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Third Evaluation Round

Evaluation Report on Belgium on Incriminations (ETS 173 and 191, GPC 2)

(Theme I)

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I. INTRODUCTION

1. Belgium has been a member of GRECO since 1999. GRECO adopted its first round evaluation report on Belgium (Greco Eval I Rep (2000) 1F) at its 4th meeting (12-15 December 2000) and the second round evaluation report (Greco Eval II Rep (2004) 1F) at its 21st meeting (29 November - 2 December 2004). The aforementioned evaluation reports, and the corresponding compliance reports, are available on the GRECO web site (http://www.coe.int/greco).

2. The current third evaluation round, which started on 1 January 2007, covers the following themes:

   - **Theme I - Incriminations:** articles 1a and 1b, 2 to 12, 15 to 17 and 19.1 of the Criminal Law Convention on Corruption (ETS 173), articles 1 to 6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (incrimination of corruption).

   - **Theme II - Transparency of Political Party Funding:** articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on common rules against corruption in the funding of political parties and electoral campaigns and – more generally – Guiding Principle 15 on financing of political parties and election campaigns.

3. The GRECO Evaluation Team for Theme I (hereafter referred to as the "GET"), which carried out an on-site visit to Belgium from 17 to 21 November 2008 comprised Ms Claudia Cruz-Santos, assistant professor at the law faculty of Coimbra (Portugal) and Mr André Muhlberger, Director of Public Safety (Principality of Monaco). The GET was assisted by Mr Christophe Speckbacher of the GRECO secretariat. Prior to the visit the GET received a comprehensive reply to the evaluation questionnaire (Greco Eval III (2008) 8F, Theme I), and copies of relevant legislation, case-law and statistics.

4. The GET met representatives of the following authorities and institutions: Federal Public Service of Justice (directorate general of legislation, strategic unit of the Minister of Justice, interdepartmental anti-corruption unit and the principal co-ordinator of the crown prosecutors network of experts on corruption), the general prosecution services, the federal and crown prosecutors' services, specialist investigating judges, judges of the courts of first instance, appeal and cassation, the federal police (economic and financial crime directorate and the central anti-corruption office) and local police. It also met lawyers specialising in criminal law, university professors specialising in economic and financial crime, journalists and officials of the Belgian section of Transparency International.

5. The current report on theme I of GRECO's 3rd evaluation round – corruption offences – is based on answers to the questionnaire and information supplied during the on-site visit. The main purpose is to assess the effectiveness of measures adopted by the Belgian authorities to comply with the provisions referred to in paragraph 2. The report presents a description of the situation, followed by a critical analysis. The conclusions include a list of recommendations adopted by GRECO and addressed to Belgium on how to improve compliance with the provisions under consideration.

6. The report on theme II – transparency of political party funding – appears in Greco Eval III Rep (2008) 8F-Theme II.

II. OFFENCES

Description of the situation

7. Belgium ratified the Criminal Law Convention on Corruption (ETS 173) on 23 March 2004 and it came into force in Belgium on 1 July 2004. Belgium has entered three reservations, one each on bribery in the private sector[1], trading in influence[2] and its territorial (*ratione loci*) jurisdiction[3]. These reservations were extended in April 2007 for a further three years.

8. The draft legislation (Doc. 4-819/1) approving the additional Protocol (ETS 191) to the Criminal Law Convention on Corruption was enacted after the visit. The Protocol was therefore ratified with no special reservations or declarations on 26 February 2009, and was due to come into force in Belgium on 1 June 2009.

Bribery of national public officials (ETS 173, articles 1-3 and 19)

Definition of the offence

9. Active and passive bribery of public officials are offences under articles 246 and 247 of the Criminal Code. These provisions must be read jointly. For example, Article 246 includes the basic definitions of the offences (paragraph 1 for passive bribery and paragraph 2 for active bribery) while article 247 lists the various types of situation and acts of public officials in relation to which bribery is an offence. Article 247 distinguishes cases of unilateral active or passive bribery from ones where the bribe is agreed to or accepted by the other party. The latter are punished more severely. Article 247.4 establishes the offence of trading in influence by persons performing public duties (for trading in influence, see paragraphs 50 ff of this report). Articles 246 and 247 are of general application. In addition, articles 248 and 249 include specific aggravating circumstances applicable to offenders who are members of the police and prosecution service, judges, arbitrators and jurors[4].

> ***Art.246**. § 1. The action of a person performing public duties who requests or accepts, directly or through the intermediation of other persons, for himself or others, offers, promises or advantages of any kind, in exchange for committing the conduct referred to in Article 247 constitutes passive corruption.*
> *§ 2. The action of a person who offers to a person performing public duties, directly or through the intermediation of other persons, for himself or others, promises or advantages of any kind, in exchange for committing the conduct referred to in Article 247 constitutes active corruption.*
> [NOTE: Article 2 of the Act of 11 May 2007 states that Article 246, paragraph 2, of the Criminal Code must be understood to mean that active bribery also includes granting to a person performing public duties, directly or through the intermediation of other persons, advantages of any kind, in exchange for committing the conduct referred to in Article 247].
> *§ 3. For the purposes of this article, any person who is a candidate for a post involving the performance*

[1] "According to Article 37, paragraph 1, of the Convention, Belgium reserves the right to establish as a criminal offence under its domestic law the conduct referred to in Articles 7 and 8 of the Convention only if such conduct was committed in view of the accomplishment or the omission of an act, without the knowledge and without authorisation, as the case may be, of the board of directors or of the general meeting, of the principal or of the employer."
[2] "According to Article 37, paragraph 1, of the Convention, Belgium reserves the right not to establish as a criminal offence under its domestic law the conduct referred to in Article 12 of the Convention which does not concern the use by a person holding a public function of the influence - be it real influence or supposed influence - that he or she disposes of owing to his or her function."
[3] "According to Article 37, paragraph 2, of the Convention, Belgium reserves the right to apply Article 17, paragraphs 1 b and c, only if the offence also constitutes an offence under the legislation of the State Party in which it has been committed, unless the offence concerns a person holding a public function in a State member of the European Union."
[4] Daniel FLORE, Les infractions contre les biens, Collection Droit pénal, Larcier, 2008, p.345 à 347.

of public duties, causes persons to believe that he will perform such duties or fraudulently causes persons to believe that he performs such duties shall be treated as performing public duties.

