the police department entrusted with carrying it out. Aware of the problem, the Belgian legislature under the new Act on International Mutual Legal Assistance in Criminal Matters (Article 4) decided to eliminate the compulsory referral to the Ministry of Justice as the central authority with respect to requests by European Union countries with which Belgium has no mutual legal assistance agreement (though the requirement remains in place for countries outside the EU). Even before this reform, mutual legal assistance worked best with European countries, when the best use could be made of the direct contacts set up under international treaties. The same is true of cooperation with EUROJUST, EUROPOL and OLAF.

104. A more thorny problem is the treatment of CRIs seeking coercive measures – searches and seizures – which are nearly always requested in bribery cases with an international dimension. Except

³⁷ See the decision of 4 December 1998 of the indictment chamber of Antwerp.

where there are treaty provisions to the contrary, Belgium makes the execution of these CRIs subject to the conditions laid down in Article 11 of the Extradition Act of 15 March 1874 (as amended by the 31 July 1985 Act) which provides that searches and seizures may only be carried out once they have been pronounced enforceable by the advisory chamber of the court of first instance of the place where they are to be performed. In applying this rule to requests for searches to be carried out in several districts, the requesting authority must therefore produce a separate letter rogatory for each district involved. According to the representatives of the SPF Justice who spoke to the examiners, multiplying the steps required means in practice, that it takes much longer to comply with the request: on average, this takes between three and six months in financial matters. Some of the magistrates expressed regret that the 9 December 2004 Act on International Mutual Legal Assistance had not changed this provision. It was noted that the Act of 22 December 1998 on the Federal Prosecutor's Office makes it possible to co-ordinate these requests for mutual assistance through the Federal Prosecutor's Office.

Commentary:

The lead examiners note the legislative efforts made by Belgium in order to introduce general rules on cooperation in criminal cases into Belgian law. As part of the ongoing reform process, they invite the Belgian authorities to introduce new measures designed to reduce the delays in handling requests received by Belgium for international mutual legal assistance, for example through a greater rationalisation of procedures. The examiners further invite Belgium to introduce into an implementing directive for the Act of 9 December 2004 on mutual legal assistance standards concerning jurisdiction and rules of procedure for cases where a party to a complex and sensitive proceeding such as that involving international corruption, claims that the granting of mutual legal assistance would harm the essential interests of the Belgian State.

2. Proving the offence of bribery of a foreign public official

105. In Belgian judicial procedure, the prosecutor is responsible for proving all the elements that make up the offence of active bribery of a foreign public official, and the judge on the merits must then reach an authoritative and independent conclusion as to whether the accused is or are guilty, on the basis of the evidence presented with the help of the examining magistrates.

a) Offences partly committed on Belgian territory or outside it

i) Territorial jurisdiction – Offences committed or deemed to have been committed on Belgian territory

106. Article 3 of the Criminal Code provides that Belgian criminal law applies to offences committed within the territory of the Kingdom, irrespective of the nationality of the perpetrator. Belgian case law and legal commentary have given a broad interpretation to the notion of territoriality of the offence, applying the theory of ubiquity to give Belgian courts jurisdiction over offences even where they were only partly committed in Belgium. Thus, the *Cour de Cassation* has ruled that the commission of one of the “material” elements (and not merely intentional) on Belgian soil, was enough to establish jurisdiction of the Belgian criminal courts.

107. In case law, territorial jurisdiction under Belgian criminal law has also been found to exist for offences committed abroad that were connected or inextricably linked to offences committed in Belgium. The Belgian courts have thus tried the offenders, co-offenders, coauthors, and accomplices for an offence committed in Belgium, even though the acts in which they participated took place entirely abroad (Cass., 7 March 1955, *Pas.* I, p. 746; Cass., 20 February 1961, *Pas.* I, p. 664)

ii) Personal and extraterritorial jurisdiction – Offences committed outside Belgian territory

108. Belgian criminal law applies, on the one hand, to crimes and offences committed outside the Kingdom by Belgian nationals and any person having his principal place of residence in Belgium (“active personal jurisdiction” under Article 7 of the Criminal Procedure Code), and, on the other hand, to certain crimes and offences – including active bribery of foreign public officials - committed by “any person” who is neither a Belgian national nor has their principal place of residence in Belgium (“universal jurisdiction” under Article 10quater of the Criminal Procedure Code).³⁸

109. The application by a Belgian judge of universal jurisdiction with regard to acts of bribery of the public officials of States outside the European Union is an innovation, but it is subject to procedural requirements that make it especially difficult to apply in sensitive cases of foreign bribery. In fact, Article 10quater of the Criminal Procedure Code provides not only that a person having committed active bribery of a foreign public official outside the national territory shall be prosecuted in Belgium solely where the act committed abroad is punishable under the law of the country where it was committed (dual criminality) and where that State’s laws also make it an offence to bribe a Belgian public official (reciprocity), but also requires an official opinion from the foreign authorities where the offence was committed. It further provides that prosecution can only take place upon the requisition from the Belgian public prosecutor.

110. Aside from requirement of dual criminality and reciprocity, which rule out Belgian extraterritorial jurisdiction over offences committed in the numerous countries in the world where it is not an offence to bribe a foreign public official, the requirement of an opinion from the foreign authority undoubtedly creates a further obstacle to Belgian jurisdiction. The Belgian authorities assured the examining team that such opinions were not binding; the fact remains that since the law makes prosecution conditional upon receiving an official opinion, if none is forthcoming (where, for example, the foreign authorities do not respond to the Belgian request), the prosecutor will automatically drop the case. Lastly, in a departure from the general law of prosecution, Article 10quater excludes the possibility for a civil party to demand a public prosecution as a way of overcoming inaction on the part of the prosecutor. Under that Article, where a crime or offence is committed outside the territory against a foreigner, the prosecutor alone has the right to initiate the prosecution. In the view of the examiners, there is a risk that considerations of national economic interest, or of the possible effect on relations with the foreign State, could influence the prosecutor’s decision whether or not to proceed.

111. The exercise of active personal jurisdiction is nonetheless subject to procedural requirements that can make it especially problematic in the context of the fight against bribery of foreign public officials. Article 7 §2 of the Criminal Procedure Code not only provides that prosecution of an act of bribery of a foreign public official on the basis of personal jurisdiction – as is also the case for prosecutions on the basis of universal jurisdiction – is reserved to the public prosecutor, and requires either a prior complaint by the victim or an official opinion given to the Belgian authorities by the authorities in the country where the offence took place, but, moreover, it imposes a requirement of dual criminality in respect of acts committed abroad (i.e., the act must be a criminal offence in the place where it was committed as well as in Belgium)³⁹.

³⁸ While the principle of “active personality” refers to Belgian nationality or the residency of the perpetrator of the offence as the criteria for jurisdiction of the Belgian courts, jurisdiction over any other person is governed by the principle of universal jurisdiction: Henry-D. Bosly and D. Vandermeersch, *Droit de la procédure pénale*, (Bruges 2003), p. 74.

³⁹ The prosecutors’ monopoly over proceedings is reserved to the particular case of an offence committed “against a foreigner” (Criminal Procedure Code, Article 7 §2). The general rules of law apply to other offences, so that prosecution can be instituted either by the public prosecutor or by an individual joining in the proceedings to make a civil claim (Criminal Procedure Code, Article 7 §1).

Commentary:

The lead examiners consider that Belgian statute and case law confer a broad territorial jurisdiction on the Belgian courts over bribery cases. However, it is doubtful whether extraterritorial jurisdiction over this offence is effective, because prosecution is conditioned upon the victim having filed a complaint or an official opinion having first been obtained as well as the requirement that the act must also be a punishable offence in the country where it is committed, and that, even where the conditions for the exercise of Belgian extraterritorial jurisdiction are met, it is not possible for an individual to file a civil claim to compel a prosecution in the event of inaction of the prosecutors that decide not to proceed. Similar doubts exist as to the effectiveness of universal jurisdiction. The lead examiners recommend that the Belgian authorities take appropriate corrective measures in order to facilitate the exercise of Belgian jurisdiction with regard to offences of bribery of foreign public officials committed abroad.

b) *Elements of the offence of bribery of a foreign public official*

112. Since there had not yet been a case of foreign bribery brought before the Belgian criminal courts at the time of the Phase 2 examination of Belgium, testing the limits of the scope of the Act of 10 February 1999 is no easy task. While it has been possible to examine some of the elements of the offence in the context of domestic bribery cases under the pre-existing anti-bribery provisions of the Criminal Code, others, however, which have not or only partially been tested by Belgian courts, give way to uncertainty as to how they will be interpreted. These include the notion of foreign public official and international public official, the definition of the functions of a public official, and the behaviour that constitutes an offence.

i) *Behaviour that constitutes an offence*

113. The Act of 10 February 1999 substantially changed the definition of the behaviour that constitutes an offence from the one in the preexisting law. While the old law referred to the notion of a “corruption pact”, a meeting of minds between the briber and the bribed, since the 1999 Act the offence of active corruption is complete where there is a mere promise or offer (Criminal Code, Article 246, para. 2): a finding by the court that there was a pact is simply a circumstance aggravating the bribery offence. The Act also dissociated active bribery from passive bribery: previously, active bribery was only a form of participation in passive bribery, and could thus not be prosecuted independently. These changes, introduced by the 1999 Act, were designed to facilitate the work of the magistrates who no longer have to find an agreement between the two parties in order to show the offence of bribing a public official to be proved.

114. Doubt remains, however, whether the giving of an advantage to a public official is punishable under the 1999 Act. While the OECD Convention requires that not only an offer or promise but also the giving of an advantage is punishable, the Belgian Criminal Code criminalises only “the proposal of an offer, promise or advantage of any kind”. In the view of the lead examiners, this omission, which might at first sight seem theoretical, could hinder the prosecution of those involved in committing the offence.

Commentary:

The current definition of bribery in Article 246 of the Criminal Code does not appear specifically to cover the giving of an advantage, but only the proposal of an advantage. The lead examiners invite the Belgian authorities and the OECD Working Group to follow up and re-evaluate this question once case law develops.

ii) *The scope of a public official’s functions*

115. Under the anti-bribery provisions in Belgian criminal law, the incriminating act consists of proposing an offer, promise or advantage of any kind to a public official in order to induce him to perform

an act defined either as forming part of his official duties (where the bribery is intended to induce the official to perform a lawful act) or in relation to his official duties (where the intended act is unlawful) or to refrain from doing something which otherwise falls within the scope of his official duties. The examining team became concerned during the on-site visit that the Belgian law was unclear.

116. Fears that the formulation of Belgian law is ambiguous, and that it could be interpreted in such a way as to restrict the scope of the offence with respect to the Convention, Article 1 of which requires “any use of the public official’s position, whether or not within the official’s authorised competence” to be covered, have been confirmed by the *Cour de Cassation*. In a judgment handed down on 11 February 2003, the Court, expressly following its previous decisions based on the old wording of the Criminal Code which required the official to have done “an act forming part of his official duties or his employment”, held that “the act forming part of his duties must fall within the scope of the *rationae materiae, loci et personae* competence of the public function he performs”⁴⁰. The *Cour de Cassation* had already held in 1997, that “on the one hand the accused must have performed, or refrained from reforming, in the exercise of his function, the act of which he is accused, and on the other hand, the act must have formed part of the exercise of his functions; and it is thus necessary to prove that the wrongful act or omission with which the official is charged falls within his duties and territorial competence as the case may be”.

