

BELGIUM

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal issues

The Convention was signed on 17 December 1997. The Ratification Bill was adopted by the Senate on 20 April 1999 and by the Chamber of Representatives on 29 April 1999. The Ratification Act received royal approval on 9 June 1999. Belgium deposited its ratification instrument with OECD on 27 July 1999.

To meet the requirements of the OECD Convention, and more generally to modernise the Criminal Code's provisions on bribery, which dated from 1867 and had not been substantially amended since then, the Belgian Parliament adopted two Acts. The first is the Bribery Prevention Act (hereinafter "the Bribery Prevention Act of 10 February 1999"), adopted by Parliament on 4 February 1999 and signed by the King on 10 February 1999, which entered into force on 3 April 1999, following publication in the *Moniteur belge* (Official Gazette) on 23 March 1999. This Act amends in particular the provisions contained in Title IV of the Criminal Code in Articles 246-252 of Chapter IV on "The Bribery of Public Officials". The second Act is that of 4 May 1999 (hereinafter "the Act of 4 May 1999 Establishing the Criminal Liability of Legal Persons"), which entered into force on 3 August 1999. This Act establishes the criminal liability of legal persons, henceforth subject to the provisions the Bribery Prevention Act of 10 February 1999.

The main objectives of the amendments to the Criminal Code, as explained by the Minister of Justice in his introductory presentations to the Senate and later to the Chamber of Representatives, are three-fold¹. The first objective is to cover new offences contained in the OECD Convention and not previously covered by Belgian legislation (bribery of foreign public officials and international civil servants), as well as other offences such as bribery of an applicant for a public function, trading in influence and private corruption. The second objective is to fill some gaps in the field of sanctions, primarily by adapting penalties to current penological trends (higher minimum and maximum penalties for sentences involving deprivation of liberty and for fines), by introducing new administrative sanctions against public works contractors who engage in bribery, and by amending the Income Tax Code to limit the tax deductibility of bribes. The third objective is to broaden the extraterritorial jurisdiction of Belgian courts, in particular as regards bribery involving foreign public officials.

The Convention and the Belgian legal system

Although the status of international conventions in domestic law is not defined by the Constitution, the Belgian authorities have indicated that the Convention will take precedence over national law. It was necessary to pass an Implementing Act as the Convention is not directly applicable in the national legal system. The Commentaries on the OECD Convention have interpretative value only.

1. ARTICLE 1. THE OFFENCE OF BRIBERY OF FOREIGN PUBLIC OFFICIALS

In order to meet the requirements of Article 1 of the Convention, Belgium has passed the Bribery Prevention Act of 10 February 1999 to amend Articles 246 and 247 of the Criminal Code, which now cover not only bribery of national civil servants but also of foreign public officials, including officials of public international organisations. Thus, Article 246 § 2 of the Criminal Code lays down that "the act of

1. *Rapport fait au nom de la commission de la justice de la Chambre le 29 janvier 1999, Doc. Parl., Chambre, (1997-1998), No. 1664/3, pages 3-8.*

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”². The offence of active bribery, which was always a misdemeanour under the previous legislation, can now be qualified as a crime when it involves a judge acting in his judicial capacity.

1.1 Elements of the Offence

The components of the offence set out in Article 1 of the Convention are covered as follows:

1.1.1 any person

Pursuant to the general provisions of the Criminal Code as amended by the Act of 4 May 1999 Establishing the Criminal Liability of Legal Persons, all persons -- whether natural or legal -- may be prosecuted for bribing foreign public officials.

1.1.2 intentionally

Under Belgian law, bribery of a foreign public official is an intentional act. The general principle of criminal law by which intent must be a component of any criminal offence or misdemeanour also applies to legal persons. According to the Belgian authorities, whenever the law does not state that the offence must be committed with the specific intent known as special intent (“*dol spécial*”), under case law and legal doctrine the theory of general intent (“*dol général*”) applies, and it is sufficient that the act is committed knowingly and willingly.

1.1.3 to offer, promise or give

Under Article 246 § 2 of the Criminal Code, the act of “proposing (...) an offer, promise or advantage” constitutes an offence. Consequently, the mere act of making such a proposal constitutes bribery, and is of itself an offence. It does not matter whether the foreign public official accepted or refused the offer or promise, or was even aware that they were being made.

1.1.4 any undue pecuniary or other advantage

Article 246 § 2 of the Bribery Prevention Act of 10 February 1999 lays down that “the act of proposing (...) an advantage of any kind shall constitute active bribery”. The concept of “advantage of any kind” is very broad, in accordance with the way in which case law already interpreted the concepts of offers, promises, donations or gifts contained in the previous Article 246³. What matters is not the nature or value of the advantage, but the connection between what is given and the objective sought, i.e. to induce the

2. For the types of behaviour specified in Article 247, see *infra* 1.1.8.

3. *Rapport fait au nom de la commission de la justice du Sénat, Doc. Parl.*, Sénat (1997-1998), No.1-107/5, page 71; *Rapport de la commission de la justice de la Chambre*, page 12. When the Bill was being examined by the Chamber of Representatives on 29 January 1999, the representative of the Minister of Justice said that an advantage of any kind “is a very broad concept that covers a promise, donation, gift, reduction or bonus. (...) It is important to specify that in accordance with case law, the advantage must always be of a pecuniary nature”. Nevertheless, the comment on the pecuniary nature of the advantage needs to be interpreted in light of the fact that these concepts were already interpreted broadly under the previous law, and the promise of sexual intercourse, for example, was already considered as an advantage: P.E. Trousse, *R.D.P.*, 1967-1968, page 996 and Cass., 25 March 1957, *R.D.P.*, 1956-1957, page 853. Moreover, Commentary 7 on the Convention is fully applicable under Belgian law according to the Belgian authorities.

person exercising a public function to behave in a certain way. For this reason, according to the Belgian authorities, so-called facilitation payments fall within the scope of Article 246 § 2 if they match the other components of the act of bribery.

1.1.5 whether directly or through intermediaries

Under Article 256 § 2 of the Bribery Prevention Act of 10 February 1999, the act of “proposing directly or through intermediaries” constitutes bribery. The third party may be an accomplice or a co-author⁴, or may in good faith be unaware of the offence. Moreover, it is not necessary that the official be aware of the intermediary’s role for an offence to be constituted.

1.1.6 to a foreign public official

The Bribery Prevention Act of 10 February 1999 extends the provisions on bribery to three categories of persons who do not exercise a public function within the Belgian legal system: “foreign public officials”, “international civil servants” and applicants for public functions and “fictitious public officials”.