***Art.247**. § 1. Bribing a person performing public duties to carry out an official duty that is lawful but for which no remuneration is payable is punishable by six months' to one year's imprisonment and a fine of 100 to 10 000 francs, or one of these penalties.*
When, in the case specified in the previous paragraph, the request as specified in Article 246§1 is followed by an offer as specified in Article 246§2, and in cases where an offer as specified in Article 246§2 is accepted, the penalty shall be six months' to two years' imprisonment and a fine of 100 to 25 000 francs, or one of these penalties.
§ 2. Bribing a person performing public duties to perform a wrongful act or refrain from an act which forms part of his duties is punishable by six months' to two years' imprisonment and a fine of 100 to 25 000 francs, or one of these penalties.
When, in the case specified in the previous paragraph, the request as specified in Article 246§1 is followed by an offer as specified in Article 246§2, and in cases where an offer as specified in Article 246§2 is accepted, the penalty shall be six months' to three years' imprisonment and a fine of 100 to 50 000 francs, or one of these penalties.
Persons who perform a wrongful act or refrain from an act which forms part of their duties shall be punishable by six months' to five years' imprisonment and a fine of 100 to 75 000 francs.
§ 3. Bribing a person performing public duties to commit a serious or lesser offence in the course of his duties is punishable by six months' to three years' imprisonment and a fine of 100 to 50 000 francs.
When, in the case specified in the previous paragraph, the request as specified in Article 246§1 is followed by an offer as specified in Article 246§2, and in cases where an offer as specified in Article 246§2 is accepted, the penalty shall be two to three years' imprisonment and a fine of 500 to 100 000 francs.
§ 4. Bribing a person performing public duties to use his real or supposed influence arising from his position to obtain an action or decision from a public authority or ensure that no such decision is made is punishable by six months' to one year's imprisonment and a fine of 100 to 10 000 francs.
When, in the case specified in the previous paragraph, the request as specified in Article 246§1 is followed by an offer as specified in Article 246§2, and in cases where an offer as specified in Article 246§2 is accepted, the penalty shall be six months' to two years' imprisonment and a fine of 100 to 25 000 francs.
If the person who is bribed has actually used his influence arising from his duties he shall be punished by six months' to three years' imprisonment and a fine of 100 to 50 000 francs.

***Art.248**. When the acts specified in articles 246 and 247 §§ 1 to 3 concern a police officer, a person exercising judicial police functions or a member of the prosecution service, the maximum penalty shall be twice the maximum specified in Article 247 for those acts.*

***Art.249**. § 1. When the bribery specified in Article 246 concerns an arbitrator and is related to his judicial function, the penalty shall be one to three years' imprisonment and a fine of 100 to 50 000 francs.*
When, in the case specified in the previous paragraph, the request as specified in Article 246§1 is followed by an offer as specified in Article 246§2, and in cases where an offer as specified in Article 246§2 is accepted, the penalty shall be two to five years' imprisonment and a fine of 500 to 100 000 francs[5].
§ 2. When the bribery specified in Article 246 concerns a non-presiding judge or juror and is related to his judicial function, the penalty shall be two to five years' imprisonment and a fine of 500 to 100 000 francs.
When, in the case specified in the previous paragraph, the request as specified in Article 246§1 is followed by an offer as specified in Article 246§2, and in cases where an offer as specified in Article 246§2 is accepted, the penalty shall be five to ten years' imprisonment and a fine of 500 to 100 000 francs.
§ 3. When the bribery specified in Article 246 concerns a presiding judge and is related to his judicial function, the penalty shall be five to ten years' imprisonment and a fine of 500 to 100 000 francs.
When, in the case specified in the previous paragraph, the request as specified in Article 246§1 is followed by an offer as specified in Article 246§2, and in cases where an offer as specified in Article 246§2 is accepted, the penalty shall be ten to fifteen years' imprisonment and a fine of 500 to 100 000 francs.

[5] These are the amounts specified in the Act of 10 February 1999. The version of the Criminal Code on the JUSTEL database refers to 500 to 10 000 francs.

Elements and aspects of the offence

National public officials

10. According to the Belgian authorities, the scope of articles 246 and 247 of the Criminal Code is very broad. It refers to persons performing public duties, which is interpreted very widely. It is not the status of the person that counts but the public nature of the duties performed. In specifying offences, the Criminal Code does not distinguish between categories of persons, other than to make the corruption of certain categories such as judicial police officials, police officers (who do not all perform judicial police functions), judges and members of the prosecution service aggravating circumstances.

11. According to the parliamentary proceedings on the Act of 10 February 1999[6], which altered the arrangements governing offences, the notion of public duties or public service (*fonction publique*) in Belgium covers all categories of persons, irrespective of status, performing public duties, whether these be federal, regional, municipal, community or provincial established civil servants and other public officials, elected members[7], professional officers, other persons exercising permanent or temporary public authority and persons, including private individuals, carrying out a public service function. Private individuals performing public duties are directly covered. Ministers, junior ministers, members of ministers' private offices and members of the armed forces perform public duties, as does a (foreign) president of the republic, who may thus be deemed to be a public official[8]. Moreover, Article 246 paragraph 3 states that any person who is a candidate for a post involving the performance of public duties, causes persons to believe that he will perform such duties or fraudulently causes persons to believe that he performs such duties shall be treated as performing public duties.