117. This analysis of criminal law was made by the *Cour de Cassation* concerning a case of bribery of Belgian civil servants; this particularity should be borne in mind. Nonetheless, the behaviour of a public official punishable by the foreign bribery offence is identical to that of bribery of Belgian public officials. Furthermore, the Court gave its interpretation at a time when no other interpretation existed concerning the behaviour of a public official in a case of bribery of foreign public officials, and for this reason it carries all the weight of authority of the *Cour de Cassation*. Given the potential implications of this judgment for the foreign bribery offence, it is important to follow the development of case law and prosecution practice.

Commentary:

The lead examiners note that existing case law of the Cour de Cassation with regard to the behaviour of a public official are a departure from the terms of the OECD Convention. The examiners recommend follow-up by the Belgian authorities and the Working Group up in order to verify that the exercise of the public officials’ position is construed broadly in implementing the offence of bribery of a foreign public official.

iii) The notion of foreign public official

118. The 1999 Act amended the definition of the actual or intended recipients of bribes. Under the former Article 252 of the Criminal Code which punished active bribery, only civil servants and public officials, and those responsible for performing a public service or an adjudicatory function were liable. The scope of bribe recipients became broader since the Act of 10 February 1999; the law now refers to persons exercising a public function, which brings elected representatives, among others, within the scope of the law.

119. 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. The risk that the wording of the 1999 Act proves ambiguous and might be interpreted in such a way as to limit the scope of the offence in relation to what was envisaged in the OECD Convention, was already raised as a concern by the *Conseil d’Etat*⁴¹ during the legislative process, and again by a number of

⁴⁰ *Cour de Cassation*, Dutch section, 2nd Chamber, 11 February 2003.

⁴¹ Opinion of the *Conseil d’Etat*, 5 January 1998, Doc. Parl., Senate, No. 1-107/5, Annex 1, pp. 117-119.

the academics the examining team met during the on-site visit. One must wait for case law to see whether the courts interpret this provision in conformity with the requirements of the Convention.

120. Another aspect of the 1999 Act that could give rise to uncertainty is the requirement that the prosecution decides who is a foreign public official by direct reference to the definition of a public official in force in the foreign country in question (Criminal Code, Article 252 §2). The same is true for the narrow definition of international public officials, which refers to the status of the organisation in question, which might exclude “consultants” hired under private law contracts, who could nonetheless be major vectors of corrupt practices (Criminal Code, Article 251 §2).

121. Article 250 §2 of the Criminal Code provides that “whether a person exercises a public function in another State shall be determined in accordance with the law of the State in which the person exercises that function”. Where that State is outside the European Union, reference must also be made to Belgian law by verifying “whether the function in question is also considered to be a public function under Belgian law”. During the Phase 1 examination of Belgium, the Working Group took the view that this approach did not conform to the autonomous definition set forth under Article 1 of the OECD Convention, nor with its objectives of guaranteeing its homogenous application. The Working group expressed concerns that the approach taken by Belgium would affect the implementation of the Convention, and consequently recommended that this aspect of the Belgian law be discussed further in Phase 2.

122. In the view of the Belgian authorities encountered during the on-site visit, determining the nature of the functions of a foreign person who receives a bribe should not pose any real problems. The lead examiners were told by magistrates and federal police representatives that in the three cases under inquiry or at the investigation stage at the time of the on-site visit, there had been no difficulty in establishing whether a person was a foreign public official by reference to the law of the State of the bribed official. The prosecuting and examining magistrates the examining team met did however acknowledge that, for cases involving the public officials of certain distant countries, they would have to rely on the opinion of the authorities of the country in question in order to make an informed judgment on whether or not the recipient of the bribe was exercising a public function in the foreign State. In the view of the examiners, it might in practice be difficult to secure the cooperation of the foreign State to establish public official status, especially in countries where the judicial authorities have shown little inclination to cooperate where their own public decision-makers are implicated.

Commentary:

The definition of foreign public official was identified during Phase 1 as too narrow in relation to the requirements of the Convention. The examiners recommend that the Belgian authorities take the necessary steps to ensure that the definition of foreign public official fully covers the scope required by the Convention, in particular as to the notion of a public official, and to enact an autonomous statutory definition of a foreign public official.

3. Liability of legal persons

123. Criminal liability of legal persons, as laid down in Article 5 of the Criminal Code, has existed in Belgium since 1999.⁴² Its scope *rationae materiae* covers, in principle, all offences whether or not they require intention, including transnational bribery, which is an intentional offence⁴³. For offences requiring intent, like bribery, it is possible for both individuals and legal persons to be jointly or severally liable:

⁴² When criminal liability was introduced, related amendments were also made to other Belgian laws, including the Criminal Procedure Code and the Criminal Investigation Code.

⁴³ Corruption in Belgium is an intentional offence; the act must have been committed knowingly and wilfully.

both an individual and a legal person might be liable, or either one of them could be liable while the other is not.⁴⁴ The scope *ratione personae* is equally broad: it includes public law legal persons, private law legal persons such as commercial companies and associations, and certain entities that do not have legal personality but are assimilated to legal persons. The applicable sanctions, which include fines of up to 10 million euros depending on the nature of the act committed and the public official receiving the bribe, appear relatively severe.⁴⁵

124. A number of judgments – around 400 – have been handed down since that Act came into force. However, these concern, first and foremost, non-intentional violations, mostly of labour and environmental law. There seem to be few judgments dealing with intentional offences. With the exception of one judgment referred to by a lawyer, in a minor case involving the receipt of bribe proceeds by civil servants in the Belgian police service, there has been no judgment handed down in respect of bribery of public officials.

a) *Factual imputation and imputation of intent*

i) Determining the factual element

125. Under Article 5, “a legal person is 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 its behalf”. These criteria, especially the ones that apply to an offence committed on behalf of an enterprise or those intrinsically linked to the defence of the interests of a legal person, seem broad enough to apply without difficulty to all cases where an agent acts “in order to obtain or retain business or other improper advantage in the conduct of international business”, as required by Article 1 of the OECD Convention. The Act does not identify the persons or entities through whose acts the legal person can be held liable; all that is required is a link between the offence and the enterprise. As the person who drafted the Bill pointed out in the *travaux préparatoires*, “it was not thought necessary to identify the individuals or bodies through whose acts the legal person might be held liable”⁴⁶.

ii) Determining the intentional or mental element

126. As with the factual element, the intentional or mental element is necessary to establish the commission of offences both intentional and non-intentional by a legal person: the criminal liability introduced by the Act of 4 May 1999 is not in fact liability in the “*objective*” sense, triggered simply by the facts having occurred. The application of Article 5 to intentional offences, such as transnational bribery, does however raise particular problems. The examiners noticed three aspects especially: it seems unclear how intent is imputed to the legal person, which could have the effect of discouraging inquiries and prosecutions; it is possible that a judge on the merits would apply the law very restrictively on this point; and uncertainty could persist on this question as there seem to be limited prospects of building up a body of case law.

⁴⁴ For non-intentional offences, concurrent liability is a complex matter that can require a comparison of the degrees of fault of the individual and the legal person.

⁴⁵ The applicable sanctions are dealt with in the third part of this Report.

⁴⁶ See the introductory statement by the author of the draft law, *Rapport de la Commission de la Justice du Sénat, Doc. parl.*, Senate, 1998-99, no. 1217/6 (hereinafter “the Senate Report”), p. 8; see also the Opinion of the legislation section of the Conseil d’Etat (reproduced at pages 114-124 of the Senate Report, hereinafter “the Conseil d’Etat Opinion”), p. 117 (emphasising that the first draft “says nothing about who must have committed the material act”...”).

127. This uncertainty as to the criteria for imputation of the mental element arises partly from the fact that the Act is silent and partly from the apparently contradictory statements in the *travaux préparatoires*. The text of the Act does not describe how intention is to be imputed to the legal person; it merely requires a link between the offence and the legal person. The *travaux préparatoires*⁴⁷, which are not binding on the judge but can assist in interpreting or implementing the law, contain two statements to that effect. First is the statement that the law does not define the method of imputation because this is “a question of fact best left to the judge to assess”. Second, however, is the statement that “where the law requires intention ... as an element of the offence, it will be necessary [in order to establish the mental element] to show that it is also present at the management level”. For intentional offences such as transnational bribery, this latter wording would seem to argue in favour of a uniform method of imputation based on the intention of the management.

128. The uncertainty surrounding the criteria for imputation of the mental element, and more generally, about how to interpret the law, appear to put a brake on its enforcement, especially with regard to intentional offences. Some of those interviewed, including a judge, drew attention to the effect these uncertainties had in deterring inquiries and prosecutions. The fact that there were no imputation criteria for the element of intention in the first draft of the law had also attracted criticism from the *Conseil d’Etat*⁴⁸. Likewise, those interviewed noted that the case law is concentrated in a few regions, and that some major regions, Brussels included, had opted for a wait-and-see approach until the applicable legislative provisions were improved.

129. Secondly, it is possible that a judge on the merits might rely on the *travaux préparatoires* and take the view that the method of imputation to be used in a transnational bribery case required intent at the management level in the entity. That there is no mention of “management” in the wording of the Act, or any definition of it in the *travaux préparatoires*, invites a number of interpretations. The court, or the prosecution, might opt for a restrictive interpretation of the notion of “management” and limit this to an actual organ or organs of the legal entity.⁴⁹ The examiners consider that this possibility could give rise to problems with respect to the Convention.

130. Thirdly, there is uncertainty as to the capacity of the *Cour de Cassation* to verify the method used for imputing the mental element, or to build up case law on this question. In principle, no appeal can be made before to that court except on the grounds of an alleged error of law; questions of fact are the sole preserve of the judge on the merits. The absence of criteria for imputing intention in the Act, coupled with the express characterisation of this issue in the *travaux préparatoires* as a question of fact, could restrict the role of the *Cour de Cassation* as regards imputation of liability.

131. Mindful of the fact that the implementation of the Act gives rise to legal as well as practical difficulties, the Minister of Justice has reconstituted a working group (which had previously examined certain aspects of the text) to look at other aspects of the Act and put forward amendments. On the basis of the report submitted by the Group to the Minister in May 2005, which did not, however, address the question of imputation of the mental element in intentional offences, work was begun on drafting a law.

⁴⁷ Senate Report, p. 9. (“The draft law does not clarify the means whereby acts are to be imputed to the legal person. This was thought to be a question of fact best left to the judge to assess”); also p. 10.

⁴⁸ Opinion of the *Conseil d’Etat*, p. 121-122; see id. p. 119-120 (emphasising that both the Belgian Constitution and the European Human Rights Convention lay down the principle that an offence must be clearly defined by the law).

⁴⁹ This was how the Belgian authorities answered the Phase 2 questionnaire on this issue: “In order to assess what the fault element consisted of and how it manifested itself within the legal entity, the court shall base its judgment on the attitude of the organs of the legal entity.”