Foreign public officials

The Bribery Prevention Act of 10 February 1999, in defining who is considered to be a person exercising a public function abroad, makes a distinction between persons who exercise a public function in a Member State of the European Union and those who do so in other foreign States (non-Members of the European Union). Article 250 § 2 lays down 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”. The same provision states that when this State is outside the European Union, reference should also be made to Belgian law by verifying “whether the function concerned is also considered to be a public function under Belgian law”. According to the Belgian authorities, a foreign State is any State recognised under international public law.

The justification for the first provision, as given in the *Rapport fait au nom de la commission de la justice du Sénat*, stems in particular from the Additional Protocol of 27 September 1996 to the Convention on the protection of the European Communities’ financial interests and from the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union⁵. As for the imposition of two requirements for defining public officials, it is “aimed at taking into account the potentially very great differences between what is considered to be the exercise of public functions in very different legal systems”⁶. According to the Belgian authorities, even though the imposition of two requirements may appear restrictive, the broad scope given to the concept of “a person exercising a public function” under Belgian law, which may well be broader than the definition used in the

4. Cass. 23 Décembre 1999, (Title II, Chapter II).

5. *Rapport fait au nom de la commission de la justice du Sénat le 1er juillet 1998, Doc. Parl., Sénat*, (1997-1998), No. 1-107/5; and *Official Journal of the European Communities* No. C 313 of 23 October 1996, pages 2-10, *Official Journal of the European Communities*, No. C 195 of 25 June 1997, pages 1ss. Article 1 para. 1 c) of the Additional Protocol of 27 September 1996 lays down that, for the purposes of said protocol, “the term ‘national official’ shall be understood by reference to the definition of ‘official’ or ‘public officer’ in the national law of the Member State in which the person in question performs that function for the purposes of application of the criminal law of that Member State. Nevertheless, in the case of proceedings involving a Member State’s official initiated by another Member State the latter shall be bound to apply the definition of ‘national official’ only when that definition is compatible with its national law”.

6. *Rapport fait au nom de la commission de la justice du Sénat, op. Cit.*, page 29.

OECD Convention must be borne in mind⁷. This reference to Belgian law is also aimed at excluding cases in which the function is in no way of a public nature.

The definition of what constitutes the offence of bribery under Belgian law is identical, whether the public officials, either Belgian or foreign, are ordinary civil servants or persons holding high office (ministers, elected officials, magistrates, etc.). If such differences exist, they only concern procedure and the applicable penalty (see *infra* 3.1).

International civil servants

Article 251 § 1 of the Criminal Code extends the application of Articles 246-249 to the case of bribery involving “a person who exercises a public function in a public international organisation”.

Article 251 applies when the following two conditions are met: the organisation must be governed by “public international law”, and the person must actually perform a public function within the international organisation in question. With respect to the first condition, the Belgian authorities state that non-governmental organisations are not covered, nor are charitable or humanitarian organisations or international organisations of operational public services (Interpol) or international sports organisations (FIFC, IOC, etc.)⁸. As for the second condition, Article 251 § 2 of the Criminal Code lays down that the definition of persons performing a public function within the international organisation “is determined in accordance with the regulations of the public international organisation to which the person belongs”.

Just as the law does not distinguish between persons who exercise a public function in Belgium on the basis of whether they are ordinary civil servants or persons holding high office, neither does it make any distinction among persons who exercise public functions in an international organisation: whatever the type of function they exercise, they are covered by the law. If such differences exist, they only concern procedure and the applicable penalty (see *infra* 3.1).

Applicants for public functions and “fictitious public officials”

The new Article 246 § 3 extends the provisions on bribery to 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.

The purpose of this provision is, according to the Belgian government, to be able to sanction bribery from its inception, even if it takes place between private persons who anticipate that one of them will later exercise a public function and perform an act at that time. Its aim is to make it possible to sanction persons who subsequently exercise public functions as well as those who do not. The case of persons who

7 . D. Flore, *L'incrimination de la corruption: La nouvelle loi belge du 10 février 1999*, Brussels: Editions La Charte, 1999, page 85. The concept of “any person exercising a public function under Belgian law” covers all categories of persons who, whatever their status, exercise a public function of any kind (federal, regional, community, provincial, communal civil servants or public officials; elected officials [i.e. any persons holding legislative, communal or other elected office]; public officers; temporary or permanent holders of a portion of public power or authority; and persons, even private individuals, responsible for a public service mission...). Moreover, according to the Belgian authorities, the managers of private enterprises are deemed to exercise public functions to the extent that the act of bribery affects a public service mission entrusted to the enterprise. The government’s aim is that the crucial factor should not be the status of the person concerned, but the function exercised, which must be of a public nature. This functional approach is in line with the interpretation given by previous case law. Thus, a political party official in a single party country is considered to be a public official if he performs public functions.

8 . D. Flore, *L'incrimination de la corruption: La nouvelle loi belge du 10 février 1999*, Brussels: Editions La Charte, 1999, page 86.

“mislead others into believing” that they currently exercise such a function or will do so in the future falls within the ambit of the case law on abuse of confidence⁹.

1.1.7 for that official or for a third party

The offence covered by Article 246 § 2 of the Bribery Prevention Act of 10 February 1999 is constituted irrespective of whether the offer, promise or advantage of any kind is proposed for the benefit of the person who exercises a public function or for a third party. It is not necessary that the advantage benefit the person being bribed, but may benefit a third party: personal enrichment is not a necessary component of the offence, and there is no requirement to prove a connection between the public official and the third party.

1.1.8 in order that the official act or refrain from acting in relation to the performance of official duties

It is the new Article 247 of the Criminal Code, as amended by the Bribery Prevention Act of 10 February 1999, that defines the different types of behaviour that bribery may seek to induce. Bribery can be aimed at inducing a public official to perform a proper but “unpaid” official act, to engage in an improper act while carrying out official duties or refrain from a proper one, or to commit a criminal offence or misdemeanour in the course of official duties.

- “to perform a proper but unpaid official act”, covers an act carried out by an official in strict application of the applicable rules. Such acts comply with the obligations of the person exercising the public function, who would have acted in the same way even if no bribe had been proposed¹⁰. The Belgian authorities indicate that a “paid” act is merely an act for which a certain remuneration is required. It is an old term used to distinguish bribery from misappropriation. What is punishable when an official accepts a bribe to perform a proper but “unpaid” act is the fact that he agrees to accept compensation to perform a proper act even though it is deemed free of charge. However, an official is guilty of misappropriation if he knowingly accepts or requires payment that is not due or that exceeds what is due for a proper, paid official act.
- “to engage in an improper act while carrying out official duties or refrain from a proper one” refers to behaviour that does not comply with the public official’s obligations, but which is influenced by the proposal, although not necessarily constituting an offence in itself.
- “to commit a criminal offence or misdemeanour in the course of official duties” might refer, for example, to falsification of documents for a person responsible for the awarding or signature of a contract, fraud on behalf of a person responsible for granting subsidies and violence against persons or fraudulent removal of evidence for a police official¹¹.

