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Anti-corruption legislation in Belgium

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I. Brief Introduction to the Legal System of Belgium

The Belgian legal system¹ is based on civil law and originates from the Napoleonic code. It has five formal sources of law: three mandatory sources - legislation (written), customary law (unwritten) and general principles of law (expressing superior values such as the “*non bis in idem*” principle in criminal law²) - and two merely “persuasive” sources: case law and doctrine. Indeed, in Belgium there is no system of precedents: with the exception of the Constitutional Court, a ruling is binding only on the parties to the case.

The Belgian Constitution establishes three separate and independent branches of government: legislative, executive, and judicial. As Belgium is a federal state, rules of law are issued on a national level (federal authorities) as well as on a regional level. Each authority is sovereign in relation to the other. Rules of law issued by the federal authorities are acts or laws; implementing instruments are royal or ministerial decrees. On a regional level, rules of law are called decrees (for the Flemish, French and German-speaking Communities – and by the Flemish and Walloon Regions) or

¹ Source and further information: *The European Judicial Network*, http://ec.europa.eu/civiljustice/legal_order/legal_order_bel_en.htm.

² Similar to the common law doctrine of double jeopardy, this civil law doctrine means that no one shall be tried twice for the same offense.

ordinances (Brussels Capital Region); implementing instruments are governmental or ministerial decrees.

The Belgian hierarchy of norms states that lower-level norms can never be in conflict with higher-level norms. Internally, the Constitution is the highest-ranking norm, but international and supranational instruments rank higher than any internal instruments and thus higher than the Constitution. In other words, European Regulations will for instance prevail in case of a conflict with Belgian law.

The judicial power is provided for by the courts and tribunals working within the framework of constitutional and legal provisions.

II. Belgium's Anticorruption Laws

In order to meet its international obligations resulting from Belgium's accession to the OECD Convention,³ the Protocol to the Convention on the Protection of the European Communities' Financial Interests,⁴ and the Convention against Corruption Involving Officials,⁵ Belgium adopted the Law of 10 February 1999,⁶ amended by the Law of 11 May 2007, to change the anti-bribery provisions of the Belgian Criminal Code by (i) updating the definitions with respect to corruption, taking into account the definitions used in international conventions; (ii) eliminating several "loopholes" (such as the requirement of a "bribery pact" between the payer and the recipient of the bribe); (iii) increasing penalties; and (iv) expanding the jurisdiction of the Belgian criminal courts for bribery committed abroad.

Bribery of Belgium public and foreign officials

New Chapter IV (art. 246 – art. 253) of the Belgian Criminal Code prohibits active or passive bribery of a public official, including foreign public officials and applicants for a public function. "Active bribery" is defined as proposing, promising, or offering, personally or by means of a third party, to a public official an advantage of any kind in order to induce him to properly exercise one of his duties, when such duty should be free of charge; to exceed his duties and act beyond his duties; abstain from properly exercising his duties; or commit an offence while exercising his/her duties. This is the "supply side" of bribery, that is, a bribe by one demanding the misconduct of a public or foreign official. It is in essence the same as the Foreign Corrupt Practices Act and implements the requirement of the OECD Convention.

³ Adopted by the Negotiating Conference on November 21, 1997 and ratified by Belgium on April 3, 1999.

⁴ 96/C 313/01.

⁵ Official Journal C 195 of 25 June 1997.

⁶ Published in the Belgian State Journal of 23 March 1999.

The new law goes a step beyond international norms to address the “demand side,” that is a request for a bribe by the official. This is essentially the definition of what the law calls “passive bribery,” that is, a request of or acceptance by the official, directly or indirectly by a third party, of an advantage of any kind for the same purposes as defined in “active bribery.

A public official is defined as “a person who exercises a public function,” irrespective of the title. The law applies to public officials as well as to applicants for a public function and to persons who falsely represent themselves to be public officials. The law equally applies to foreign public officials, defined as those who exercise a public function for a foreign state or an international public organization. The Criminal Code was also amended to allow the prosecution, in Belgium, of bribery of Belgian public officials abroad or of foreign public officials in Belgium.⁷

The statute defines a bribe as an offer, promise to pay, or payment *before* the exercise of the duties by the public official. A payment made after the fact is not by definition a bribe: a payment made to a public official *after* the exercise of his duties will not constitute a bribe if it was not offered or promised *before* and therefore did not induce the official to act. In practice, a court may be skeptical that a large payment made after the official acts was not offered or promised before he took the act.