Commentary:

The examiners note that a draft law is being prepared to revise the criminal liability of legal persons. They recommend that, as part of this work, the Belgian authorities seek to resolve the problems of the imputation of the mental element in the intentional offence of transnational bribery. The examiners consider that the draft law should contain provisions that reduce the uncertainty in this regard, in order to facilitate prosecutions. More specifically, under the present law, where the intention of the legislator could be interpreted as requiring intention at the management level, the examiners recommend that the authorities broaden and clarify which are the persons and organs whose intention can be attributed to the legal entity, in order to ensure that effective, proportionate and dissuasive sanctions can be applied in cases of transnational bribery.

b) *Subsidiaries*

132. A Belgian parent company is not liable as such for the acts of its subsidiaries. However, if the parent company takes part in the dealings of its subsidiaries (or third parties), it appears that the traditional rules of participation in a crime would apply. According to one author, the Belgian parent company could be liable where the order or instruction to commit the offence, or acts necessary or incidental to it, were given or done by the parent company in the furtherance of its own objectives or in defence of its interests, or where these acts were done on its behalf.⁵⁰

Commentary:

Given the lack of case law on the application of the Criminal Liability of Legal Persons Act in the field of bribery, the examiners consider that the Working Group should follow up on the application of the law and case law, taken as a whole, in this field.

⁵⁰ Damien Vandermeersch, “La loi du 4 mai 1999 instaurant la responsabilité pénale des personnes morales”, p. 4 (study submitted to the OECD examining team during the Phase 2 on-site visit to Belgium).

C. SANCTIONING THE OFFENCE OF ACTIVE BRIBERY OF FOREIGN PUBLIC OFFICIALS AND RELATED OFFENCES

1. *Convictions and sentences handed down for acts of corruption*

a) *Applicable sanctions and their determination by the judges*

i) Applicable sanctions

133. By virtue of the repressive measures that Belgium has put in place pursuant to the OECD Convention, any Belgian company head, and more generally any individual, who has paid a bribe to a foreign public official in order to obtain an improper advantage, whether or not as part of an international business transaction, is liable to imprisonment for up to 15 years, depending on the nature of the offence and the foreign public official who received the bribe (see Annex 2 to this report, describing applicable penalties for the crime of corrupting foreign public officials). Applicable penalties may also result in jeopardising that person's continued pursuit of professional activity.

134. Companies and other legal persons are liable to fines of more than €10 million, depending on the nature of the offence and the public official bribed⁵¹. Penalties are not limited to fines: accessory penalties, ranging from dissolution of the company to prohibition on the conduct of its corporate business, and including the closure of one or more establishments and publication or dissemination of the judgment, may be ordered by the judge on the merits pursuant to article 7bis of the Criminal Code⁵². Items that are the object of the offence or that were used to commit the offence, any that were derived from the offence as well as assets derived directly from the offence, may also be ordered by the judge to be confiscated pursuant to the special confiscation provisions of Articles 42 et seq. of the Criminal Code. Finally, under the terms of legislation governing public procurement and the contractual clauses for the granting of public export guarantees, the company also runs the risk of having its export privileges suspended and of being barred from public procurement in Belgium.

ii) Elements taken into consideration by the judge in applying penalties

135. In practice, penalties are determined in light of the circumstances surrounding the offence and the personal characteristics of the offenders. According to the general provisions of the Criminal Code on extenuating and aggravating circumstances, the judge may take various factors into account in determining the penalty. Belgian legislation makes these rules fully applicable to legal persons in determining their penalty. A legal person may also obtain, like a physical person and in accordance with the probation law of 29 June 1964, a suspended or deferred sentence (article 18 of the law).

136. From discussions with judges during the on-site examination of Belgium, it emerged that there are four essential factors in determining the penalty for corrupting foreign public officials: the gravity of the offence, the offender's legal history, the length of proceedings, and the pressure exerted on the offender. The first two may constitute aggravating circumstances, while the second two may be extenuating circumstances.

⁵¹ Article 41bis of the Criminal Code provides a mechanism for converting prison sentences to fines in the case of a legal person.

⁵² To guarantee the continuity of public services, certain accessory penalties do not apply to public enterprises and to enterprises responsible for providing public service: dissolution, temporary or permanent prohibition on conducting a business, temporary or permanent closure of one or several establishments.

137. All the justice officials interviewed by the examiners indicated that the prevailing public concern over a major series of crimes constituting economic and financial crime would influence them to treat such crimes, including the corruption of foreign officials, as serious offences deserving heavy penalties. The offender's judicial record would undoubtedly also be taken into account as a negative indicator of the defendant's readiness to reform: in such cases, suspension or deferral would most likely not be granted.

138. A clean judicial record, as well as proceedings that exceed a "reasonable" time limit, would on the other hand likely produce a decision to mitigate the penalty: this is what happened in a case involving the corruption of Belgian public officials, as the examining team was told by one of the magistrates of the *Cour de Cassation*⁵³. More disturbingly, in the opinion of the lead examiners, some judges seem to take into consideration the defendant's argument that under the circumstances, external pressure is a mitigating factor. Indeed, when questioned about the criteria he would take into account as mitigating circumstances in respect of persons guilty of foreign bribery, one sitting magistrate singled out pressure exerted by the foreign official. On the other hand, the practice of Belgian courts in dealing with economic and financial cases suggests that a business manager who believes he will be exonerated by invoking the "state of necessity" under the Criminal Code could well find that argument rejected, but, as the sitting magistrates stressed to the examining team, regardless of any extenuating circumstances, the fact that an act of corruption was justified by economic reasons could, in theory, lead to a decision to mitigate the penalty.

b) *Convictions and sanctions handed down by Belgian courts*

i) Individuals convicted and sanctions imposed

139. Because the offence of bribery of foreign officials came into effect only in 1999, and given the complexity of procedures, there have as yet been no cases handled by the Belgian criminal justice system. It would require several cases to establish an initial evaluation of the judicial treatment of cases submitted to the prosecutors, the profile of persons convicted, and the sanctions imposed for the offence of active bribery of foreign public officials.

140. With respect to domestic corruption, i.e. the active bribery of Belgian public officials, one finding stands out: there have been relatively few criminal convictions. According to statistics from the Criminal Policy Office of the Federal Public Service of Justice provided to the examining team, during the last nine years (from 1995 to 2003), an average of 17 individuals have been convicted each year for active bribery of a Belgian public official under former article 252 of the Criminal Code⁵⁴. In total, over that nine-year period, 156 people were convicted for having paid bribes to Belgian civil servants or other public officials. Prison sentences were ordered in 97% of convictions, and fines in 89%.

141. The analysis of corruption in Belgium undertaken by the Central Office for the Repression of Corruption (OCRC) and provided to the OECD during the on-site visit confirms that there have been few convictions: 741 acts of corruption, of all kinds, were recorded during the period from 1 January 1996 to 1 January 2001 by the 27 prosecutors' offices in Belgium. Of the 248 cases recorded during that time in the prosecution offices that are most involved with economic and financial crimes in Belgium (Antwerp, Brussels, Charleroi, Ghent and Liège) and within the OCRC, only 16 (6.8% of the total) had produced a conviction as of 1 January 2001. From this analysis, the reasons for the low number of convictions, other

⁵³ Article 21ter of the Code of Criminal Procedure provides 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. If the judge orders conviction by simple declaration of guilt, the guilty party is liable for expenses and restitution, as appropriate. Special confiscation is pronounced".

⁵⁴ See the legislative provisions and statistics produced by the SPF Justice in the annex to this report.

than the lengthy procedures – many cases opened during the period were still under investigation at the time the OCRC study had ended -, would have to do with the difficulty in proving the charges (a common problem with corruption cases), the absence of sufficient charges, and the priority that some prosecution offices have given to other criminal cases.⁵⁵

142. As to the profile of persons involved in corruption cases, the amount of illicit payments made, and the advantages obtained by the bribers, three points can be made on the basis of the OCRC's analysis. First, investigations into corruption in commercial transactions with public officials have involved individuals both from large enterprises and from SMEs. Second, one-third of the advantages sought through bribery had to do with obtaining an improper tax advantage, while nearly a fifth of the cases concerned a contract or public procurement. Illicit payments (bribes), when made in the form of money, have varied between €248 and €700,000 in the public works and construction sector. In one case of a bribe linked to a contract in the aviation sector, the amount of the advantage extracted from the public official was €371,000. Finally, there is a great variety of financial or material advantages (i.e. the value of contracts and agreements) obtained by the bribers: for example, an advantage of more than €200 million was obtained in two cases relating to the armaments sector.

ii) Legal persons convicted and sanctions imposed

143. Since the entry into force of the law of 4 May 1999, Belgian magistrates have made broad use of the possibilities offered by the law for convicting legal persons: as of 30 April 2004, according to a study by the criminal policy office of the SPF Justice⁵⁶, 381 judgments have been handed down – all areas of the law combined - in application of various provisions of the 1999 law. Yet, with the exception of a ruling in a minor case involving corruption (*recel*) of police officers in a small Belgian town, no legal person had been convicted of the crime of bribing public officials at the date of the examination of Belgium.

144. The most frequent convictions have had to do mainly with violations of labour laws (47% of the judgements), violations of environmental law (9%), violations of customs and excise regulations (9%), and violations of commercial and company law (8%). Few convictions have been issued for economic and financial offences (fewer than 6%), and they have related essentially to articles 196 and 197 of the Criminal Code (forgery and use of forgeries) and article 193 (falsifying accounts). Not surprisingly, given the uncertainty surrounding the terms of article 5 of the Criminal Code on determining the mental element of the offence, the great majority of convictions have involved unintentional violations.

145. Without a body of case law in the area of corruption, it is difficult to derive principles for anticipating how the courts will in practice interpret the criminal liability of businesses for corruption of public officials. However, the significant number of judgments handed down in dealing with matters other than acts of corruption points to some trends. Thus, convictions have covered a fairly broad range of entities subject to criminal liability: business corporations (*sociétés anonymes*) (in nearly 40% of convictions) and private limited companies (*sociétés privées à responsabilité limitée*) (in 50% of judgments), but also nonprofit associations, limited partnerships (*sociétés en commandite simple*, SCS), joint stock companies (*sociétés par actions*, SCA), general partnerships (*sociétés en nom collectif*, SNC), limited or unlimited cooperatives (*sociétés coopératives à responsabilité limitée ou illimitée*, SCRL and SCRI), and certain corporations under public law (*sociétés anonymes de droit public*). As to sanctions imposed on legal persons, the examiners also found that Belgian judges frequently resort to a wide range of principal and accessory penalties in the 1999 law: fines of course (64.3% of businesses convicted were

⁵⁵ OCRC, *Corruption en Belgique*, pp. 22, 40-41.

⁵⁶ *L'application de la loi du 4 mai 1999 instaurant la responsabilité pénale des personnes morales sous forme de statistiques* (Brussels: SPF Justice, Criminal Policy Office, 30 April 2004).

required to pay a fine), but also confiscation (in nearly 10% of judgments) and accessory penalties (in around 8% of judgments).

146. Finally, despite the principle in Belgian law of “decumulation” between the criminal liabilities of legal persons and individuals, statistical data show that one or more individuals have been systematically prosecuted together with the company (in 346 out of 381 cases recorded). The rather obscure wording of article 5 (2) of the Criminal Code referred to above, as to such notions as "the most serious fault" and an offence "committed knowingly and willingly", would seem to be confirmed in the judicial proceedings conducted by the Belgian courts.