The common feature of the three categories of behaviour is that they concern official acts or acts carried out while exercising official duties. According to the Belgian authorities, to propose an advantage to a person exercising a public function in order to induce him to do something that has nothing to do with his function might possibly constitute another offence, if the act is contrary to the law, but does not constitute bribery. This being said, case law -- which will also apply to the new provisions of the Criminal Code since they did not amend the content of the previous offence -- interprets the concept of an official act in

9. *Rapport fait au nom de la commission de la justice du Sénat, op. Cit.*, page 41 and 63.

10. See *Rapport fait au nom de la commission de la justice du Sénat, op. Cit.*, page 26.

11. See D. Flore, *L’incrimination de la corruption: La nouvelle loi belge du 10 février 1999*, Brussels: Editions La Charte, 1999, page 9.

broad terms. It is not necessary for the person to have decision-making power; it is sufficient that the official participates in some way in the decision-making process or its preparation¹². An official act may even consist merely of “approaching or intervening with higher authorities”¹³. Furthermore, it not only covers acts actually performed, but also acts left unperformed through omission, even if this failure to act is not in breach of the obligations of the person exercising the public function.

In addition to bribery relating to a proper act, an improper act or the commission of an offence, the legislation introduces into Belgian law a new offence in the field of bribery concerning the use of influence. Pursuant to the new Article 247 § 4 of the Criminal Code, trading in influence is defined as bribery that “is aimed at inducing a person exercising a public function to use the real or supposed influence he possesses because of his function to induce a public authority or administration to perform or refrain from an act.” The new offence is particularly broad since it covers acts that may or may not be a part of the public official’s duties; similarly, it punishes not only misuse but any use of influence. Lastly, the influence may be only presumed: it is sufficient that the person making the proposal has reason to believe that the official actually does have influence.

1.1.9 in order to obtain or retain business or other improper advantage

Belgian legislative provisions on bribery do not mention the goals of bribery specifically. Whatever the objective sought, including to obtain or retain business or other improper advantage, it is covered by the legislation.

1.1.10 in the conduct of international business

As stated above, the offence of bribery of a foreign public official is not limited to obtaining advantages in the sphere of international business.

1.2 Complicity

Article 1(2) of the Conventions requires Parties to take the steps necessary to criminalise complicity, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official. Complicity, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official, is covered by Articles 66 and 67 of the Criminal Code on co-authors and accomplices.

Article 66 of the Criminal Code lays down that “the following shall be punished as the authors of a criminal offence or misdemeanour: (i) anyone who has committed the offence or directly co-operated in committing it; (ii) anyone who has in any way aided or abetted those committing the offence, if without their assistance it could not have been committed; (iii) anyone who, through gifts, promises, threats, misuse of authority or power, plots or deception, has directly caused the offence; (iv) anyone who, through what they have said in meetings or public places, or what they have written or published or through any kinds of pictures or symbols posted, distributed or sold, placed on sale or put on public view, has directly caused the offence to be committed, without prejudice to the penalties imposed by law upon those who incite others to commit crimes or offences, even if this incitement is without effect.”

As for Article 67 of the Criminal Code, it provides that “the following shall be punished as accomplices to a criminal offence or misdemeanour: (i) anyone who has given instructions to commit the offence; (ii) anyone who has procured arms, tools, or any other means used to commit the offence, with full knowledge that they would be used for that purpose; (iii) anyone who, apart from the cases provided for under § 3 of

12. Cass., 9 décembre 1997, *F.J.F.*, 1998/1, page 5.

13. Cass., 13 juillet 1960, *R.D.P.*, 1960-1961, page 234.

Article 66, has knowingly aided or abetted the author or authors of the offence in preparing, facilitating or committing the offence”.

Apart from the case of Article 66 (iv), the act of corruption has to be effective to constitute co-perpetration and complicity.

Co-authors receive the same punishment as authors of an offence (Article 66), while accomplices to a crime are punished by the penalty immediately below that they would have received had they been the author of the offence (Article 69). Accomplices of a misdemeanour receive a penalty not exceeding two-thirds of the penalty that they would have received had they been the authors of the offence.

1.3 Attempt and conspiracy

Article 1(2) of the Convention requires each Party to take any measures necessary to establish that attempt and conspiracy to bribe a foreign public official are offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

Attempt

The attempt to commit a criminal offence or misdemeanour is covered by Articles 51, 52 and 53 of the Criminal Code. “There is punishable attempt when the intent to commit a criminal offence or misdemeanour has been demonstrated by outward acts that constitute a first step towards committing this offence, and which were only stopped or only proved ineffective due to circumstances beyond the author’s control”. “Attempt” to commit a misdemeanour must be provided for in legislation, which is not the case in the Bribery Prevention Act of 10 February 1999 for bribery of a public official (national or foreign). The Belgian authorities state that the unilateral act of proposing a bribe, which might be considered as attempt, constitutes a specific offence in the case of bribery. The latter is now considered to be an “instantaneous” offence, perpetrated as soon as the proposal is made. Accordingly, it was not considered necessary to sanction an attempt to commit the unilateral act of proposing a bribe. However, Article 52 covers attempt for all crimes, including attempt to bribe a judge, punished by the penalty directly below that imposed for the offence itself.

Conspiracy

Conspiracy, as understood in Common law jurisdictions, is not punishable under Belgian law.

2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS

Under Article 2 of the Convention, each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official. The criminal liability of legal persons has been established under the Belgian legal system since the entry into force, on 3 July 1999, of the Act of 4 May 1999 introducing such liability, which amends the Criminal Code, in particular by inserting an Article 5 defining liability, and Articles *7bis*, *35-37bis*, and *41bis* on the applicable penalties. This Act also amends other legal provisions, such as the Code of Criminal Procedure and the Code of Criminal Investigation.

Legal entities subject to criminal liability

The scope of the criminal liability of legal persons is broad, since the legislation covers both public and private law legal persons, companies including partnerships¹⁴. The new Article 5, para. 4 of the Criminal

14. Article 5 of the Criminal Code lays down that the following are considered to be legal persons: temporary associations, joint ventures, companies referred to in Article 2, para. 3, of the co-ordinated Acts on

Code lays down that the following may not be considered as legal persons having legal liability: the federal State, the regions, communities, provinces, Brussels and its suburbs, communes, intra-communal territorial bodies, the French Community Commission, the Flemish Community Commission, the Joint Community Commission and public welfare centres.

The meaning of criminal liability

Under the new Article 5, para. 1 of the Criminal Code, “all legal persons are criminally liable for offences that are intrinsically connected with the attainment of their purpose or the defence of their interests, or for offences that concrete evidence shows to have been committed on their behalf”. The requirement that there be an intrinsic connection between the legal person and the offence is intended to ensure that the legal person is not liable for acts committed by persons connected with it who merely took advantage of the legal or physical framework of the legal person to commit offences in their own interest or on their own behalf¹⁵.