Promising, offering or giving (active bribery)

12. Paragraph 2 of Article 246 of the Criminal Code uses the terms *offering promises or advantages*. The Act of 11 May 2007 amending the anti-corruption legislation (MB. 8 June 2007) includes interpretative provisions. Section 2 states that Article 246, paragraph 2, of the Criminal Code must be understood to mean that active bribery also includes granting to a person performing public duties, directly or through the intermediation of other persons, promises or advantages of any kind, in exchange for committing the conduct referred to in Article 247. This provision is in response to an OECD recommendation that Belgium makes it an offence not only to offer but also to grant a benefit.

Request or receipt of any undue advantage, or the acceptance of an offer or a promise (passive bribery)

13. Paragraph 1 of Article 246 of the Criminal Code uses the terms *requesting or accepting offers, promises or advantages*. The Belgian authorities state that since acceptance is explicitly an offence, the act of receiving must be covered by this wording.

14. In Belgium (as in certain neighbouring countries), it was a traditional requirement of jurisprudence and legal theory that there had to be a "bribery/corruption agreement", understood to mean an agreement that a briber would grant an undue advantage in exchange for a benefit provided by

[6] In particular, the report of the Senate Justice Committee, doc. Parl., Senate (1997-1998), 107/5, of 1 July 1998, p.35.
[7] The expression "elected member" (*mandataire élu*) includes anyone holding elective office, whether this be legislative, municipal or other.
[8] Without prejudice to the rules on diplomatic immunities.

the person bribed. The Act of 10 February 1999 shows that Belgian legislation now seeks to draw a clear distinction between the offences of active and passive bribery, and as from this date, the offence is constituted even in the absence of un underlying corruption agreement (between the briber and the bribe). Paragraphs 1, 2 and 3 of Article 247 make the distinction between active and passive bribery and cases of bribes offered and accepted. Such cases where bribes are offered by one of the parties and accepted by the other constitute since 1999 objective aggravating circumstances that are subject to harsher penalties than simply offering, requesting or promising. As the GET was told on site, the 1999 amendments to the legislation reflected the practice of the courts, which had finally acknowledged that bribe givers and receivers could be prosecuted separately and that in cases of attempted bribery it was unnecessary to establish the existence of an agreement or meeting of minds that, logically, had not yet taken place.

Any undue advantage

15. Article 246 uses the term *advantages of any kind*. The Belgian authorities state that this is a very broad notion[9], in accordance with how the courts were already interpreting the notions of offers, promises, donations and gifts in the pre-1999 version of Article 246. It could, for example, include the promise of sexual relations. What counts is not the nature or value of the advantage but the link between what is given and the objective sought, that is to secure a particular decision or action from the person performing public duties. Both material and non-material benefits are covered, which might include advantages arising from preferential treatment, such as obtaining or support for obtaining a particular post or other benefit, and symbolic or honorific advantages, such as titles or distinctions. The expression *advantages of any kind* corresponds to the wording of the 1997 Convention based on Article K.3 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 ("advantages of any kind whatsoever"), which predates the Strasbourg Convention of December 1999. Parliament wanted to avoid any regressive steps by tolerating gifts or by setting a maximum value of such gifts, as in some other countries.

Directly or indirectly

16. Article 246 uses a similar expression, namely "directly or through the intermediation of other persons". Such third parties may be accomplices or joint perpetrators, or alternatively have nothing to do with the offence and be of good faith.

For themselves or others

17. The same term is used in Article 246 ("for himself or others"). The advantage need not necessarily benefit the person who is bribed but may go to a third party. Personal enrichment is not an essential ingredient of the offence.

To perform or refrain from performing actions in the exercise of their duties

18. Article 247, which clarifies the offence specified in Article 246, refers to the following actions by persons performing public duties:
    - carrying out an official duty that is lawful but for which no remuneration is payable (a), or
    - carrying out a wrongful act or refraining from an act which forms part of his duties (b), or
    - committing a serious or lesser offence in the course of his duties (c), or

[9] Report of the Senate justice committee, op. cit., p.71.

- using his real or supposed influence arising from his position to obtain an action or decision from a public authority or ensure that no such decision is made (trading in influence).

19. The courts interpret the notion of performance of duties fairly broadly. Those concerned do not have to have decision-making powers. It is sufficient for them to take part in the decision-making process or the preparations for it[10]. The performance of duties may even consist simply in an approach or appeal to an individual's superiors[11]. By "lawful official duty" (in French *acte juste*) the legislation means any action that is compatible with the obligations of the person performing the public duties. That person would have acted in the same way, even in the absence of any offer[12]. Unlawful acts are ones that are incompatible with public officials' obligations but that have been influenced by the offer, though without necessarily constituting offences. If the person performing public duties agrees to take the action sought by the person offering the bribe, this constitutes an aggravating circumstance. This is a personal aggravating circumstance that only applies to the former and not to the person giving the bribe, since the circumstance is quite independent of the will of the latter[13]. Whether an action is lawful or wrongful is left to the discretion of the courts.

20. When a bribe is offered in exchange for the commission of an offence and the latter is committed or the process is started this constitutes coincidence of offences, both on the part of the person who is bribed and the person giving the bribe, who becomes the joint perpetrator of the offence.

Committed intentionally

21. The notion of intention does not appear in the wording of the offences but under Belgian law corruption has to be intentional. However, no special intent is required. Awareness of committing such an act is sufficient.

Penalties for individuals

22. This section is only concerned with the penalties applicable to individuals. The situation regarding legal persons was dealt with in the second evaluation round report. It should first be noted that the various articles on corruption specify fines that need to be converted. Under the Act of 5 March 1952 on the revaluation of criminal fines, the amounts concerned, which are specified in Belgian francs, must be multiplied by 5.5. Following the introduction of the euro, the amounts remained unaltered and the reference to currency must now be read as replacing "francs" with "euros", in accordance with the Introduction of the Euro Act of 26 June 2000.

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[10] Cass, 9 December 1997, F.J.F., 1998/1, p.5.

[11] Cass, 13 July 1960, R.D.P., 1960-1961, p.234.