Commentary:

The lead examiners consider that the number of convictions for active bribery of Belgian public officials appears to be low, and that the possible consideration as an extenuating circumstance of external pressure (economic reasons, public official) dictating the criminal act is a departure from the spirit and standards of the OECD Convention. In light of these elements, and the fact that no case involving the bribery of foreign public officials has yet been tried by the courts, a circular should be sent out drawing attention to the text and the scope of the law establishing the crime of bribery of foreign public officials, in order to encourage the police and the public prosecutors to look systematically to the liability of persons suspected of having committed the offence. Steps to make investigating magistrates and trial judges more aware of the importance of effective, proportionate and dissuasive sanctions for corrupt activities in foreign markets are also important.

iii) Businesses convicted or involved in acts of corruption and their exclusion from Belgian public procurement.

147. Pursuant to government procurement legislation, any businessperson, supplier or service provider may be excluded from a public tender if that person has been convicted definitively for any crime affecting his/her professional integrity. Since entry into force of the law of 10 February 1999 amending the law of 20 March 1991 on the authorisation of public works contractors, the same rule applies specifically to enterprises that are found to have committed or have been involved in acts of corruption, particularly of foreign public officials. In practice, however, the risk that an enterprise that has committed or has been involved in acts of bribery of foreign public officials will be excluded or suspended from Belgian public procurement remains very limited.

148. While professional immorality duly established is grounds for exclusion at any stage of the procurement process (attribution and execution of contracts), professional immorality relating specifically to corruption is grounds for exclusion only at the award stage. Also, exclusion on grounds of corruption is applicable only to contracts above a certain threshold. Finally, the authorities have broad discretion on the question of exclusion, since the legislation requires the awarding authorities only to consider applying the clause when selecting competing firms, but not to apply it automatically (law of 20 March 1991 as amended by the law of 10 February 1999). On this point, as noted earlier, the absence of a police record for legal persons, together with the lack of any mechanism for feedback to the Belgian judicial and prosecution authorities of pertinent information on firms that have been found to have committed or been involved in acts of corruption certainly constitutes an obstacle for awarding authorities to exclude firms from the procurement process.

Commentary:

The examiners recommend, as a means of strengthening the system of excluding from Belgian public procurement those enterprises determined to have bribed foreign public officials, that the Belgian authorities consider making the non-fulfilment of this criterion a ground for unilateral and mandatory

exclusion from public procurement. Such a measure should also be applicable both at the contract awards stage and at the contract execution stage.

- c) *Confiscation of property*
- i) Confiscation at the domestic level

149. Because it strikes directly at criminals' pocketbooks, confiscation can be a highly effective means of punishment: indeed, persons who commit financial crimes at times fear less imprisonment than losing their illicitly gained property. In this area, Belgium has a highly developed confiscation system. Under article 42 of the Criminal Code, confiscation applies not only to the bribe that is the object of the offence of bribing foreign public officials or that was used to commit the offence, but also to any property directly related to the offence as well as any goods and securities acquired in exchange for these advantages and any income derived from investing them. Financial assets invested in Belgium that originate from corruption may also be confiscated under the money-laundering and stolen property provisions of article 505 of the Criminal Code. These provisions apply equally to individuals and to legal persons.

150. Recent judicial practice over the last 4 or 5 years shows that Belgian judges are quite ready to impose confiscation on persons convicted: of the 49 convictions of individuals for corruption of Belgian public officials handed down by the courts in 2001/2003 under the former provisions of the Criminal Code, 12 (or one-quarter of the total) involved a measure of confiscation.⁵⁷

151. Articles 42 (1 and 2) and 43 of the Criminal Code provide for mandatory confiscation of items that constitute the object of the offence or that were used or were intended for use in committing the offence, and any proceeds of the offence. In Belgium, confiscation may thus apply to the bribe which was used to commit the foreign bribery offence. Furthermore, Articles 42 (3) and 43bis of the Criminal Code also provide for optional confiscation of financial advantages deriving directly from the crime, goods and assets acquired in exchange for these advantages and any income from their investment. However, under the terms of the Law of 19 December 2002 which extends the use of seizure and confiscation in criminal matters, it becomes mandatory upon a written request of the prosecution.

152. To this end, one of the most important tasks of the prosecution and the investigating judge is to seize provisionally and maintain in safekeeping "anything that appears to constitute one of the items mentioned in article 42 of the Criminal Code and anything that could serve to demonstrate the truth". Because seizure is defined very broadly in Belgian law, it may apply to movable goods, for example an automobile, or to real property (in which case seizure would be effected by an entry in the property registry) and other assets (contracts, financial claims, intangible assets, etc.). For example, the freezing of accused persons' bank accounts was ordered in the case of corruption of an official of the European Commission discovered by OCRC investigators following a report from the European antifraud agency, OLAF, which was under investigation at the time of the Phase 2 examination of Belgium.

153. Until recently, custody of seized items was the responsibility of the magistrates, who had neither the means nor the training necessary for this task. In order to remove this burden from the magistrates, a Central Agency for Seizure and Confiscation (OCSC) was created by the law of 26 March 2003. Henceforth, at the request of the magistrates, the OCSC may take over the custody of seized assets (essentially cash but sometimes movable and immovable properties as well). A review of the statistics produced by the central agency for the OECD examining team shows that, during 2004 alone, the agency was managing assets seized from nearly 30 cases. Some of these amounts exceeded €325,000.

⁵⁷ Statistics from the Criminal Policy Office of the SPF Justice produced for the OECD examining team (Brussels, 27 January 2005).

154. Confiscation does not in all cases involve the property of the person convicted: this is only a requirement for confiscating the bribe with which the offence was committed. Where the proceeds or property advantages directly deriving from the bribery offence have been transferred to a third party, the confiscation can apply to that third party, as confirmed by the *Cour de Cassation* in a judgment of 29 May 2001: the third party can only escape confiscation if he can prove that those items were in his legitimate possession. : Unavailability of the goods concerned, whether because they have disappeared or have been unidentifiably incorporated into other property than that of the convicted persons, is no longer an obstacle to confiscation: the courts may order confiscation of assets of equivalent value since this concept was introduced into Belgian law by the Act of 17 July 1990. While confiscation of equivalent value is a secondary remedy (in other words, it is only available if the goods or securities connected to the bribery offence cannot or can no longer be located among the assets of the person convicted), practice suggests that most of the courts do not try to determine whether the assets are still to be found in the convicted person's possession: instead, they resort immediately to seizure of assets of equivalent value.

155. In the opinion of the lead examiners, the use of equivalent confiscation may be very effective for legal persons who may have hidden abroad the proceeds of corruption although, as a prosecuting magistrate with the Court of Appeals remarked to the examining team, the law appears ambiguous when it comes to situations where the advantages flowing directly from the crime, or their substitute, have not disappeared as such (as the legislation requires) but have been transferred abroad while remaining the property of the person concerned⁵⁸. In the absence of case law in this area, it is difficult to assess the limitations on the scope of application of the law. Yet, even on the assumption that the legislation applies only to assets located in Belgium, the judge still has the legal means to sanction the company: it is always possible for the judge to resort to the procedure (cumbersome and uncertain as it is, given the limited treaty framework in Belgium) concerning international legal cooperation in order to seize and confiscate assets located abroad; and, since the proceeds of the crime have been transferred abroad, the legal person or individual could be exposed to charges of money laundering.

ii) Belgian cooperation in the execution of foreign seizure and confiscation orders.

156. Since the adoption of the law of 20 May 1997 on international cooperation in the execution of seizure and confiscation, it is now possible for Belgium to satisfy requests from foreign countries for the seizure and confiscation of the proceeds of crime, including the corruption of public officials. Those requests, in principle, may deal with any type of confiscation covered by article 42 of the Criminal Code (object or instrument of the crime, proceeds of the crime and financial advantages deriving from the crime, or substitutes therefore). Execution of the request for confiscation is, however, always subject to the existence of a treaty between Belgium and the requesting State on the basis of reciprocity (article 2 of the law of 20 May 1997)⁵⁹. The embryonic nature of the treaty framework no doubt presents the greatest obstacle at this time to the effectiveness of the law of 20 May 1997.

157. Of course, foreign requests for the temporary seizure of assets or for their confiscation in Belgium may be handled through the Strasbourg Convention of 8 November 1990 on laundering, search, seizure and confiscation of the proceeds from crime, or through the United Nations Convention on Transnational Organised Crime (ratified by Belgium on 11 August 2004), but these apply only among States that are party to the Conventions, and there are moreover a number of situations that fall outside these Conventions. Some bilateral conventions may also contain provisions on legal assistance with seizure

⁵⁸ Damien Vandermeersch, « *La loi du 4 mai 1999 instaurant la responsabilité pénale des personnes morales : évaluation après cinq ans d'application. La dimension internationale* » (analysis provided to the OECD examining team during the Phase 2 examination of Belgium).

⁵⁹ As indicated earlier in this report, the request cannot be executed if this would threaten the security or other essential interests of Belgium (article 3 of the law).

and confiscation, but the establishment of such provisions is not yet systematic. In the opinion of some of the magistrates interviewed, in the absence of a treaty, the only alternative would be to open criminal proceedings for money laundering under domestic law, in which case seizures could be ordered and confiscation imposed. In all, according to the Belgian authorities, confiscations of goods worth at least 474 million euros have been ordered since the 1997 Act came into force.

Commentary:

The lead examiners welcome the recent legislative developments to facilitate the confiscation of the object or the proceeds of the crime, including financial assets derived from corruption or linked to it.

2. Sanctions for laundering the proceeds of bribery of foreign public officials

158. Under the provisions of article 505 of the Criminal Code, which targets assets derived from crimes of any sort (including the bribery of foreign public officials), laundering gives rise each year to approximately one hundred convictions in the Belgian courts⁶⁰. Of the 5000 or so cases transmitted by the financial information processing unit to the prosecutors' office since 1993, the Belgian courts have handed down convictions in at least 513 cases (or about 10% of the total), and 867 persons had been convicted as of 1 January 2004. Convictions have resulted in prison sentences totalling 1739 years, and in fines amounting to nearly €23 million.

159. The corruption of public officials has accounted for 12 of the cases sent for prosecution. Among these cases, six or eight involved potential bribery of foreign public officials. Of the cases relating to the bribery of foreign public officials, three have been dismissed (the other three were in the investigation or preliminary hearing stage at the time of the examiners' visit). Several explanations for these figures were provided to the examining team by the representatives of the unit.

160. The first explanation dismisses the idea that the low number of corruption cases might reflect the unit's decision to devote its resources to laundering related to crimes other than corruption: the unit applies the same diligence to all laundering cases. Nor would the situation seem to reflect any lack of awareness about corruption on the part of Belgian financial institutions: as evidence, all but one of the cases involving indications of corruption of public officials handed over by the unit to the prosecution originated from a report from a Belgian financial institution. According to the unit, the cases handed over to the prosecution simply reflect the nature of laundering operations in Belgium, and it has thus not overlooked any money laundering cases in relation to corruption.

161. The second cites the difficulty of producing evidence of laundering in court, and the fact that many Belgian prosecutors still have little specialisation in handling what are often complex financial cases. In the opinion of the CTIF representatives expressed to the examining team, the situation could however change in the near future. Recent legislative measures adopted in Belgium, such as establishment of a federal prosecution office, the new witness protection law and new investigation techniques, could improve the justice system's record in combating laundering.

Commentary:

The lead examiners appreciate the important role that the financial information processing unit plays in bringing to light cases of laundering, including those relating to the corruption of foreign public officials.

⁶⁰ According to the statistics provided to the OECD examining team by the Criminal Policy Office of the SPF Justice (Brussels, 27 January 2005).