Invoking criminal liability

According to the Belgian authorities, the criminal liability of legal persons is not a derived liability. In other words, for there to be proceedings and a conviction against a legal person, there is no need for evidence that an offence has been committed by an individual natural person within the legal person, for whose behaviour it is responsible. For this reason, the new provisions of the Criminal Code do not specify the natural persons or bodies on whose account the criminal liability of the legal person might be invoked, since the law does not specify how responsibility for acts is to be attributed to legal persons. It was considered that this was a factual matter that is best left to the assessment of the judge. The judge will decide not only on the basis of the attitude of the legal or statutory bodies, but also of bodies, which are not identified in the statute or by law. The liability of a legal person may also be the consequence of material acts committed by certain of its employees or representatives.

This said, the general principle of criminal law under which the element of intent is a component of any offence also applies to legal persons. It must be established that the offence was the result of an intentional decision taken within the legal person, or, through a specific relationship of cause and effect, of negligence by the legal person¹⁶. According to the Belgian authorities, inasmuch as the legal definition of an offence requires general or special intent, the decision will probably have been made at a higher level. But the law would not exclude that a legal person might be held liable for the action of a person at a lower level.

It should be noted that the principle retained by Belgian law excludes multiple responsibility, except in cases where it is established that the offence can be attributed personally to a natural person who acted intentionally. Thus, Article 5, para. 2 provides that: “When the liability of a legal person is invoked only because of the action of a known natural person, only the person who committed the more serious offence can be convicted. If the known natural person committed the offence knowingly and willingly, he can be convicted at the same time as the legal person liable.” Thus, two cases are distinguished depending on whether the known natural person committed an offence or whether he committed this offence knowingly and willingly. In the first case, the judge will have to choose to sanction either the natural person or the legal person. In the second, both the natural and legal persons can be convicted.

companies, as well as companies in the process of being established and civil partnerships that have not been constituted as a company.

15. *Rapport fait au nom de la commission de la justice du Sénat*, p. 18.

16. *Proposition de loi instaurant la responsabilité pénale des personnes morales*, Vandenberghe, *Doc. Parl.*, 1-1217/1, 23 December 1998, p. 2. It covers, for example, the case in which defective internal organisation of the legal person, inadequate safety measures or unreasonable budget restrictions created conditions that made it possible to commit the offence.

3. ARTICLE 3. SANCTIONS

The Convention requires the Parties to establish “effective, proportionate and dissuasive criminal penalties” comparable to the penalties applicable to the bribery of the Party’s own public officials. The Convention also requires that, in the case of natural persons, the criminal penalties include “deprivation of liberty sufficient to enable effective mutual legal assistance and extradition”. The Convention further requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of “comparable effect” are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

The new provisions of the Criminal Code on bribery provide for penalties that deprive those convicted of liberty and higher fines for natural persons found guilty of bribery of a public official. They also provide for monetary penalties, and where appropriate winding-up¹⁷, for legal persons found guilty of bribing public officials. Additional administrative and civil penalties may be added to these criminal ones. Persons guilty of bribery of a person who exercises a public function in a foreign state (Article 250 of the Criminal Code) or in a public international organisation (Article 251) are subject to the same penalties as in cases of bribery of national public officials. The law considers them as being equivalent.

3.1/ Criminal penalties for bribery of a domestic or foreign official

3.2

In applying criminal penalties for bribing domestic or foreign officials, the new law maintains two distinctions, on the basis of the act and person in question¹⁸. The table on penalties provided below shows the effects of these distinct systems.

- The first distinction is between penalties of principle -- corresponding to cases of a unilateral act of bribery, i.e. a mere offering of a bribe -- and penalties in cases in which the offer was accepted. In these latter cases, a “bribery agreement” exists, i.e. an agreement between both parties to the effect that the person exercising a public function will act in a specific way in exchange for a specific advantage, that constitutes an aggravating circumstance.¹⁹

- The second distinction concerns the function of the public official to whom the bribe was offered. For acts of bribery directed at persons exercising specific functions in the field of the investigation and the prosecution of offences (police officials, officers in the judicial police and members of the public prosecutor’s office -- Article 248 of the Criminal Code) or having judicial duties (arbitrators, assessor judges, jurors and judges -- Article 249 of the Criminal Code), penalties are more severe than for bribery of other public officials (Article 247 of the Criminal Code)²⁰. The justification for the government’s

17. The new Article 35, para. 1, of the Criminal Code provides that “winding-up may be ordered by the judge when the legal person was created intentionally to carry out the punishable activities for which it is being convicted or when its purpose was intentionally subverted in order to carry out such activities”.

18. During the parliamentary discussion of the Bill, it was considered that to do away with this division of penalties into different categories is contrary to the current structure of the Criminal Code, and that to do so would require a fundamental debate on criminal law.

19. *Rapport fait au nom de la commission de la justice du Sénat, op. Cit.*, page 8. The agreement, which is most often oral but may be tacit, may be proved in any legal way and may be deduced in particular from acts or behaviour pointing to prior agreement and the necessary relation of cause and effect between the offers, promises or gifts and the action of the person responsible for the public service. Cass. 23 December 1998, (so-called “Agusta-Dassault” case), *R.G.* No. A 94.0001.F (Title II, Chapter II).

20. Article 249 only applies if the bribery is aimed at an official performing a judicial function. This means that if a judge is bribed to perform a purely administrative act in the course of his duties or to use his influence with another judicial or administrative body, he would be punishable under Article 247 rather

amendment is that “bribery of such persons affects law and order more directly and seriously than other forms of bribery, inasmuch as these persons are assigned by law to duties essential to maintaining the rule of law and the administration of justice (...)”²¹. The provision on aggravating circumstances is aimed specifically at protecting the judicial function of these persons and does not apply to trading in influence, for which they are punished in the same way as would be any other public official.

than Article 249. However, the application of Article 248 on police officials is not dependent on the incriminated act being part of the function of investigating and prosecuting offences, for the police perform both judicial and administrative duties.

21. *Rapport fait au nom de la commission de la justice du Sénat, op. Cit.*, page 44 and 45.