[12] For example, approving fees and accepting work performed may be considered to be part of an official's lawful duties, but for which no remuneration is payable **(**Cass. (2e ch.) RG P.02.0734.N, 11 February 2003 (L.W., D.C.L.), *Arr. Cass.* 2003, liv. 2, 360; http://www.cass.be (5 March 2003); *Pas.* 2003, liv. 2, 303; *C.D.P.K.* 2003, liv. 3, 485.

[13] For example,

- by benefits or promises agreed to, donations or gifts received from the company Agusta SpA or its representatives, [the accused] wrongfully awarded the Aéromobilité 1 contract to Agusta SpA (Cass. (ch. réun.), 23 December 1998, A.R.: A.94.0001.F, RG A.94.0001.F, 23 December 1998 (General Prosecutor to the Court of Cassation / Coëme); http://www.cass.be (18 October 2001); A.J.T. 1998-99, 541; Arr. Cass. 1998, 1166; Bull. 1998, 1256; J.L.MB. 1999, 61 and http://jlmbi.larcier.be (15 January 2003); R.W. 1998-99, 1309 and http://www.rwe.be
(12 July 2006); Rev. dr. pén. 1999, 393).

- [the accused] accepted advantages in exchange for committing a wrongful act, namely signing an agreement that he knew to be a forgery (Cass.(ch. réun.), RG A.94.0002.F, 5 April 1996 (Coëme / A.S.B.L. INUSOP**)** http://www.cass.be (18 October 2001); *Arr.* 1996, 283; *J.T.* 1996 (abrégé), 411; *Jaarboek Mensenrechten* 1995-96, 429; *Pas.* 1996, I, 283; *R. Cass.* 1996, 257; *Rev. dr. pén.* 1996, 634).

23. There are various types of principal penalties for individuals:

a. when the bribe is in exchange for the official carrying out an official duty that is lawful but for which no remuneration is payable: 6 months' to 1 year's imprisonment and/or a fine of 550 to 55 000 euros; if the offer is accepted, the penalty rises to 6 months' to 2 years' imprisonment and/or a fine of 550 to 137 000 euros (art.247, §1);

b. when the bribe is to persuade a person exercising public duties to perform a wrongful act or refrain from an act which forms part of his duties: 6 months' to 2 years' imprisonment and a fine of 550 to 25 000 euros; if the offer is accepted: 6 months' to 3 years' imprisonment and if the wrongful act is actually carried out: 6 months' to 5 years' imprisonment and a fine of 550 to 412 500 euros (art.247, §2);

c. when the bribe is to persuade the person to commit a serious or lesser offence in the course of his duties: 6 months' to 5 years' imprisonment and a fine of 550 to 275 000 euros; if the offer is accepted: 2 to 5 years' imprisonment and a fine of 2 750 to 550 000 euros (art.247, §3). The objective aggravating circumstances make it possible to impose sanctions of up to 15 years' imprisonment (art.249, §3 subpara.2), without prejudice to the general Criminal Code provisions (art. 54 to 57) which allow to increase these penalties further in case of repeat offences.

24. The following ancillary penalties may also be applied: a) confiscation (articles 42, 43, 43bis, 43ter and 43 quater of the Criminal Code; b) withdrawal of certain civic and political rights (art.252 of the Criminal Code); c) restrictions on the right to vote and eligibility (art.6, 7 and 227 of the Electoral Code); d) ban on performing certain functions (royal decree 22 of 24 October 1934); e) exclusion from public procurement (section 19 of the Act of 20 March 1991 on the licensing of public contractors, and section 20 of the Act of 15 June 2006 on public procurement and tendering for certain public works, supplies and services contracts. For further information on these ancillary penalties see the second evaluation round report on Belgium.

25. A comparison may be made with other offences: embezzlement (art 240 of the Criminal Code): 5 to 10 years' imprisonment and a fine of 2 750 to 550 000 euros; extortion (art.243): 6 months' to 5 years' imprisonment and/or a fine of 550 to 275 000 euros; if the offer is accepted: unlawful receipt or acceptance of an interest (art 245): 1 to 5 years' imprisonment and/or a fine of 550 to 275 000 euros; fraud (royal decree of 31 May 1933 on required declarations concerning grants and allowances): 8 days' to one year's imprisonment and a fine of 143 to 82 500 euros.

Statistics

26. The prosecution service maintains detailed and relatively complete statistics[14] on offences recorded, the prosecution office concerned, state of progress on cases and reasons for discontinuing proceedings; the figures shown hereinafter were communicated before the on site visit (updated figures exist up to year 2008 and were communicated after the visit):

[14] For example, one of the 28 prosecution offices in Belgium does not supply figures to the central database, most offices do not register all the data (some of which are not obligatory) and prosecution offices do not take account of some police reports.

Number and percentage of cases of extortion, bribery and receipt of an interest by public officials between 01/01/2000 and 31/12/2007 in accordance with the prevention code and year first recorded																		
	2000		2001		2002		2003		2004		2005		2006		2007		Total	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%
25A: Extortion	21	7.89	17	7.26	27	10.47	38	13.24	52	17.16	28	10.04	39	11.75	35	12.07	257	11.43
25B: Bribery	146	54.89	127	54.27	122	47.29	134	46.69	137	45.21	160	57.35	242	72.89	201	69.31	1.269	56.43
25E: Receipt of an interest	99	37.22	90	38.46	109	42.25	115	40.07	114	37.62	91	32.62	51	15.36	54	18.62	723	32.15
Total	266	100.00	234	100.00	258	100.00	287	100.00	303	100.00	279	100.00	332	100.00	290	100.00	2.249	100.00