3. *Persons found guilty of accounting and tax offences*

a) *Prosecution of accounting offences*

162. The OCRC study on corruption in Belgium during the years 1996/2000 showed that Belgian bribers, like those in many other OECD countries, often use very sophisticated means to disguise the funds used for financing clandestine transactions: primarily, false invoicing, over-invoicing, and overvaluation of services and goods, but also the establishment of secret funds, shell corporations, the payment of under-the-table commissions, and the use of phantom personnel. Among the 127 corruption cases consulted by the OCRC during the period, 48% (or 61 cases) involved use of forgeries, 12% embezzlement, and 10% violations of commercial laws and tax fraud.⁶¹

163. The Belgian courts have a wide range of criminal penalties available for punishing activities of this type. Article 127 of the Companies Code (CS), for example, punishes fraudulent accounting with imprisonment of five to 10 years and a fine. Failure to follow the rules governing the establishment of annual accounts and consolidated accounts are punished under article 126 of the CS (with a fine and imprisonment of one month to one year in the case of fraudulent intent)⁶². Article 171 of the CS deals with forged attestations and approvals. Finally, the criminal liability of company managers and auditors may also be incurred by receiving stolen property and laundering money and illicitly obtained assets (or by participating in such deeds).

164. The virtual lack of convictions in this area stands in stark contrast with the number of instances where the corporate manager or accountant is subject to liability under criminal law and the criminal provisions of the Company Code. The number of legal cases where the criminal liability of company managers has been upheld by the courts is still very modest, and this is even more true for auditors: criminal convictions of auditors have been very rare and, according to representatives of the profession interviewed by the examining team, none has involved omissions or falsification of books, records, accounts and financial statements for purposes of bribing Belgian or foreign public officials, or concealing such corruption.

165. In the opinion of some representatives of the profession interviewed by the examiners, the situation may however be changing, as evidenced by recent cases that have attracted media attention concerning the liability of auditors. According to those representatives, Belgium's growing determination to fight economic crimes, as manifested in particular by the greater specialisation of prosecutors, suggests that the days of virtual immunity for auditors may be coming to an end. Some recent convictions and the profile of some cases now under investigation would seem to support this trend. There was a recent case, for example, involving the falsification of annual accounts, in which the auditor was convicted as an accomplice. The case involved an insurance company for which the auditor deliberately certified false annual accounts that he was supposed to examine as a statutory auditor licensed by the Insurance Control Office. The judgment, dated 29 June 1999, was upheld on appeal.⁶³

⁶¹ OCRC, *Corruption en Belgique. Une première analyse stratégique (1996-2000)*, (Brussels, 2002).

⁶² The Court of Appeals has consistently held that fraudulent intent is the intent to procure for oneself or another illicit advantages or benefits, i.e. an advantage of any kind that would not have been obtained had accounting truthfulness or integrity been observed. See in this regard: Cass. 3 Dec 1973, *Arr. Cass.* 1974, 376; Cass. 13 March 1996, *Arr. Cass.* 1996, 224.

⁶³ Cass 3 May 2000, *Arr. Cass* 2000, no. 268.

Commentary:

The lead examiners consider that Belgian legislation recognizes offences, in particular forgeries and the use of forgeries, and illegal attestations and approvals that allow for the punishment of fraudulent acts foreseen under article 8 of the OECD Convention. They recommend that the authorities draw the attention of the prosecutors to the importance of vigorously pursuing accounting violations that could conceal the giving of a bribe to a foreign public official.

b) *Enforcement of the non-deductibility of undue payments to foreign public officials*

166. Two different legal regimes apply in Belgium to the tax-deductibility of "secret commissions" that enterprises pay to maintain or obtain export markets by virtue of tax laws and decrees. The first concerns commissions paid in order to obtain or keep government contracts or administrative authorisations. Tax deductibility of such commissions is prohibited by article 58 (2) of the 1999 Income Tax Code (CIR 92). The second refers to amounts that enterprises pay as secret commissions to facilitate their export business, and that do not involve obtaining or retaining public procurement contracts or administrative authorisations: such commissions are deductible as professional expenses under the terms of article 58 (1), CIR 92, provided they satisfy certain conditions (see *infra*).

167. For the first category of "commissions", those paid in respect of exports in order to maintain or obtain a public procurement contract or an administrative authorisation, enterprises and individuals who intentionally try to pass them off as deductible charges are *a priori* liable to severe administrative and criminal sanctions.⁶⁴ In the first place, the tax administration will oppose the deduction of such commissions from taxable income, and if fraudulent intent by the company is demonstrated, a special tax equal to 309% of the declared commission will be imposed. The administration may also decide, pursuant to articles 444 and 445, CIR 92 on sanctions applicable to intentionally incomplete or inaccurate declarations, either to increase the tax on the undeclared portion of income to as much as 200%, or to impose an administrative fine of 625 euros or 1250 euros depending on the nature and severity of the offence, and on whether the case has occurred before.

168. A taxpayer is also liable to criminal prosecution for criminally punishable acts by virtue of tax laws and decrees, quite apart from any administrative sanctions that may be imposed.⁶⁵ A company or individual who fraudulently tries to pass off as a deductible expense a commission paid in respect of exports in order to obtain or retain a public procurement contract or an administrative authorisation is liable, under article 449, CIR 92 which sanctions violations of the provisions of CIR 92, to imprisonment of eight days to two years and/or a fine ranging from 250 to 12,500 euros. If the conviction falls upon an accountant, a tax adviser or any other professional whose role is to counsel a taxpayer in fulfilling his obligations, the judge may increase the penalty in accordance with article 455, CIR 92 which allows for professional disbarment and the closure of the establishments of a company, an association, a group or a business of which the convicted person has been a manager or an employee, for a period of between three months and five years.

169. For the second category of secret commissions, i.e. those that do not involve obtaining or retaining a public procurement contract or an administrative authorisation, they will be deductible provided

⁶⁴ In the case of administrative sanctions, under a decree dating from March 1831, the Minister of Finance may, at the request of the interested party, waive or reduce a tax increase or fine under his general powers for the remission of fines.

⁶⁵ The public prosecutor has sole discretion to pursue such cases: the fact that the administration may make itself an accruing party to the cause, however, makes it less likely that the prosecutor will fail to follow through on a report received from the administration.

it is established that the payment of these commissions was necessary to counter foreign competition, that it is normal practice in the sector of the economy concerned to pay such commissions, that the amount of the commissions does not exceed the “usual” limits, and that the business pays tax on them, at the fixed rate calculated by the Finance Minister, which must be not less than 20.6%.⁶⁶.

170. The anticorruption law of 10 February 1999 is of course applicable automatically to Belgian tax officials. In theory, then, whenever a commission paid to a foreign public official is submitted as a tax deduction, the tax officer should report this as a criminal violation to the prosecutor’s office, pursuant to article 29 (1) of the Code of Criminal Investigation. The briber would then be exposed to criminal prosecution under articles 250 and 251 of the Criminal Code (corruption of foreign public officials).

171. In the absence of a general prohibition on the deductibility of secret commissions, and with the autonomy of tax law vis-à-vis criminal law, the Belgian tax authorities may decide, under the terms of applicable tax law, that the payment of a secret commission to a foreign public official (apart from cases where such a payment is made to obtain or retain a public procurement contract or administrative authorisation) constitutes a simple professional expense, and may therefore allow it to be deducted from income for tax purposes, because such a payment would meet the requirements of the tax law (i.e. that it is current practice in the economic sector concerned, that the amount is within normal bounds, that it is necessary for the enterprise to counter foreign competition, and that it helps to safeguard Belgium's national economic interests).

172. The illicit nature of the act in criminal law is not important: if the Belgian tax authorities consider the payment necessary for countering foreign competition, the company may be allowed to use the tax law’s special deductibility rule. Every year, pursuant to article 58 (1) of the CIR 92, the Belgian administration accepts about four cases involving total annual commissions in the order of €500,000 paid essentially in the course of executing oil or private commercial contracts. In the opinion of the lead examiners, Belgian law thus contains a loophole in terms of prohibiting the deductibility of bribes paid to foreign public officials, in the terms of the 1997 Revised Recommendation on Combating Bribery in International Business Transactions, as noted by the OECD working group during the Phase 1 examination of Belgium.

173. The criminal prosecution of cases where taxpayers fraudulently attempt to pass off prohibited commissions as deductible expenses has become problematic. Evidence, in particular admissions obtained during the – administrative – tax procedure, in which persons under investigation are required to testify even if they incriminate themselves, can often no longer be used in criminal proceedings, which require that all defendants be informed of their right to remain silent so as not to incriminate themselves. Belgium, like other countries, has recently been condemned by the European Court of Human Rights for having tried to use admissions obtained by plea bargaining in an administrative tax procedure in criminal proceedings. This procedural problem is currently being reviewed by both the tax and criminal authorities.

Commentary:

The lead examiners note that Belgium remains in contravention of Article IV of the 1997 Revised Recommendation on the non-deductibility of bribes to foreign public officials. During the examination of Belgium under Phase 1 of the OECD Convention follow-up procedure, the Belgian authorities undertook to take measures for a complete prohibition of the deductibility of bribes in the context of international business transactions involving a foreign public official in accordance with the revised recommendation.

⁶⁶ Taxpayers who invoke the special regime for secret commissions under article 58, CIR 92 must, in order to do so, present a written request, after payment of the commissions, to the Finance Minister, who alone has the power to decide whether the commissions fulfil the necessary conditions to be considered as professional expenses.

The lead examiners call upon the Belgian authorities to move promptly to adopt adequate taxes measures that will make non-deductible any improper advantage in the context of international business transactions.

RECOMMENDATIONS

174. Consequently, based on the findings of the Working Group with respect to Belgium's implementation of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to Belgium. In addition, the Working Group recommends that certain issues should be re-examined as the case law evolves.

a) *Recommendations*

Recommendations to ensure the effectiveness of measures to prevent and detect the bribery of foreign public officials

175. 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).
- 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)).

176. With respect to other measures of prevention, the Working Group recommends that Belgium:

- c. 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).

177. With respect to detection, the Working Group recommends that Belgium:

- d. 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).
- e. remind public officials, through a circular or other means, of their obligation under Article 29, paragraph 1 of the Criminal Investigation Code 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)).
- f. 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).

- g. 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)).
- h. 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).

Recommendations to ensure the effective prosecution of the offence of bribery of foreign public officials and related offences

178. With respect to prosecution, the Working Group recommends that Belgium:

- i. 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).
- j. 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).
- k. 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).
- l. 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).
- m. 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 Article 5 of the Convention (Convention, Article 5).

179. With regard to sanctions, the Working Group recommends that Belgium:

- n. 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)).
- o. 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)).

- p. 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).

b) Follow-up by the Working Group

180. The Working Group will follow up the following issues, in the light of developments in case law and practice, in order to verify:

- q. whether the current definition of bribery under Article 246 of the Criminal Code specifically covers the giving of an advantage (Convention, Article 1).
- r. 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).
- s. 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 D).