PENALTIES APPLICABLE FOR UNILATERAL ACTS OF BRIBERY (BOLD FACE)
AND FOR "BRIBERY AGREEMENTS"

Act of the public official	Natural persons			Legal persons	
	Fine BF (M=million)	Imprisonment	Additional penalties Loss of rights Public procurement	Fine BF (M=million)	
Article. 247 Ordinary law, public officials in general					
247 § 1 proper act	20.000 to 2M	6 months to 1 year	Article 33	Downgrading, suspension or withdrawal of contractor's accreditation	600.000 to 4.8M
	<i>20.000 to 5M</i>	<i>6 months to 2 years</i>			600.000 to 9.6M
247 § 2 improper act	20.000 to 5M	6 months to 2 years	Optional	Optional	600.000 to 10M
	<i>20.000 to 10M</i>	<i>6 months to 3 years</i>			600.000 to 20M
247 § 3 criminal offence or misdemeanour committed by the official	20.000 to 10M	6 months to 3 years			600.000 to 20M
	<i>100.000 to 20M</i>	<i>2 years to 5 years</i>			2.4M to 40M
247 § 4 influence	20.000 to 2M	6 months to 1 year			600.000 to 4.8M
	<i>20.000 to 5M</i>	<i>6 months to 2 years</i>			600.000 to 10M
Art. 248 Police officials and members of the public prosecutor's office					
247 § 1 proper act	20.000 to 4M	6 months to 2 years	Article 33 Optional		600.000 to 9.6M
	<i>20.000 to 10M</i>	<i>6 months to 4 years</i>			600.000 to 20M
247 § 2 improper act	20.000 to 10M	6 months to 4 years			600.000 to 20M
	<i>20.000 to 20M</i>	<i>6 months to 6 years</i>			600.000 to 40M
247 § 3 criminal offence or misdemeanour committed by the official	20.000 to 20M	6 months to 6 years			600.000 to 40M
	<i>20.000 to 40M</i>	<i>6 months to 10 years</i>			600.000 to 80M
Art. 249 Judges, jurors, arbitrators and assessor judges					
249 § 1 arbitrator	20.000 to 10M	1 to 3 years	Article 33 Optional		1.2M to 20M
	<i>100.000 to 20M</i>	<i>2 to 5 years</i>			2.4M to 40M
249 § 2 juror or associate judge	100.000 to 20M	2 to 5 years	Article 32 Optional		2.4M to 40M
	<i>100.000 to 20M</i>	<i>5 to 10 years</i>			6M to 48M
249 § 3 judge	100.000 to 20M	5 to 10 years	Article 31 Automatic		6M to 48M
	<i>100.000 to 20M</i>	<i>10 to 15 years</i>			12M to 72M

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 may be either cumulative or alternative, while all the others are cumulative.

The exchange rate at 1 September 1999 was 1 US dollar for 38.60 Belgian francs (BF), i.e. 2.60 US dollars (or 2.48 euros) for 100 BF.

The legislation is silent on how penalties within the limits laid down by the law should be set. Sentencing is left fully to the discretion of the judge, pursuant to the Act of 4 October 1864, which provides that it is for the courts, investigating authorities and the public prosecutor's office to assess whether there are any mitigating circumstances. Only the aggravating circumstances of Articles 248 and 249 and the "bribery agreement" are specified *a priori* by law.

The Belgian authorities indicate that one of the objectives of the Bribery Prevention Act of 10 February 1999 was to increase penalties. Consequently, in the spirit of the governmental note on criminal policy and the enforcement of penalties, minimum prison sentences for most forms of bribery were raised to six months, and maximum fines were increased in line with the amounts provided for by the new laws for offences of the same seriousness, such as money laundering or fraud. The Belgian authorities consider that the sanctions applied are now effective, proportionate and dissuasive.

3.3 Penalties and mutual legal assistance

According to the Belgian authorities, the measures entailing deprivation of liberty under Articles 246-249 of the new Criminal Code are sufficient for effective mutual legal assistance, the maximum penalty required being at least one year, making it possible to issue letters rogatory regarding compulsory measures, such as searches and seizures.

3.4 Penalties and extradition

Bribery of a foreign public official is deemed to constitute an extraditable offence under Belgian law when the penalty allows extradition, under Section 1 § 2 of the Belgian Act of 15 March 1874 on extradition. This Article provides that extradition is allowed for acts punishable under Belgian and foreign law by a penalty entailing deprivation of liberty for a maximum of at least one year. This therefore includes all cases of bribery covered by the Bribery Prevention Act of 10 February 1999.

Furthermore, Article 2 of the European Convention on Extradition of 13 December 1957 lays down the same conditions of implementation. 38 countries, including Belgium, have ratified this Convention.

3.6 Seizure and confiscation of the bribe and its proceeds

There are no specific provisions regarding confiscation and seizure of bribes and their proceeds in Belgian law. The provisions of ordinary law apply in such cases.

Confiscation

The ordinary law on confiscation is set out in Articles 42-43^{ter} of the Criminal Code. Article 42 provides for confiscation of "items that are the object of the offence or that were used or intended to be used to commit the offence (when they belong to the convicted person), any proceeds of the offence and patrimonial advantages derived directly from the offence, as well as any goods and assets acquired in exchange for these advantages and any income derived from investing them". It is to be noted that although the court is required to confiscate the advantage received (for example, the bribe and its proceeds), the confiscation of any patrimonial advantage derived from the offence is left to the discretion of the court under Article 43^{bis} of the Criminal Code. If the items cannot be found among the convicted person's assets, the court will assess their monetary value and an equivalent sum of money will be confiscated. Confiscation may also be ordered when the items specified by Article 42 are located outside Belgium. Article 253 of the Criminal Code, which laid down that the items constituting the offence would be confiscated and "placed at the disposal of the commune in which the offence was committed" has been abolished. Articles 42-43^{ter} of the Criminal Code also apply in this regard, and if the confiscated items go unclaimed, they are turned over to the Public Treasury.

Seizure

The general provisions of Articles 35-39 and Article 89 of the Code of Criminal Investigation are applicable with respect to the seizure of bribes and their proceeds.

International co-operation regarding seizure and confiscation

The Belgian Act of 20 May 1997 on international co-operation regarding seizure and confiscation lays down the conditions and procedures for responding to requests that temporary measures or seizures be carried out in Belgium for the purposes of confiscation and confiscation orders issued in a foreign State. Furthermore, Belgium has ratified the Council of Europe Convention of 8 November 1990 on laundering, search, seizure and confiscation of the proceeds from crime.

3.8 Additional civil and administrative sanctions

Belgian legislation provides for three types of additional penalties to combat bribery: loss of rights, disqualification from public procurement and prohibition of the practice of certain professions.

Loss of rights

Articles 31-33 of the Belgian Criminal Code allow or require, depending on the case, the courts to forbid those found guilty of certain offences to exercise various rights, such as holding public functions, employment or office, acting as an administrator of an estate, etc. Persons found guilty of bribing a judge will be deprived for life of all applicable rights. In other cases of bribery, the courts have latitude to deprive the convicted person of all or part of the rights listed in Article 31 for a specific time.