25B: Bribery

Progress on 10 July 2008 on bribery cases first recorded between 01/01/2000 and 31/12/2007, by year first recorded																		
Most recent stage	2000		2001		2002		2003		2004		2005		2006		2007		Total	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%	n	%
1. initial investigation	2	1.37	3	2.36	8	6.56	5	3.73	2	1.46	15	9.38	23	9.50	45	22.39	103	8.12
2. no action	79	54.11	74	58.27	55	45.08	58	43.28	59	43.07	81	50.63	95	39.26	77	38.31	578	45.55
3. for allocation	20	13.70	11	8.66	13	10.66	17	12.69	16	11.68	17	10.63	55	22.73	17	8.46	166	13.08
4. joinder	19	13.01	14	11.02	17	13.93	24	17.91	24	17.52	18	11.25	38	15.70	42	20.90	196	15.45
5. settlement	3	2.05	2	1.57	.	.	1	0.75	1	0.73	1	0.63	4	1.65	4	1.99	16	1.26
6. criminal mediation	.	.	1	0.79	.	.	.	.	.	.	1	0.63	1	0.41	.	.	3	0.24
7. judicial investigation	1	0.68	1	0.79	5	4.10	1	0.75	7	5.11	11	6.88	13	5.37	13	6.47	52	4.10
8. judicial chambers	5	3.42	5	3.94	8	6.56	12	8.96	13	9.49	8	5.00	8	3.31	1	0.50	60	4.73
9. summons	17	11.64	16	12.60	16	13.11	16	11.94	15	10.95	8	5.00	5	2.07	2	1.00	95	7.49
Total	146	100.00	127	100.00	122	100.00	134	100.00	137	100.00	160	100.00	242	100.00	201	100.00	1.269	100.00

27. Other information supplied to the evaluators on site showed that, over the same period, the main reasons for discontinuing proceedings were insufficient evidence (39.97% of cases), no offence committed (20.24%), other priorities (11.25%), no antecedents (3.81%), perpetrator unknown (3.81%), limited social impact (3.63%), reasonable time exceeded (2.77%), consequences disproportionate to the disturbance caused (2.42%). Grounds such as insufficient investigation capacity (1.56%) and time-barred (1.04%) were very infrequent.

28. The following table shows convictions concerning the bribery of persons responsible for public services. At the time of the visit, the 2005 and 2006 figures were not yet definitive.

Convictions	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
Bribery of a person responsible for a public service	**26**	**42**	**37**	**42**	**25**	**43**	**16**	**19**	**27**	**35**	**15**	**19**	**31**	**20**
of whom (1)	11	15	22	17	6	22	4	10	10	13	5	10	15	11
of whom (2)	15	27	15	27	19	21	12	9	17	22	10	10	16	10
of whom (3)	0	0	0	0	0	0	0	0	0	0	0	0	0	1

(1) Passive bribery of person performing public duties

(2) Active bribery or coercion by force or threats of person performing public duties

(3) Unlawful issue of a passport, firearms licence, identity card or waybill by an official in response to gifts or promises

Bribery of members of domestic public assemblies (Article 4, ETS 173)

29. The Belgian authorities state that the Criminal Code makes no reference to members of parliament at federal or federated entity level, but that according to the parliamentary proceedings on the Act of 10 February 1999, they are covered by the term "person performing public duties" in articles 246 and 247 of the Criminal Code. The Belgian authorities have confirmed that this also covers members of local and regional assemblies, whether elected or appointed.

30. The applicable penalties are supplemented by a number of consequences in terms of electoral rights – to vote and to stand for election – that under the Electoral Code automatically follow certain convictions[15]. For example, under Article 7.2 of the Electoral Code, persons sentenced to more than four months' imprisonment have their electoral rights suspended and are not allowed to vote during their disqualification period. The latter is six years in the case of sentences of four months' to less than three years' imprisonment, and twelve years for terms of imprisonment of at least three years. Under Article 9 of the Electoral Code, any sentence of imprisonment of at least four months that is final and not suspended leads to suspension of electoral rights. Under Article 6, exclusion from the electoral register is definitive in the event of a conviction for a serious offence. Finally, under Article 227.3.3 of the Code, persons who have had their electoral rights suspended under Article 7 are not eligible for the federal legislative chambers. Similar rules apply in the federated entities.

31. In a recent decision (no 187/2005, of 14 December 2005 – MB. 6 February 2006) the Constitutional Court found that suspension under Article 7 of the Electoral Code was in breach of articles 10 and 11 of the Constitution because it applied automatically. The last government tabled a bill to bring the electoral legislation into line with the Court's ruling, in particular by abolishing the automatic application of the electoral suspension (DOC 51-3005/001), but the bill could not be passed in time before Parliament was dissolved in 2008.

Bribery of foreign public officials (Article 5, ETS 173)

32. Bribing foreign public officials is an offence under Article 250, in combination with articles 246-249, of the Criminal Code.

> ***Article 250***
> *When the bribery specified in articles 246 to 249 concerns a person performing public duties in a foreign state or an organisation governed by public international law, the penalties shall be as provided for in these provisions.*

33. Article 250 is concerned with persons performing public duties in a foreign country. Since the Act of 11 May 2007[16], the functional definition applied to Belgian public officials is also applied to their foreign counterparts. The key element is the duties performed rather than the person's status, in accordance with how this has been interpreted by the courts. The elements of the

[15] These are not ancillary or subsidiary penalties that the courts may impose, under articles 31 to 34 of the Criminal Code.

[16] The former Article 250.2 of the Criminal Code specified that the status of persons performing public duties in another state would be determined in accordance with the legislation of that country. However, in the case of non-European Union member states, the status would only be recognised if the duties performed were also considered to be public duties in Belgium. This paragraph was repealed by the Act of 11 May 2007 to make interpretation of this notion autonomous. The change was in response to an OECD recommendation.

offence are assessed in the same way as for bribery of national public officials (persons performing public duties) and the penalties are the ones specified in articles 246-249 of the Criminal Code.

34. The available statistics do not include bribery of foreign public officials as a separate category. The overall figures appear in paragraphs 26 ff.