Companies as well as individuals may be prosecuted. The Public Prosecution may institute the Public Action not only against the individuals acting on behalf of the incorporated body – usually the directors – but also against the incorporated body itself. Sanctions range from (high) money penalties through temporary suspension of the activity of the incorporated body, up to the winding up of the incorporated body.

Sanctions

Depending on the nature of the offence, sanctions vary from a 6 month to a 3 year imprisonment and fines ranging from €100 up to €100,000 (indexed in 2012 to €600 and €600,000 respectively) or even up to €200,000 (indexed in 2012 to €1,200,000) if the public official is a police officer or a magistrate. A company may have its limited liability status suspended or may be forced to be dissolved and in fact this sanction has been imposed. Given the severity of the sanction of dissolution, it may only be implemented when the company was acting illegally and beyond the purposes set forth in its articles of association.

Anticorruption matters are handled by the criminal courts. The defendant and the prosecution may negotiate monetary settlements in lieu of criminal prosecution in a case where the offense is punishable by a term of imprisonment of less than two years. Any such settlement must include reparations to the victims of the bribe, confiscation of any benefit obtained from the offense, and approval by the appropriate court.

⁷ Art. 10 Preliminary title Criminal Code, §1 and §2.

Facilitation payments

The law does not provide for any exception, such as facilitation payments or “grease.”

Civil actions

An injured party may bring a civil action, which may be tried concurrently with the criminal trial or separately in a civil court, after the criminal case has been concluded. In the latter case attention has to be paid to the statute of limitation. If the civil litigation has already started before the criminal litigation, the civil litigation will be suspended until the end of the criminal litigation. The statute of limitations is five years for a civil action, but a civil action may not precede a criminal one and may be extended to ten years in the event that the criminal investigation has not been timely concluded.

III. Evaluation

In its 2008 follow-up report, the OECD Working Group on Bribery raised three concerns. First, insufficient measures have been taken by the Government to raise awareness of the offense of bribing foreign officials and to the extent measures were taken, they focused on domestic bribery and not on bribery of foreign officials, which is the thrust of the OECD Convention. Second, there is a lack of protection of whistleblowers, a criticism also leveled by Transparency International. Third, the draft reform bill on criminal responsibility of legal persons, which has not yet been adopted, lacks clarity on the issue of intent required for the prosecution of transnational bribery.

Ernst & Young’s Global Fraud Survey 2012 reports that Belgian entrepreneurs have fewer objections than their West-European colleagues to giving “financial stimuli” in order to obtain contracts.

IV. Texts

- A. Council Act of 27 September 1996 drawing up a Protocol to the Convention on the protection of the European Communities' financial interests (Official Journal C 313 of 23.10.1996)
[\[http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996F1023\(01\):EN:HTML\]](http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996F1023(01):EN:HTML)
- B. Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (Official Journal C 195 , 25/06/1997 P. 0002 - 0011)
[\[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41997A0625\(01\):EN:HTML\]](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41997A0625(01):EN:HTML)
- C. Law of 10 February 1999 on the repression of corruption (published in the Belgian State Journal of 23 March 1999)

[http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1999021039&table_name=loi]

- D. Law of 11 May 2007 modifying the legislation with respect to the battle against bribery (B.S., 4 May 2007, err., B.S., 24 May 2007)

[http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2007051142&table_name=loi]

- E. Ernst & Young's Growing Beyond: a place for integrity – 12th Global Fraud Survey

[[http://www.ey.com/Publication/vwLUAssets/Global-Fraud-Survey-a-place-for-integrity-12th-Global-Fraud-Survey/\\$FILE/EY-12th-GLOBAL-FRAUD-SURVEY.pdf](http://www.ey.com/Publication/vwLUAssets/Global-Fraud-Survey-a-place-for-integrity-12th-Global-Fraud-Survey/$FILE/EY-12th-GLOBAL-FRAUD-SURVEY.pdf)]

- F. Ernst & Young's Growing Beyond: a place for integrity – 12th Global Fraud Survey findings for Belgium

[http://www.slideshare.net/EY_Belgium/belgium-12th-global-fraud-survey]