Disqualification from public procurement

Belgian legislators have chosen to adopt a further dissuasive measure, i.e. the disqualification from participation in public procurement of natural or legal persons who have obtained contracts by bribing a public official. Article 7 of the new Bribery Prevention Act of 10 February 1999 amends item d) of Article 19 § 1 of the Act of 20 March 1991 providing for the accreditation of contractors. The article enables the regional government to withdraw or suspend the accreditation(s) of a contractor, after the Accreditation Commission has given its opinion²², when a complaint is filed with the Commission by the public works supervisors accusing an accredited contractor of certain types of practices. The new provision now explicitly includes “non-compliance with the prohibition of any act, agreement or entente that distorts the normal conditions of competition set out in Article 11 of the Act of 24 December 1993 on public procurement and certain contracts for public works, supply and service contracts, including the acts of bribery referred to in Articles 246, 247, 250 and 251 of the Criminal Code”. This is a procedure that can be undertaken independently of criminal procedure.

Prohibition of the practice of certain professions

Belgian law provides for a third dissuasive measure to combat bribery of public officials. Section 1 of Royal Order No. 22 of 24 October 1934 on the legal prohibition of certain convicted persons and bankrupt individuals from exercising certain functions, professions or activities, gives courts the power to prohibit a person who has received a sentence (whether suspended or not) involving deprivation of

22 . This Commission is composed of a chairman (a magistrate or honorary magistrate) and 24 members drawn from public bodies (federal and regional authorities), representatives of professional business organisations and trade union organisations of the construction industry.

liberty for at least three months for having committed certain offences -- including bribery of a public official -- from exercising the functions of administrator of an estate, company auditor or manager or functions that confer the authority to commit a company.

4. ARTICLE 4. JURISDICTION

Article 4 of the Convention requires each Party to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part on its territory, whether or not a national of the said Party is involved. The Convention also requires States Parties which have jurisdiction to prosecute their nationals for offences committed abroad to take such measures as may be necessary to establish their jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles. The Commentaries state that the territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

4.1 Territorial jurisdiction

Article 3 of the Criminal Code provides that “an offence committed within the territory of the Kingdom, either by Belgians or foreigners, shall be punished in accordance with the provisions of Belgian law.” According to the Belgian authorities, the provisions on the bribery of foreign public officials apply when the offence is committed in whole or in part on Belgian territory. According to the jurisprudence on objective ubiquity, an offence is deemed to be committed in all territories in which a component of the offence can be identified.

4.2 Nationality jurisdiction

The Bribery Prevention Act of 10 February 1999 inserts an Article 10^{quater} into the Code of Criminal Procedure, specifying that “any person who has committed outside Belgian territory an offence referred to in Articles 246-249 (...), Article 250 (...), Article 251 of the Criminal Code, may be prosecuted in Belgium”. This Article derogates from the rules of ordinary law under which offences committed outside Belgian territory will not be prosecuted, and thus falls within the scope of Article 4 of the Criminal Code, which lays down that “an offence committed outside the territory of the Kingdom, whether by Belgians or by foreigners, is only punishable in Belgium in the cases determined by the law”. Article 12 of the preliminary title of the Code of Criminal Investigation specifies that in the event of extra-territorial jurisdiction, the accused must be found in Belgium. This article applies to the offence of bribery of a foreign public official.

Four cases are distinguished, depending on the authority responsible for the person exercising the public function concerned by the act of bribery. This authority may be an EU Member State, a non-EU Member State, one of the institutions of the EU or another international organisation. A fifth regime applies specifically to the bribery of a Belgian public official by a Belgian national or foreigner, in which the jurisdiction of the court is unconditional.

- In the case of an offence concerning a person who exercises a public function in an EU Member State other than Belgium, Belgian extraterritorial jurisdiction is subject to official consultation with the State responsible for the person exercising the public function²³.

23. This official consultation is aimed at avoiding the risk of conflicting proceedings by allowing that State to decide who has jurisdiction. It can consist of an international arrest warrant, a report that a crime has been committed or simply a written request that the State examine the case. Lastly, Belgium can also lodge a request with the other State by asking for information about a case or proposing to prosecute the offence.

- In the case of an offence concerning a person who exercises a public function in a foreign State that is not a Member of the European Union, the establishment of Belgium's extraterritorial jurisdiction is subject to three conditions: official consultation with the country responsible for the person concerned, reciprocity (punishability of foreign public officials in the country responsible for that person) and dual criminality (punishability in the country responsible for the person exercising the public function). According to case law, application of the principle of dual criminality does not require that the components of offences coincide exactly in both national systems; it is sufficient that the act be punishable, even under another criminal provision.
- In the case of an offence concerning a person who exercises a public function in one of the institutions of the European Union, there are no conditions for initiating proceedings.
- In the case of an offence concerning a person who exercises a public function in a public international organisation other than the European Union, proceedings are subject to official consultation with the competent authority of the international organisation in question.

4.3 Consultation procedures

Article 4 of the Convention states that when more than one Party has jurisdiction over an alleged offence involving bribery of foreign public officials, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution. Belgium has ratified the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959.

4.4 Effective jurisdiction

According to the Belgian authorities, the current basis for jurisdiction is sufficiently effective in the fight against bribery of foreign public officials.

5. ARTICLE 5. ENFORCEMENT

Article 5 of the Convention requires that investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. It further requires that each Party shall ensure that investigation and prosecution "shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved".

5.1 Rules and principles applying to investigation and prosecution

Investigations and prosecution in cases of bribery of a foreign public official are carried out according to the general rules and principles contained in the Code of Criminal Investigation: the Crown Prosecutor conducts an investigation, following which he/she decides whether prosecution is advisable, on the basis of the recognised discretionary power to initiate a prosecution and the criminal policy guidelines laid down by the Minister of Justice and the Board of Attorneys-General.

5.2 Political or economic considerations

The public prosecutor's office, in accordance with the recognised discretionary power to initiate a prosecution, laid down by Article 28^{quater}, paragraph 1, of the Code of Criminal Investigation, has the right to assess whether it is advisable to take action on a complaint or a denunciation. However, according to the Belgian authorities, investigation and prosecution in the case of bribery of a foreign public official, as for any other offence, cannot be influenced by considerations of national economic or political interest.

6. ARTICLE 6. STATUTE OF LIMITATIONS

Articles 21-28 of the Code of Criminal Investigation lay down that the statute of limitations for public action is five years for misdemeanours and ten years for criminal offences. In both cases, it runs from the date on which the act was committed. These periods may be interrupted by investigations or prosecution carried out during this time, following which a new limitation period of equal duration begins. Consequently, the maximum length of the statute of limitations is of 10 or 20 years after the offence was committed. The statute of limitations for civil action related to an offence may not lapse before that for public action.

7. ARTICLE 7. MONEY LAUNDERING

Article 7 of the Convention requires each Party which has made bribery of its own public officials a predicate offence for the purpose of the application of its money laundering legislation to do so on the same terms for the bribery of foreign public officials, without regard to the place where the bribery occurred.