Bribery of members of foreign public assemblies (Article 6, ETS 173)

35. In the same way as applies to nationals, bribing members of foreign public assemblies is an offence under Article 250, in combination with articles 246-249, of the Criminal Code, which is concerned with persons performing public duties in foreign countries. The elements of the offence are assessed in the same way.

36. The available statistics do not include bribing members of foreign public assemblies as a separate category. The overall figures appear in paragraphs 26 ff.

Bribery in the private sector (Articles 7 and 8, ETS 173)

Reservation

37. Belgium lodged a reservation[17] in 2004 at the time of deposit of the instrument of ratification and renewed it in 2007. It justifies the reservation by stating that articles 7 and 8 of the Convention base the offence of active and passive bribery in the private sector on the fact that persons, in the course of business activity, request or are offered an undue advantage to act, or refrain from acting, in breach of their duties. This is a broader and less precise notion than the one in Article 504bis of the Criminal Code, which requires the action in question to be part of, or facilitated by, the individuals' official duties and to be taken unbeknown to and without the authorisation of, as appropriate, the board of directors or general meeting, the manager or the employer. However, Article 504bis is not confined to undertakings' sectors of activities or the business sector, or to persons in an employment relationship since it also covers persons who are self-employed or who are contracted to perform a particular operation. The reservation to this article therefore makes it possible to limit the Convention's scope to situations where the sought-after action (or failure to act) is carried out unbeknown to and without the authorisation of the person or body to whom the perpetrator is formally responsible.

Definition of the offence

38. Bribery in the private sector is an offence under 504bis of the Criminal Code. The first paragraph concerns passive bribery and the second active bribery. Article 504ter, paragraph 1 lists the penalties applicable and paragraph 2 concerns cases of bribes offered and accepted (as in the case of bribery of public officials), which are liable to slightly higher penalties.

> ***Art.504bis**. § 1. The action of a person who as the director or manager of a legal person, or the representative or employee of a legal person or an individual, requests or accepts, directly or through the intermediation of other persons, for himself or others, offers, promises or advantages of any nature in exchange for performing or refraining from performing actions in connection with his duties, unbeknown*

[17] It reads as follows; "According to Article 37, paragraph 1, of the Convention, Belgium reserves the right to establish as a criminal offence under its domestic law the conduct referred to in Articles 7 and 8 of the Convention only if such conduct was committed in view of the accomplishment or the omission of an act, without the knowledge and without authorisation, as the case may be, of the board of directors or of the general meeting, of the principal or of the employer."

to and without the authorisation of, as appropriate, his board of directors or annual general meeting, his principal or his employer constitutes passive private corruption.
§ 2. The action of a person who offers, directly or through the intermediation of other persons, promises or advantages of any nature to the director or manager of a legal person, or the representative or employee of a legal person or an individual, for himself or others, in exchange for performing or refraining from performing actions in connection with his duties, unbeknown to and without the authorisation of, as appropriate, his board of directors or annual general meeting, his principal or his employer constitutes active private corruption.
[**NOTE**: Article 4 of the Act of 11 May 2007 specifies that article 504bis, § 2 of the Criminal Code, inserted by the Law of 10 February 1999, should be interpreted in such a way that it also constitutes an active bribery offence in the private sector to grant directly or through the intermediation of other persons, promises or advantages of any nature to the director or manager of a legal person, or the representative or employee of a legal person or an individual, for himself or others, in exchange for performing or refraining from performing actions in connection with his duties, unbeknown to and without the authorisation of, as appropriate, his board of directors or annual general meeting, his principal or his employer.]

***Art.504ter**. § 1. The penalty for private corruption shall be six months' to two years' imprisonment and a fine of 100 to 10 000 francs, or one of these penalties.*
§ 2. When the request specified in Article 504bis, § 1 is followed by an offer as specified in Article 504bis, § 2, and in cases where an offer as specified in Article 504bis, § 2 is accepted, the penalty shall be six months' to three years' imprisonment and a fine of 100 to 50 000 francs, or one of these penalties.

Elements and aspects of the offence

Persons who direct or work for private sector entities

39. Article 504bis refers to the director or manager of a legal person, or the representative or employee of a legal person or an individual. The law does not define the notion of private sector. However, it has a broad scope. It is not confined to employment relationships but also covers persons who are self-employed or who are contracted to perform a particular operation[18]. Nor is it confined to undertakings' sectors of activities or the business sector, since it also covers, for example, non-profit organisations. Finally, it extends beyond work-related activities to include voluntary work and the world of sport[19].

Promising, offering or giving (active bribery)

40. Article 504bis refers to "offering ... promises or advantages of any nature", which are the same words as appear in the offence of bribing a public official. In 1999, Parliament deliberately adopted a definition of the forms of behaviour covered that was similar to the one used in connection with public sector bribery. In the debates in Parliament, the then justice minister had spoken of his wish to maintain this parallel approach[20]. In addition, Article 4 of the Act of 11 May 2007 specifies that article 504bis, § 2 of the Criminal Code, inserted by the Law of 10 February 1999, should be interpreted in such a way that it also constitutes an active bribery offence in the private sector to grant directly or through the intermediation of other persons, promises or advantages of any nature to the director or manager of a legal person, or the representative or employee of a legal person or an individual, for himself or others, in exchange for performing or refraining from performing actions in connection with his duties, unbeknown to and without the authorisation of, as appropriate, his board of directors or annual general meeting, his principal or his employer.

[18] Report of the Senate justice committee, op. cit., p. 47.
[19] Report of the Senate justice committee, op. cit., pp. 19 and 69.
[20] Report of the Senate justice committee, op. cit., p. 71.

Request or receipt of any undue advantage, or the acceptance of an offer or a promise (passive bribery)

41. Article 504bis refers, as in the case of bribery of a public official, to requesting or accepting promises or advantages of any nature.

Directly or indirectly; For themselves or for anyone else; To act or refrain from acting; Committed intentionally

42. Belgian law also uses the terms already seen in connection with the offence of bribing a public official, namely: directly or through the intermediation of other persons; for himself or others; and for performing or refraining from performing actions in connection with his duties. As previously noted, the offence of bribery is deemed to be intentional, under the general principles of criminal law.