ANNEX 1: LIST OF ABBREVIATIONS

Al.	Alinéa [Clause]
AR	Arrêté royal [Royal Decree]
Art.	Article
ASBL	Association sans but lucratif [Non-profit association]
AWEX	Agence Wallonne à l'Exportation [Walloon Export Agency]
Cass.	Cour de cassation [Court of Cassation, the highest appeals court]
CBFA	Commission Bancaire, Financière et des Assurances [Banking, Financial and Insurance Commission]
Ch.	Chiffre [Figure]
C.jud.	Code judiciaire [Judicial code]
C.i.cr.	Code d'instruction criminelle [Code of Criminal Investigation]
CIR 92	Code des impôts sur le revenu [Income Tax Code (1992)]
CNC	Commission des Normes Comptables [Commission on Accounting Standards]
Corr.	Jugement du tribunal correctionnel [court judgment]
CP	Code pénal [Criminal Code]
CRI	Commission rogatoire internationale [international rogatory commission]
CTIF	Cellule de traitement des informations financières [financial information processing unit]
C.S.	Code de Sociétés [Companies Code]
DGCD	Direction Générale de la Coopération au Développement [General Directorate for Development Cooperation]
DJF	Direction de la lutte contre la criminalité économique et financière [Economic and financial crimes directorate]
Doc. Parl.	Documents parlementaires [Parliamentary Documents]
FEB	Fédération des entreprises de Belgique [Belgian Federation of Enterprises]
FEBELFIN	Fédération Financière Belge [Belgian Financial Federation]
FGTB	Fédération Générale de Travail de Belgique [General Labor Federation of Belgium]
FINEXPO	Comité de Soutien financier à l'exportation de biens d'équipement [Financial Support Committee for Capital Goods Exports]
FUNDP	Facultés Universitaires [University Faculties] of Notre Dame de la Paix (Namur)
IEC	Institut des Experts Comptables [Institute of Professional Accountants]
INS	Institut national de Statistique [National Statistics Institute]
IRE	Institut des Réviseurs d'Entreprises [Institute of Company Auditors]
IPCf	Institut Professionnel des Comptables Fiscalistes Agréés [Professional Institute of Chartered Tax Accountants]
M.B.	Moniteur belge ["Belgian Monitor"]
OCDEFO	Office Central de lutte contre la Délinquance Économique et Financière Organisée [Central Office on the fight against Organized Economic and Financial Crime]
OCRC	Office central de la répression de la corruption [Central Office for the Repression of Corruption]
OLAF	Office européen de lutte anti-fraude [Antifraud Office of the European Union]
OCSC	Organe Central pour la Saisie et la Confiscation [Central Seizure and Confiscation Agency]
Pas.	Pasierisie
SMEs	small and medium-sized enterprises
GNP	Gross National Product
SA	Société anonyme [a form of business corporation]
SCA	Société en commandite par actions [Limited partnership with shares]
SCRI	Société coopérative à responsabilité illimitée [cooperative with unlimited liability]
SCRL	Société coopérative à responsabilité limitée [cooperative with limited liability]
SCS	Société en commandite simple [limited partnership]
SJA	Service judiciaire d'arrondissement [district judicial service]
SNC	Société en nom collectif [General partnership]
SPF	Service Public Fédéral [Federal Public Service]
SPRL	Société à responsabilité limitée [limited liability company]

UEB Union des Entreprises de Bruxelles [Brussels Union of Enterprises]
UWE Union Wallonne des entreprises [Walloon Union of Enterprises]
Voka Vlaams Economisch Verbond [Flemish Business Union]

ANNEX 2: CRIMINAL SANCTIONS APPLICABLE TO THE OFFENCE OF BRIBING FOREIGN PUBLIC OFFICIALS

Penalties Applicable for Unilateral Acts of Bribery (bold face) and for Bribery Agreements

Nature of the offence	Natural persons			Legal persons	
	Fine in € (M=millions)	Imprisonment	Additional penalties Loss of rights or debarment form public procurement	Fine in € (M=millions)	
Article. 247 Ordinary law, public officials in general					
247 § 1 proper act	<i>550 to 55,000</i>	<i>6 months to 1 year</i>	CP Article 33 Optional Downgrading, suspension or withdrawal of contractor's accreditation Optional	16,500 to 132,000	
	<i>550 to 137,500</i>	<i>6 months to 2 years</i>		16,500 to 264,000	
247 § 2 improper act	550 to 137,500	6 months to 2 years		16,500 to 264,000	
	<i>550 to 275,000</i>	<i>6 months to 3 years</i>		16,500 to 264,000	
247 § 3 official's act constitutes offence	550 to 275,000	6 months to 3 years		16,500 to 396,000	
	<i>2,750 to 550,000</i>	<i>2 years to 5 years</i>		66,000 to 660,000	
247 § 4 influence	550 to 55,000	6 months to 1 year		16,500 to 132,000	
	<i>550 to 137,500</i>	<i>6 months to 2 years</i>		16,500 to 264,000	
Art. 248 Police officials and members of the public prosecutor's office					
247 § 1 proper act	<i>550 to 110,000</i>	<i>6 months to 2 years</i>	CP Article 33 Optional	16,500 to 264,000	
	<i>550 to 275,000</i>	<i>6 months to 4 years</i>		16,500 to 528,000	
247 § 2 improper act	550 to 275,000	6 months to 4 years		16,500 to 528,000	
	<i>550 to 550,000</i>	<i>6 months to 6 years</i>		16,500 to 792,000	
247 § 3 official's act constitutes offence	550 to 550,000	6 months to 6 years		16,500 to 792,000	
	<i>2,750 to 1,1M</i>	<i>6 months to 10 years</i>		66,500 to 1.32M	
Art. 249 Judges, jurors, arbitrators and assessor judges					
249 § 1 arbitrator	550 to 275,000	1 to 3 years		CP Article 33	270.000 to 396,000
	<i>2,750 to 550,000</i>	<i>2 to 5 years</i>	540.000 to 660,000		
249 § 2 juror or assessor judge	2,750 to 550,000	2 to 5 years	Optional	540.000 to 660,000	
	<i>2,750 to 550,000</i>	<i>5 to 10 years</i>	CP Article 32	1.35M to 1.32M	
249 § 3 judge	2,750 to 550,000	5 to 10 years	Optional	1.35M to 1.32M	
	<i>2,750 to 550,000</i>	<i>10 to 15 years</i>	CP Article 31 automatic	2.7M to 1.98M	

Explanatory notes: The penalties shown in bold type are for unilateral acts of proposing a bribe, and the penalties on the line directly below are for "bribery agreements" (i.e. when the bribe is accepted).

The penalties in italics are either cumulative or alternative, while all the others are cumulative.

The fines are calculated on the basis of the provisions of the criminal code as well as article 1 of the law of 5 March 1952 adding additional percentage points to fines and article 2 of the law of 26 June 2000 on introduction of the euro in legislation concerning the matters of article 78 of the Constitution.

ANNEX 3: CONVICTIONS SINCE 1995

Active bribery of Belgian public officials (art. 252 former CP)

	1995	1996	1997	1998	1999	2000	2001	2002	2003
Number of persons convicted	15	27	20	23	13	9	19	21	9
Gender: Men	13	22	16	14	10	7	14	14	8
Women	0	3	1	5	0	1	1	2	0
Gender unknown	2	2	3	4	3	1	4	5	1
Nationality : Belgian	9	17	15	17	11	6	13	17	6
Non-Belgian	6	9	4	4	2	3	4	3	3
Nationality unknown	0	1	1	2	0	0	2	1	0
Ages: under 18 years	0	0	0	0	0	0	0	0	0
18 – 19 years	0	0	0	0	0	0	0	0	0
20 – 29 years	3	7	4	2	2	0	3	1	1
30 – 39 years	5	4	7	6	3	3	7	2	4
40 – 49 years	4	5	3	7	2	5	5	6	2
50 – 59 years	2	8	3	3	3	1	2	7	1
60 years & over	1	3	3	5	3	0	2	5	1
Prison sentences	15	26	19	23	13	9	18	21	8
Fines	12	21	16	20	13	8	18	21	6
Confiscation:									
As main penalty	0	0	0	0	0	0	0	0	0
As additional penalty	0	0	0	0	0	0	2	6	4

Forgery and use of forgeries

	1995	1996	1997	1998	1999	2000	2001	2002	2003
Number of persons convicted	27	38	13	11	30	37	23	49	90
– Forgeries in commercial, banking or private documents (art. 196 CP)	8	4	4	1	9	13	9	16	50
– Use (art. 197 CP)	9	13	6	7	12	17	5	12	11
– Use of these forged docs (197, 207, 212 CP)	10	21	3	4	9	7	9	21	29

Money laundering (art. 505 CP, 2° 3° 4°)

	1995	1996	1997	1998	1999	2000	2001	2002	2003
Number of different individuals	1.666	1.755	1.735	1.876	1.671	1.795	1.990	1.828	1.786
Of whom: Art. 505, 1°	1.661	1.737	1.677	1.779	1.555	1.649	1.817	1.683	1.633
Art. 505, 2°	5	17	57	91	87	121	141	109	122
Art. 505, 3°	0	1	0	5	25	18	28	34	29
Art. 505, 4°	0	0	0	0	1	3	1	1	0
With aggravating circs. (art. 506)	0	0	0	1	2	1	1	0	5
Gender: Men	1.256	1.380	1.362	1.149	1.314	1.497	1.640	1.524	1.487
Women	167	178	169	194	178	144	185	128	142
Gender unknown	243	197	204	263	179	154	165	176	156
Nationality : Belgian	849	968	971	1.009	886	917	1.017	897	918
Non-Belgian	617	624	600	669	646	683	777	750	676
Nationality unknown	200	163	164	198	139	195	196	181	192
Ages: under 18 years	2	1	5	1	1	4	6	4	2
18 – 19 years	54	66	30	37	44	47	57	42	23
20 – 29 years	852	873	831	804	643	766	831	737	739
30 – 39 years	451	482	520	637	571	575	606	610	585
40 – 49 years	229	214	235	242	291	245	329	291	284
50 – 59 years	61	94	97	117	91	125	132	116	121
60 years & over	17	25	17	37	30	33	29	28	31
age unknown	0	0	1	1	0	0	0	0	1
Prison sentences	1.566	1.643	1.662	1.793	1.611	1.719	1.867	1.706	1.508
Fines	1.064	1.092	1.115	1.185	1.011	1.081	1.125	1.021	967
Confiscation:									
As main penalty	0	0	0	0	0	0	0	0	1
As additional penalty	0	0	0	0	0	0	155	458	523

Note: Only offences pursuant to art. 505-2°, 505-3° and 505-4° relate to money-laundering. Article 505-1° sanctions « persons who receive, in whole or in part, items taken, diverted or obtained through an offence ».

ANNEX 4: PERTINENT LEGAL PROVISIONS (EXTRACTS)

1. Criminal Code

Criminal responsibility of legal persons

Art. 5. – Any legal person is criminally liable for offences which are intrinsically linked to the achievement of its purpose or to the defence of its interests or for offences on whose behalf the facts show they were committed.

When a legal person is liable solely because of the intervention of an identified natural person, only the person who committed the more serious fault may be convicted. If the identified natural person committed the fault knowingly and voluntarily, he/she 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, Brussels and its suburbs, municipalities, (multi-district zones), intra-local territorial organs, French community Commission, Flemish community Commission, joint community Commission and the public centres for social welfare.

Corruption

Chapter IV. (On the corruption of persons exercising a public function)

Article 246. – 1. The act, by a person exercising a public function, of soliciting or accepting, whether directly or through intermediaries, an offer, promise or advantage of any kind to 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 passive bribery.

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.