7.1/ Bribery of Belgian and foreign public officials

7.2

Article 505 of the Penal Code addresses the laundering of the bribe and the proceeds of bribing a foreign public official, by establishing as an offence the concealing, converting, transferring, etc. of the "tangible advantages" of "a crime or a misdemeanour". The Belgian authorities confirm that this includes the offence of bribing a foreign public official. They also explain that it is a general principle of penal law that the money laundering offence applies regardless if the bribery offence occurred in Belgium or abroad. Laundering is punished by imprisonment from 15 days to 5 years, and/or a fine from 5200 to 1 million Belgian francs.

8. ARTICLE 8. ACCOUNTING

8.1 Maintenance of books and records

All the acts prohibited by Article 8 of the Convention (establishing of off-book accounts, making off-book or inadequately identified transactions, recording non-existent expenditures, entry of liabilities with incorrect identification of their object, use of false documents) are prohibited in general by the Act of 17 July 1975 on accounting and the annual accounts of enterprises, and by the Companies Act of 17 May 1872, co-ordinated by the Royal Order of 30 November 1935 and inserted into the Commercial Code. There is no special provision covering the case in which these practices would be used for the purpose of bribing a foreign or Belgian public official.

8.2 Companies subject to these laws and regulations

According to the Belgian authorities, all commercial concerns or businesses having a commercial form are subject to the rules on maintenance of books (retailers, natural persons, companies set up as general partnerships, limited liability partnerships, private limited liability companies, co-operatives, public limited liability companies, limited partnerships with share capital, consortia) as are public bodies with a statutory mission of a commercial, financial or industrial nature. Application of these principles has also been extended to various categories of non-commercial bodies set up as non-profit associations.

8.3 Penalties for omissions or falsifications

Persons infringing Belgian accounting law are subject to criminal, civil and administrative sanctions.

Criminal sanctions

The criminal sanctions applying to enterprises in general are of three kinds:

- the criminal sanctions for offences under the provisions of the Act of 17 July 1975 on accounting and the annual accounts of enterprises, Article 17;
- the criminal sanctions for offences under corporate law, Sections 201-3°, 201-4°, 204-2°, 205, 207, 208, 209 and 210 of co-ordinated corporate law;
- the general sanctions for falsification of commercial or banking documents and private documents (sanctions applicable in the case of falsification of accounts and financial records), Article 196 of the Criminal Code.

Special sanctions are applicable to enterprises in specific sectors, for example, credit institutions or insurance companies. However, these sanctions are broadly similar to the other sanctions, according to the Belgian authorities.

Civil sanctions

Non-compliance with Belgian accounting legislation may also lead to civil sanctions: liability under ordinary law, pursuant to Article 1382 of the Civil Code; joint and several liability of company administrators and managers in the event of damage to third parties caused by offences under corporate law (including the provisions on annual accounts and book-keeping) and the provisions of the statutes, Article 62, para. 2 and 3 of co-ordinated corporate law.

Administrative sanctions

The administrative sanctions are loss of rights (see 3.8 above).

9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE

The OECD Convention requires each Party, “to the fullest extent possible under its laws and relevant treaties and arrangements”, to provide “prompt and effective” legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of the Convention, and for non-criminal proceedings within the scope of the Convention brought by a Party against a legal person. The Convention further establishes dual criminality when that is a condition for mutual legal assistance. Lastly, the Convention requires Parties not to refuse mutual legal assistance for criminal matters on the ground of bank secrecy.

9.1 Laws, treaties, arrangements enabling mutual legal assistance

In Belgium mutual legal assistance is based on five types of instruments:

- The Treaty on Extradition and Mutual Assistance in Criminal Matters between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands of 27 June 1962, approved by Belgium through the Act of 1 June 1964 (Benelux Treaty);
- The Convention applying the Schengen Agreement of 19 June 1990;
- The European Convention on Mutual Assistance in Criminal Matters of 20 April 1959. 35 States, including Belgium, have ratified this Convention under the auspices of the Council of Europe;
- The bilateral treaties on mutual legal assistance signed but not yet ratified with two countries that are signatories to the OECD Convention on Combating Bribery of Foreign Public Officials in

International Business Transactions (Canada, United States). A treaty has been initialled with Australia, but has not yet been signed.

- The provisions of the Judicial Code (on civil procedure, Articles 11 and 873) applicable to criminal procedures unless otherwise provided in the Code of Criminal Investigation.

9.2 Dual criminality

According to the Belgian authorities, if the offence for which assistance is sought is within the scope of the OECD Convention, dual criminality shall be deemed to exist.

9.3 Bank secrecy

Bank secrecy does not exist under Belgian law. Banks only have an obligation of discretion vis-à-vis their clients, which does not constitute grounds for refusing to divulge information to the judicial authorities.

10. ARTICLE 10. EXTRADITION

10.1 Extradition for bribery of a foreign public official

In Belgium, bribery of a foreign public official constitutes an extraditable offence pursuant to three types of legal instrument:

- The Belgian Extradition Act of 15 March 1874, which lays down that extradition may be allowed for acts punishable, under Belgian and foreign legislation, by a penalty entailing deprivation of liberty for at least one year.
- The European Convention on Extradition of 13 December 1957, which in Article 2 lays down that extradition may be allowed for acts punishable by a penalty entailing deprivation of liberty for at least one year, on condition that the maximum penalty provided for in the other State is at least one year. 38 States, including Belgium, have ratified this Convention.
- The bilateral extradition treaties signed with 20 States²⁴.

The procedure for ratifying the Convention of 27 September 1996 on extradition between the Member States of the European Union is under way.

10.2 Convention as a legal basis for extradition

Where there is no extradition treaty between Belgium and another Party to the OECD Convention, the Convention itself is the legal basis for extradition for bribery of a foreign public official.

10.3/ Extradition of nationals

10.4

Under Section 1 of the Extradition Act of 15 March 1874, no Belgian national may be extradited to a foreign country. In principle, the competent Belgian authorities will take proceedings against the person accused of the offence, provided that the requesting Party is bound by the European Convention on Extradition or by a bilateral treaty providing for such action. In cases of bribery, Article 10*quater* of the preliminary title of the Code of Criminal Investigation lays down the cases of bribery committed

24. Algeria, Argentina, Australia, Austria, Bolivia, Bosnia-Herzegovina, Brazil, Chile, Ecuador, Hungary, Lebanon, Luxembourg, Mexico, Morocco, Paraguay, El Salvador, San Marino, Thailand, Tunisia and the United States.

outside Belgian territory over which Belgian judges have jurisdiction, in accordance with Article 4 of the Criminal Code.