In the course of business activity; In breach of their duties

43. Belgian law makes no reference to the context of the business activity and as noted above the offence of bribery in the private sector is not confined to the commercial sphere. Moreover the offence does not expressly stipulate that there should be a breach of duties but Article 504bis of the Criminal Code requires the action in question to be part of, or facilitated by, an individual's official duties and to be taken unbeknown to and without the authorisation of, as appropriate, the board of directors or general meeting, the manager or the employer. This wording is based on pre-2005 French law. Belgian law's choice of this approach has led to the reservation regarding the offence of private sector bribery. The authorisation referred to may take any form. It may derive from previous mandate or terms of reference that can be explicit or implicit. It is for the prosecution service to establish that the action that is the subject of proceedings has been carried out without authorisation.

Penalties

44. The penalties specified in Article 504ter include 6 months' to 2 years' imprisonment and/or – subject to the adjustment method referred to in paragraph 22 – a fine of 550 to 55 000 euros. In the event of a request followed by an offer or an offer accepted, the penalty may be up to 3 years' imprisonment and/or a 550 to 275 000 euro fine. The arrangements and ancillary penalties applicable to the bribery of a public official also apply to private sector bribery.

Statistics and judicial decisions

45. The following table summarises convictions for bribery in the private sector. At the time of the visit, the figures for 2005 and 2006 had not yet been finalised.

Convictions	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
Private sector bribery	**-**	**-**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**4**	**1**	**0**	**0**
Passive private sector bribery	-	-	0	0	0	0	0	0	0	0	2	0	0	0
Active private sector bribery	-	-	0	0	0	0	0	0	0	0	2	1	1	1

Bribery of officials of international organisations (article 9 of ETS 173), bribery of members of international parliamentary assemblies (article 10 of ETS 173) and bribery of judges and officials of international courts (Article 11 of ETS 173)

46. Article 250 of the Criminal Code, seen previously in connection with the bribery of foreign public officials, extends the provisions on bribery (articles 246 to 249 of the Criminal Code) to persons performing public duties in organisations governed by public international law. This also includes members of international parliamentary assemblies and judges and officials of international courts.

> ***Article 250***
> *When the bribery specified in articles 246 to 249 concerns a person performing public duties in a foreign state or an organisation governed by public international law, the penalties shall be as provided for in these provisions.*

47. This article applies to both established and contractual international public officials and makes no distinction between international civil servants in the strict sense and members of international parliamentary assemblies and judges and officials of international courts. The former Article 250 specified that the status of such persons would be determined in accordance with the statute of the international organisation to which they belonged. Following an OECD recommendation, the Act of May 2007 deleted this sentence to make the notion of international public official autonomous. The broad definition of public service applied in Belgium now also applies to persons performing such duties in international organisations.

48. The reference to articles 246 to 249 of the Criminal Code means that the same elements and penalties apply to this offence (see paragraphs 22 ff). The Belgian authorities state that to be eligible for the European Parliament, persons must not be covered by one of the cases of ineligibility or suspension in articles 6 to 9bis of the Electoral Code or have been deprived of their right to vote by an individual decision, civil or criminal, in their country of origin (Article 41.1.1.bis of the Elections to the European Parliament Act of 23 March 1989). Belgium's membership of the organisation concerned is not a precondition for this offence.

49. The available statistics do not include bribing persons in this category as a separate group. The overall figures appear in paragraphs 26 ff.

Trading in influence (Article 12 of ETS 173)

Reservation

50. Belgium lodged a reservation on 23 March 2004 at the time of deposit of the instrument of ratification, and renewed it in 2007[21]. Article 12 of the Convention requires states to establish as criminal offences the promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any public official or judge, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or leads to the intended result. Article 247.4 of the Criminal Code is

[21] According to Article 37, paragraph 1, of the Convention, Belgium reserves the right not to establish as a criminal offence under its domestic law the conduct referred to in Article 12 of the Convention which does not concern the use by a person holding a public function of the influence - be it real influence or supposed influence - that he or she disposes of owing to his or her function.

concerned with bribing a person performing public duties to use his real or supposed influence arising from his position to obtain an action or decision from a public authority or ensure that no such decision is made. It is not therefore concerned with private trading in influence in which a private individual offers or requests an advantage from another private individual in exchange for exercising influence over someone performing public duties. The authorities state that Article 12 is excessively broad in scope and that the reservation to it makes it possible to exclude private sector trading in influence.

51. Draft legislation to add to the Criminal Code the offence of trading in influence by individuals aimed at persons performing public duties was passed by the Senate and sent to the House of Representatives in February 2008[22]. This draft legislation is intended to bring Belgium into line with the Council of Europe Criminal Law Convention and the UN Convention on Corruption. The House of Representatives is anxious not to interfere with legitimate forms of lobbying and has not yet passed the legislation.

Definition of the offence

52. Article 247§4 of the Criminal Code, in conjunction with Article 246, makes public sector trading in influence an offence, as a form of public sector bribery. The Belgian authorities say that this makes it possible to extend the notion of corruption beyond the normal activities of persons performing public duties. However, Belgian law is not concerned with private trading in influence in which a private individual offers or requests an advantage from another private individual in exchange for exercising influence over someone performing public duties. The matter was not raised in parliament when the original draft legislation was debated in 1999.