3. Persons exercising a public function shall be deemed under this provision to include persons who are applicants for a public function, who lead others to believe that they will exercise such a function or who, by misrepresenting themselves, mislead others into believing that they exercise such a function.

Article 247. – 1. When the object of the corruption is to induce the person exercising a public function to perform a proper but unpaid act falling within his function, the penalty shall be imprisonment of six months to one year and a fine of 100 francs to 10,000 francs, or one of these penalties.

When, in the case described in the preceding paragraph, the solicitation referred to in article 246 (1) is followed by a proposal of the kind referred to in article 246 (2), or if the proposal referred to in article 246 (2) is accepted, the penalty shall be imprisonment of 6 months to 2 years and a fine of 100 francs to 25,000 francs, or one of these penalties.

2. When the object of the corruption is to induce the person exercising a public function to engage in an improper act while carrying out official duties or refrain from performing an act falling within his duties, the penalty shall be imprisonment of 6 months to 2 years and a fine of 100 francs to 25,000 francs.

When, in the case described in the preceding paragraph, the solicitation referred to in article 246 (1) is followed by a proposal of the kind referred to in article 246 (2), or if the proposal referred to in article 246 (2) is accepted, the penalty shall be imprisonment of 6 months to 3 years and a fine of 100 francs to 50,000 francs.

When the corrupt person has performed an improper act or refrained from performing an act falling within his duties, he shall be punished with imprisonment of 6 months to 5 years and a fine of 100 francs to 75,000 francs.

3. When the object of the corruption is to induce the person exercising a public function to commit a criminal offence or misdemeanour in the course of official duties, the penalty shall be imprisonment of 6 months to 3 years and a fine of 100 francs to 50,000 francs.

When, in the case described in the preceding paragraph, the solicitation referred to in article 246 (1) is followed by a proposal of the kind referred to in article 246 (2), or if the proposal referred to in article 246 (2) is accepted, the penalty shall be imprisonment of 2 years to 5 years and a fine of 500 francs to 100,000 francs.

4. When the corruption is aimed at inducing a person exercising a public function to use the real or supposed influence he possesses because of his function to cause a public authority or administration to perform or refrain from an act, the penalty shall be imprisonment of six months to one year and a fine of 100 francs to 10,000 francs.

When, in the case described in the preceding paragraph, the solicitation referred to in article 246 (1) is followed by a proposal of the kind referred to in article 246 (2), or if the proposal referred to in article 246 (2) is accepted, the penalty shall be imprisonment of 6 months to 2 years and a fine of 100 francs to 25,000 francs.

When the corrupt person has in fact used the influence he possesses because of his function, he will be punished with imprisonment of 6 months to 3 years and a fine of 100 francs to 50,000 francs.

Article 248. – When the acts described in articles 246 and 247, clauses 1 to 3, involve a police official, officer in the judicial police or a member of the public prosecutor’s office, the maximum penalty shall be double the maximum penalty stipulated in article 247 for such acts.

Article 249. – 1. When the corruption referred to in article 246 concerns an arbitrator and is aimed at an act pertaining to his jurisdictional function, the penalty shall be imprisonment of one year to 3 years and a fine of 100 francs to 50,000 francs.

When, in the case described in the preceding paragraph, the solicitation referred to in article 246 (1) is followed by a proposal of the kind referred to in article 246 (2), or if the proposal referred to in article 246 (2) is accepted, the penalty shall be imprisonment of 2 years to 5 years and a fine of 500 francs to 10,000 francs.

2. When the corruption referred to in article 246 concerns an assessor judge or a juror and is aimed at an act pertaining to his jurisdictional function, the penalty shall be imprisonment of 2 years to 5 years and a fine of 500 francs to 100,000 francs.

When, in the case described in the preceding paragraph, the solicitation referred to in article 246 (1) is followed by a proposal of the kind referred to in article 246 (2), or if the proposal referred to in article 246 (2) is accepted, the penalty shall be reclusion of 5 years to 10 years and a fine of 500 francs to 100,000 francs.

3. When the corruption referred to in article 246 concerns a judge and is aimed at an act pertaining to his jurisdictional function, the penalty shall be reclusion of 5 years to 10 years and a fine of 500 francs to 100,000 francs.

When, in the case described in the preceding paragraph, the solicitation referred to in article 246 (1) is followed by a proposal of the kind referred to in article 246 (2), or if the proposal referred to in article 246 (2) is accepted, the penalty shall be reclusion of 10 years to 15 years and a fine of 500 francs to 100,000 francs.

Article 250. – 1. When the corruption described in articles 246 to 249 concerns a person exercising a public function abroad in a foreign State, the penalties shall be those stipulated in the respective provisions.

2. Whether a person exercises a public function in another State shall be determined in accordance with the law of the State in which the person exercises that function. When such State is outside the European Union, this qualification is recognised for purposes of applying paragraph 1 only if the function concerned is also considered to be a public function under Belgian law.

Article 251. – 1. When the corruption described in articles 246 to 249 concerns a person who exercises a public function in a public international organisation, the penalties shall be those stipulated in the respective provisions.

2. The qualification of such a person is determined in accordance with the regulations of the public international organisation to which the person belongs.

Article 260 (provision common to the preceding articles). – When a public official or officer, depository or member of the police force has ordered or performed any act contrary to a law or a royal decree, and proves that he was acting by order of his superiors in respect of objectives falling under their responsibility and concerning which he was obliged to comply, he shall be exempt from punishment, which shall be applied only to the superiors who gave the order.

Former Article 252 (active corruption under former legislation). – Any person who, through violence or threats or corruption with promises, offers, gifts or presents, induces an official, a public officer, a person responsible for a public service, a juror, an arbitrator or an assessor judge to perform any act of his office or employment, including a proper but unpaid act, or to refrain from performing one of his duties, while carrying out official duties, shall be punished with the same penalties as the official, public officer, juror, arbitrator or assessor judge who was corrupted.

Money laundering

Article 505. – The following persons are guilty of the crime of money laundering: [...]

2. Those who have purchased or received for consideration or gratuitously, possessed, kept or managed any of the things specified in Article 42 (3), when they knew or should have known their origin.
3. Those who have converted or transferred the things specified in article 42 (3) for the purpose of disguising or concealing their illicit origin, or for helping any person involved in the commission of the crime from which those things originated to escape the legal consequences of his acts.
4. Those who have concealed or disguised the nature, origin, location, disposal, movement or ownership of the things specified in Article 42 (3), when they knew or should have known their origin.

2. Code of Criminal Investigation

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 is to 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, and the corporate and profits tax administration may not, without 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.

3. Code of Criminal Procedure

Article 7. – 1. Any Belgian or any person with principal residence in the territory of the Kingdom who, outside the territory of the Kingdom, has committed a deed that qualifies as a crime or misdemeanour in Belgian law may be prosecuted in Belgian if that deed is punishable under the legislation of the country in which it was committed.

2. If the offence has been committed against a foreigner, prosecution may proceed only at the request of the public prosecution office, and must be preceded by a complaint from the injured foreigner or his family or by an official notice given to the Belgian authorities by the authorities of the country in which the offence was committed.

Article 10quater. – Any person may be prosecuted in Belgium for having committed outside the territory:

1. an offence referred to in Articles 246-249 of the Criminal Code
2. an offence referred to in Article 250 of the Criminal Code, where the person concerned exercises a public function in a member State of the European Union.

Prosecution may proceed in the latter case only upon official notification to the Belgian authority by the authority of that State.

3. an offence referred to in Article 250 of the Criminal Code, where the person concerned exercises a public function in a foreign State other than those indicated in clause 2.

Prosecution in this case is subject to the condition that the deed be punishable under the laws of the country in which it was committed, and that the legislation of that State also punish corruption concerning a person exercising a public function in Belgium. It also requires official notification to the Belgian authority by the authority of that State.

4. an offence referred to in Article 251 of the Criminal Code when it concerns a person who exercises a public function in one of the institutions of the European Union.
5. an offence referred to in Article 251 of the Criminal Code when it concerns a person who exercises a public function in a public international organisation.

In the latter case, prosecution may proceed only upon official notification to the Belgian authority by the competent authority of that organisation.

4. Legislative provisions referring to corporate books and records

Companies Code

Article 126 (*Failure to respect provisions relating to the establishment of annual accounts and consolidated accounts*).

1. A fine of 50 to €10,000 shall be imposed on: 1) administrators or managers who violate article 92 (1.2); 2) administrators, managers, directors or representatives of companies who knowingly violate the provisions of decrees implementing articles 92 (1.1), 122 and 123; 3) administrators, managers, directors or representatives of companies who knowingly violate articles 108 to 121 and their execution decrees. In the cases referred to in clauses 1), 2) and 3) herein, they shall be punished by imprisonment of one month to one year and a fine of 50 to €10,000, or one of these penalties, if they have acted with fraudulent intent. Managers, directors or representatives of companies shall not however be punishable under clause 1) for disregarding article 92 (1.1) unless the Company has been declared bankrupt.

Article 127 (*forgery and use of forgeries in annual accounts*). A penalty of reclusion for five to 10 years and a fine of 26 to €2,000 shall be imposed on: 1) those who have, with fraudulent intent or design to harm, falsified the annual accounts of companies prescribed by law or under the statutes [...]; 2) those who have made use of these falsifications. In the application of clause 1), annual accounts are deemed to exist once they have been submitted for inspection by the partners.

Article 140 (2) (*duty to report by the statutory auditors*). [The statutory auditors] shall be jointly liable to the company and to third parties for any damage resulting from violations of the provisions of this code or of the statutes. They are exonerated of liability, as to the offences in which they were not involved, only if they can prove that they exercised due diligence in their function and that they reported these violations to the management body and, if they were not remedied adequately, to the next general assembly to be held after they became aware of the offence.

Articles 143 and 146 (6). Statutory auditors shall prepare a written and substantiated report on the annual accounts [...] indicating specifically [...] whether they had knowledge of transactions conducted or decisions taken in violation of the statutes and of 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 thus created.

Article 171 (*sanctions for obstructing the work of the statutory auditors*). – 2. Persons who, as statutory auditors, company auditors or independent experts, certify or approve the accounts, annual accounts, balance sheets and statements of earnings of companies, where the provisions of clause 1 are not respected, whether they are aware of this fact or have not taken the steps necessary to assure themselves that they were respected, shall be punished by a fine of 50 to €10,000. They shall be punished by imprisonment of one month to one year and a fine of 50 to €10,000, or one of these penalties, if they have acted with fraudulent intent.

Law of 17 July 1975 on corporate accounting

Article 16 (*failure to respect provisions on the keeping of books and records, and in particular on the complete nature of accounts*). – A fine of 50 to €10,000 shall be imposed on merchants, individuals and administrators, managers, directors or representatives of legal persons who knowingly violate the provisions of article 2 and 3 (1 and 3 [complete nature of accounts], of articles 4 to 9 or of the decrees implementing article 4 (6), article 9 (2), article 7 (2) and articles 10 and 11 [of this law]. They shall be liable for imprisonment of one month to one year and a fine of 50 to €10,000, or one of these penalties, if they have acted with fraudulent intent. [...]

Persons who, as statutory auditors, company auditors or independent experts, certify or approve the accounts, annual accounts, balance sheets and statements of earnings or consolidated accounts of companies, where the provisions of clause 1 are not respected, whether they are aware of this fact or have not taken the steps necessary to assure themselves that they were respected, shall be punished by a fine of 50 to €10,000. They shall be punished by imprisonment of one month to one year and a fine of 50 to €10,000, or one of these penalties, if they have acted with fraudulent intent. [...]