10.5 Dual criminality

Article 10.4 of the Convention states that where a Party makes extradition conditional on the existence of dual criminality, such criminality shall be deemed to exist as long as the offence for which it is sought is within the scope of Article 1 of the Convention. Belgium makes extradition conditional on the existence of dual criminality under Article 2 § 1, of the European Convention on Extradition. Extradition is conditional on the existence of dual criminality in all bilateral extradition treaties as well. According to the Belgian authorities, dual criminality is deemed to exist when the offence for which extradition is sought is within the scope of the Convention.

11. ARTICLE 11. RESPONSIBLE AUTHORITIES

According to the Belgian authorities, the competent authority for the purposes of consultation, mutual legal assistance and extradition as set out in Articles 3, 9 and 10 of the Convention is the Service for Individual Cases of International Legal Co-operation of the General Directorate of Criminal Legislation and Human Rights of the Ministry of Justice.

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

3. TAX DEDUCTIBILITY

The revised Recommendation of 1997 strongly urges Member countries rapidly to apply the 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, which is worded as follows: [the Council recommends] “that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility.” Similarly, the Commentaries on the Convention state that “in addition to accepting the Revised Recommendation of the Council on Combating Bribery, a full participant also accepts the Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, adopted on 11 April 1996, C(96)27/FINAL”.

Section 7 of the Bribery Prevention Act of 10 February 1999 supplement Article 58 of the 1992 Income Tax Code by laying down that authorisation of deductibility of “secret commissions” allowed under Article 58 of the Code “to obtain or retain public procurement contracts or administrative authorisations may not be granted”²⁵. According to the Belgian authorities, the Minister of Finance will strive to enforce the complete prohibition of the deductibility of bribes in international business transactions involving a Belgian or foreign public official.

25. Article 58 of the 1992 Income Tax Code provides for the deductibility of “secret commissions” if they are necessary to counter foreign competition, do not exceed the usual amounts, and are recognised as a common business practice in the country concerned or as being necessary, usual and normal in the economic sector in question. Anyone who wishes to deduct these commissions must file a request with the Minister of Finance indicating the amount and purpose of the commission so that the Minister can make a decision, on a proposal from the tax administration. A flat tax of 20.6 per cent of the amount of the secret commissions is then due. If the relevant conditions are not met, deductibility of the “secret commissions” is denied and the amounts in question are considered as taxable income, and are liable to a special tax equal to 309 per cent of the amount of the bribe. If the taxpayer is a company, it is liable to this tax in all cases.

EVALUATION OF BELGIUM

General Remarks

The Working Group complimented the Belgian authorities for the rapid and thorough implementation of the Convention into Belgian legislation. Delegates thanked the Belgian authorities for the comprehensive and informative responses, which significantly assisted in the evaluation process. To meet the requirements of the OECD Convention, the Belgian Parliament adopted two Acts. The first is the Corruption Prevention Act of 10 February 1999, which covers new offences contained in the OECD Convention and not previously covered by Belgian legislation (bribery of foreign public officials and international civil servants), as well as other offences such as bribery of an applicant for a public function, trading in influence and private corruption. The Second Act is that of 4 May 1999, which establishes criminal liability of legal persons, henceforth subject to the provisions of the Corruption Prevention Act.

Overall, the Working Group was of the opinion that Belgium's implementing legislation meets most of the requirements set by the Convention. Questions were raised in relation to the meaning of foreign public official, to the extraterritorial jurisdiction and to the tax deductibility of bribes. In addition, some issues might benefit from further discussion during Phase 2 of the evaluation process.

I. Specific Issues

1. The offence of bribery of foreign public officials

1.1 The definition of foreign public official

Article 1 paragraph 4 of the OECD Convention gives an autonomous definition of foreign public officials to which national legislation should conform.

In defining a foreign public official, Belgium's implementing legislation makes a distinction between persons who exercise a public function in a Member State of the European Union and those who do so in other Foreign States. The Working Group was of the opinion that this distinction is not an issue *per se*.

Belgium's implementing law, in defining foreign public officials, also refers directly to the national definition of the public official of the foreign country. Article 250 § 2 lays down 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". The Working Group considered that such an approach is not in conformity with the autonomous definition set in Article 1 of the Convention as well as with the objectives of the Convention which aim at guaranteeing a homogenous application of the Convention. The Working Group expressed concerns that the approach chosen by Belgium could affect the implementation of the Convention. This issue might benefit from further discussion during Phase 2 of the evaluation process.

The same provision stipulates that, when this State is outside the European Union, reference should also be made to Belgian law by verifying "whether the function concerned is also considered to be a public function under Belgian law". The Belgian authorities explained that this approach stems from other international anti-corruption instruments to which Belgium is a party as well as from the objective to take into account the potentially very great differences between what are considered to be public functions in different legal systems. They also pointed to the broad scope given to the concept of "a person exercising a public function" under Belgian law, which may well be broader than the definition used in the OECD Convention.

2. Jurisdiction

2.1 Nationality jurisdiction

Article 4 § 1 of the Convention requires each Party to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part on its territory. Article 4 § 2 requires that States Parties which have jurisdiction to prosecute their nationals for offences committed abroad to take such measures as may be necessary to establish their jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles. It was recognised that Belgian implementing legislation includes both territorial and extraterritorial jurisdiction for nationals and foreigners and fulfils the requirements of Article 4 of the Convention.

With regard to extraterritorial jurisdiction, the implementing legislation establishes different regimes depending on whether the authority responsible for the person exercising a public function is Belgium, another European Union Member State, a non-EU Member State, one of the institutions of the European Union or another international organisation. The Group noted that the existence of different regimes might deviate from the principle of equal treatment set in Article 4 § 2 of the Convention. It expressed the view that this issue might benefit from further discussion during Phase 2 of the evaluation process.

In the case of an offence concerning a person who exercises a public function in a foreign state that is not a Member of the European Union, the establishment of Belgium's extraterritorial jurisdiction is subject, among others, to a reciprocity condition, i.e. the punishability of Belgian public officials in the country responsible for that person. The Working Group was of the opinion that the reciprocity condition does not meet the requirements set in Article 4 § 2 of the Convention. The Group recommended the Belgian authorities to reconsider this issue.

II. Tax deductibility

Pursuant to the implementing legislation, secret commissions to obtain or retain public procurement contracts or administrative authorisations are no longer deductible. However, pursuant to Article 58 of the 1992 Income Tax Code, the deductibility of certain types of commissions may be allowed. The Working Group noted the ambiguity between the principle of prohibition of the secret commissions to obtain or retain public procurement contracts or administrative authorisations and the non-abrogation of the derogatory regime established by the Income Tax Code. The Belgian authorities indicated the Minister of Finance's commitment to fully prohibit the deductibility of bribes relating to international business transactions involving a Belgian public official or a foreign public official. The Group suggested that this issue will be re-examined during Phase 2 of the evaluation process.