General audit rules of 1998 of the Institute of Company Auditors

Paragraph 1.3.4. When an auditor conducts his work, he must be alert to the possibility of fraud. The audit must be designed in such a way that it can reasonably be expected to detect any significant alterations in the financial statements that would indicate fraud. However, a standard audit is not supposed to guarantee that every fraud will be detected nor is the auditor expected to find every fraud.

5. Tax provisions

1992 Income Tax Code, Title II: Individual Income Tax, Chapter II: Tax Base. Section IV: professional income, subsection III: determination of net income – professional expenses

Article 57. The expenses listed below are not considered professional expenses unless they are justified by the production of individual record sheets and summary statements established in accordance with the forms and deadlines determined by the King:

1. Commissions, brokerage fees, commercial or other rebates, attendance fees or honorariums, occasional or not, bonuses, compensation or advantages of any kind that constitute professional income for the beneficiaries, with the exclusion of the remuneration stipulated in article 30.3 (remuneration of workers, remuneration of company directors, remuneration of assisting spouses).
2. Remuneration, pensions, compensation or allowances in lieu of, paid to staff members, former staff members or their successors, excluding social benefits exempt in the hands of beneficiaries.
3. Lump-sum indemnities paid to staff members to reimburse expenses paid on behalf of the employer.

Article 58. In cases where the payment of secret commissions by companies is recognised as common practice, the Minister of Finance, may, at the request of the taxpayer, authorize such payments to be considered as professional expenses, provided that the commissions do not exceed normal limits and that the company pays the taxes and related charges calculated at the flat rates fixed by the Minister, which may not be less than 20%.

This authorisation shall not be granted with respect to obtaining or retaining public procurement contracts or administrative authorisations.

1992 Income Tax Code, Title VII: establishment and recovery of taxes, Chapter X: Sanctions, Section II, Criminal Sanctions

Article 449. Without prejudice to administrative sanctions, any person who, with fraudulent intent or design to harm, violates the provisions of this code or of its implementing decrees shall be punished by imprisonment of eight days to two years and a fine of €250 to €12,500 or one of these penalties.

Article 450. Any person who, for the purpose of committing one of the violations indicated in article 449, has falsified public, business or private accounts, or has made use of such falsified accounts, shall be punished by imprisonment of one month to five years and a fine of €250 to €12,500, or one of these penalties.

Commentary to the tax code on the conditions governing the deductibility of secret commissions

Number 58/3 (overview of conditions). The aforementioned restrictive interpretation, which has been constantly confirmed in case law, means that, in order for secret commissions to be deductible as professional expenses, five conditions must be met simultaneously:

1. Payment of secret commissions must be necessary to counter foreign competition.
2. Payment of secret commissions must be recognised as current practice in the economic sector in question.
3. The taxpayer must submit an application to the Minister of Finance in order to qualify for the special regime.
4. The payment of secret commissions must not exceed normal limits.
5. The taxpayer must pay a fixed tax on the commission (minimum 20% [20.6% as of 1994: see point 1 of 58/19]).

Number 58/4 (1st condition: countering foreign competition). Parliamentary documents show that the special regime of article 47 (2) of the CIR (currently article 58, CIR 92) is applicable only to export industries and businesses, for which the payment of secret commissions is necessary for countering foreign competition (CE, 3.7.1963, SA Cotrico,

Bull. 414, page 2303). Generally speaking, it should be limited in its application to cases where it is important not to harm the national economy (see also 58/17).

Number 58/6. In assessing the facts that will determine this discretionary applicability, the interpretation should be fairly broad: as soon as it is demonstrated that without paying secret commissions the taxpayer would find himself in a position of inferiority vis-à-vis foreign competitors, the special regime can be granted.

6. Legislative provisions concerning public procurement

Law of 24 December 1993 on public procurement and on certain contracts for works, supplies and services

Article 11. Any act, agreement or understanding that distorts the normal conditions of competition is prohibited. Bids submitted pursuant to such an act, agreement or understanding must be rejected. If such an act, agreement or understanding leads to the award of a public contract, execution of the contract must be stopped, unless the competent authority determines otherwise in a substantiated decision. Application of this provision may in no case give rise to compensation for the person awarded the contract.

Extract from the Royal decree of 8 January 1996 on public contracts for works, supplies and services and public works concessions.

Article 17. Without prejudice to the provisions governing the approval of works contractors, any contractor may be excluded from the procurement (at whatever stage of proceedings) if that contractor:

3. has been convicted by a judgment with the force of res judicata for any offence that affects the contractor's professional integrity.

Proof that the contractor is not in one of the situations cited in paragraphs 1, 2, 3, 5 or 6 may be adduced by producing the following documents:

a) for 1, 2 or 3: an extract of the police record or an equivalent document delivered by a judicial or administrative authority of the country of origin, showing that these requirements have been met.

When such a document or certificate cannot be delivered in the country concerned, it may be replaced by a sworn declaration or a solemn declaration by the interested party given before a judicial or administrative authority, a notary or a qualified professional body in the country of origin.

Law of 20 Mar 1991 on the approval of works contractors

Article 4 (1). To obtain approval, the contractor must satisfy the following conditions:

4 a). The contractor must not have been convicted by a judgment with the force of res judicata for any offence that affects the contractor's professional integrity.

b). The contractor must not have been excluded from public procurement on the basis of article 19 (3) of this law.

Article 5. Registration in the official list of approved contractors in another member State of the European Communities is the equivalent of approval, pursuant to article 3, inasmuch as this approval is equivalent according to the conditions of article 4 (1).

Article 19 (1). A regional government may, upon the advice of the Commission, order the suspension or delisting of the approval of one or more contractors:

1. When the Commission has received a complaint from a public works manager concerning a listed contractor pursuant to article 2 with respect to one of the following grounds: [...]

d) failure to respect the prohibition of any act, agreement or understanding that would distort the normal conditions of competition, stipulated in article 11 of the Law of 24 December 1993 on public procurement and certain contracts for works, supplies and services, including acts of corruption punishable under articles 246, 247, 250 and 251 of the Criminal Code; [...]

3. A regional government may, upon the advice of the Commission, order the withdrawal of one or more authorisations for a contractor, or exclude a contractor from public procurement in the cases referred to in clauses 1.1 (b, d and e) and 1.2 (a and b).

4. The measures applicable under clauses 1.1 and 1.2 and 2 are proposed to the regional government by the Commission in a substantiated notice, after the contractor has been made aware of the charges against him and has had the opportunity to argue his defence.

The decision of the regional government is substantiated and notified by registered letter to the contractor. An extract of it is also published in the Belgian Monitor.

ANNEX 5: LIST OF INSTITUTIONS VISITED DURING THE ON-SITE VISIT

Government and public service institutions

Ministries

Federal Public Service Justice

General Directorate of Legislation, Basic Rights and Liberties

Office of General and International Criminal Questions

Office of Mutual Legal Assistance in Criminal Matters

Criminal Policy Office

Service public federal Budget, Service Contrôle de l'intégrité [Federal Public Service Budget, Integrity Control Office]

Federal Public Service Finances

Special Tax Inspection Administration (ISI)

Fiscal Affairs Administration (AAF)

Enterprise and Revenue Taxation Administration (AFER)

Direct taxes

Anti-fraud committee

Federal Public Service Foreign Affairs, External Trade and Development Cooperation

Financial Support Committee for Capital Goods Exports (FINEXPO)

Federal Public Service Economy, SMEs, the Middle-class and Energy

Ministry of Economy, Energy, Foreign Trade and Science Policy

Federal Public Service Office of the Prime Minister

General Coordination Office of Security and the Interior

Other public institutions

Judicial investigation and prosecution authorities

Court of Cassation, financial section

Court of Appeal of Brussels

General Counsel to the Court of Cassation

Federal Prosecutor of Belgium

Federal Prosecution Office, Bureau on Mutual Legal Assistance

Federal Prosecutor of Ghent

Crown Prosecutor of Ghent

Crown Prosecutor of Liège

Federal Police/General Directorate of the Judicial Police:

Economic and Financial Crimes Directorate

Central Office for the Repression of Corruption (OCRC)

Central Office for Organised Economic and Financial Crime (OCDEFO)

Central Office for Seizure and Confiscation (OCSC)

Financial Information Processing Unit (CTIF)

Anti-corruption Unit of the SJA of Liège

Export promotion agencies

Office National du Ducroire [Export Insurance/Credit Agency]

Walloon Export Agency (AWEX)

Brussels Export

Export Vlaanderen [Flemish Export Agency]

Société Belge d'Investissement International BMI-SBI [Belgian Society for International Investment]

Others

Banking, Finance and Insurance Commission
General Directorate for Development Cooperation
Coopération Technique Belge [Technical Cooperation of Belgium]
Commission on Accounting Standards

Private sector

Belgian banks
SME active in the industrial engineering sector
An armaments company
A leading energy company
A company specialized in accounting and audit

Professional organisations

Fédération des Entreprises de Belgique (FEB) [Belgian Federation of Enterprises]
Union des Entreprises de Bruxelles (UEB) [Brussels Union of Enterprises]
Union Wallonne des Entreprises (UWE) [Walloon Union of Enterprises]
Belgian – Chinese Economic and Commercial Council
Fédération multisectorielle
Fédération Financière Belge (FEBELFIN)
Institut des Réviseurs d'Entreprises (IRE)
Institut des Experts-comptables (IEC)
Institut Professionnel des Comptables et Fiscalistes Agréés (IPCF)

Labour Union Confederation

Fédération Générale de Travail de Belgique (FGTB)

Civil society and universities

Transparency International Brussels
Knack Magazine (Dutch-speaking magazine)
Facultés Universitaires Notre-Dame de la Paix Namur
Université de Gand
Université K.U. Leuven

ANNEX 6: COMPOSITION OF THE EXAMINING TEAM

Argentina:

M. Eugenio María CURIA
Director General of Legal Advisory Services
Ministry of Foreign Affairs

Ms. Myra Valverde DE MONTAÑÉS
Head of the Legal Division
Río Cuarto (Córdoba) Regional Office
General Directorate of Taxation
Federal Revenue Administration

Ms. María Alicia GINJAUME
Analyst, Anticorruption Office
Ministry of Justice and Human Rights

M. José IPOHORSKI LENKIEWICZ
Anticorruption Office
Ministry of Justice and Human Rights
Autonomous City of Buenos Aires

Switzerland:

M. Michel-André FELS
Deputy Prosecutor General
Office of the Attorney General of the Confederation
Berne

M. Jean-Bernard SCHMID
Investigating Magistrate
Republic and Canton of Geneva

M. Alexandre DUMAS
Special Tax Investigations Division
Federal Taxation Administration
Berne

Ms. Claire DAAMS
Assistant to the Federal Prosecutor
Office of the Attorney General of the Confederation
Berne

OECD Secretariat:

M. Frédéric WEHRLE
Evaluation Coordinator for Belgium
Principal Administrator
Anti-Corruption Division
Directorate for Financial and Enterprise Affairs

M. Joachim POHL
Administrator
Anti-Corruption Division
Directorate for Financial and Enterprise Affairs

M. David GAUKRODGER
Principal Administrator
Anti-Corruption Division
Directorate for Financial and Enterprise Affairs