> ***Art.247***. *(…)*
> *§ 4. Bribing a person exercising public duties to use his real or supposed influence arising from his position to obtain an action or decision from a public authority or ensure that no such decision is made is punishable by six months' to one year's imprisonment and a fine of 100 to 10 000 francs.*
> *When, in the case specified in the previous paragraph, the request as specified in Article 246§1 is followed by an offer as specified in Article 246§2, and in cases where an offer as specified in Article 246§2 is accepted, the penalty shall be six months' to two years' imprisonment and a fine of 100 to 25 000 francs.*
> *If the person who is bribed has actually used his influence arising from his duties he shall be punished by six months' to three years' imprisonment and a fine of 100 to 50 000 francs.*
>
> ***Art.248***. *When the acts specified in articles 246 and 247 §§ 1 to 3 concern a police officer, a person exercising judicial police functions or a member of the prosecution service, the maximum penalty shall be twice the maximum specified in Article 247 for those acts.*

53. The elements of the offence are the same as for traditional public sector bribery, other than two aspects, namely the action or conduct sought and the purpose. The first is considered below. In

[22] The new Article 317 would read as follows: Art. 317. § 1. The action of a person not performing public duties within the meaning of Article 246 who requests or accepts, directly or through the intermediation of other persons, for himself or others, offers, promises or advantages of any nature in exchange for using his real or supposed influence to obtain a decision from a public authority or ensure that no such decision is made constitutes passive trading in influence.
§ 2. The action of a person who provides or offers, directly or through the intermediation of other persons, to a person not performing public duties within the meaning of Article 246, for himself or others, promises or advantages of any nature in exchange for using his real or supposed influence to obtain a decision from a public authority or ensure that no such decision is made constitutes active trading in influence.
§ 3. The penalty for trading in influence shall be six months' to two years' imprisonment and/or a fine of 100 to 10 000 francs.
§ 4. When the trading in influence concerns a public department or authority in a foreign state or in an organisation governed by public international law, the penalties shall be those specified in § 3.

contrast to bribery, the purpose is indirect, because trading in influence is a trilateral relationship. The aim is to induce a public department or authority to act, or refrain from acting. By definition, the official who carries out the action or fails to act is not part of the bribery process, otherwise he or she could be prosecuted as a joint perpetrator of passive bribery.

Elements and aspects of the offence

"asserts or confirms that he or she is able to exert an improper influence over the decision-making [of public officials]"

54. The offence in Article 247.4 is concerned with the use of influence, namely the use by persons performing public duties of their real or supposed influence arising from their position. Trading in influence is concerned with cases that go beyond ones covered by the offence of bribery, that is ones in which the influence is clearly related to the performance of his duties by the person concerned. The term used is "use" and not "abuse" of influence. Once the influence is used in exchange for the promise or granting of an advantage, this becomes an offence and the very use of the influence is punishable.

"whether or not the influence is exerted or .... the supposed influence leads to the intended result"

55. These elements are not referred to as such in the wording of Article 247.4, but they are partly taken into account in the penalties that can be imposed, since the level of the sanction varies according to whether or not the influence has been applied.

Other aspects

56. The offence in 247.4 is concerned with bribing a person performing public duties to use his real or supposed influence arising from his position to obtain an action or decision from a public authority or ensure that no such decision is made.

Penalties

57. The penalties are 6 months' to 1 year's imprisonment and, using the adjustment method referred to in paragraph22, a fine of 550 to 55 000 euros for the simple offence (Article 247.4.1). If the request is followed by an offer or the offer is accepted, the penalty is 6 months' to 2 years' imprisonment and a fine of 500 to 137 500 euros (Article 247.4.2). If the influence is actually exercised, the penalty is 6 months' to 3 years' imprisonment and a fine of 500 to 275 000 euros (Article 247.4.3). In so far as trading in influence is treated as a bribery offence, the ancillary penalties applicable to the bribery of public officials are also applicable (see paragraphs 22 ff).

Statistics and judicial decisions

58. The available statistics do not include trading in influence in the public sector (which is the only offence, and then as one aspect of bribery) as a separate group. The overall figures appear in paragraphs 26 ff.

Bribery of domestic arbitrators (Articles 1 to 3 of ETS 191)

59. The Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) was ratified after the visit, on 26 February 2009, and will come into force in Belgium on 1 June 2009. During

the visit, the Belgian authorities said that the active and passive bribery of domestic arbitrators was already an offence under Article 249.1, in combination with Article 246, of the Criminal Code.

> ***Art.249**. § 1. When the bribery specified in Article 246 concerns an arbitrator and is related to his judicial function, the penalty shall be one to three years' imprisonment and a fine of 100 to 50 000 francs.*
> *When, in the case specified in the previous paragraph, the request as specified in Article 246§1 is followed by an offer as specified in Article 246§2, and in cases where an offer as specified in Article 246§2 is accepted, the penalty shall be two to five years' imprisonment and a fine of 500 to 100 000 francs.* [23]

60. The elements of the offence have already been considered in connection with the bribery of public officials (see paragraphs 9 ff). Arbitrators and their role are defined in articles 1676 ff of the Criminal Code. The penalties in Article 249.1 are 1 to 3 years' imprisonment and, using the adjustment method referred to in paragraph 22, a fine of 550 to 275 000 euros. In the event of bribery offered and accepted the penalties rise to 2 to 5 years' imprisonment and a fine of 2 750 to 550 000 euros. The ancillary penalties applicable to the bribery of public officials are also applicable. Under Article 1680 of the Judicial Code, persons who are entitled to enter into contracts, other than ones who have been definitively excluded from the electorate or have had their electoral rights suspended, may become arbitrators.

61. The available statistics do not include bribing arbitrators as a separate category. The overall figures appear in paragraphs 26 ff.

Bribery of foreign arbitrators (Article 4 of ETS 191)

62. The Belgian authorities state that the bribery of foreign arbitrators is an offence under a combination of existing provisions. The term does not appear as such, but Article 250 of the Criminal Code, which extends the scope of nationally applicable offences to certain categories of public persons, refers to Article 249.1 (see above), which is concerned with national arbitrators.

> ***Article 250***
> *When the bribery specified in articles 246 to 249 concerns a person performing public duties in a foreign state or an organisation governed by public international law, the penalties shall be as provided for in these provisions.*

63. The elements of the offence and the penalties are the same as for national arbitrators.

64. The available statistics do not include the bribery of foreign arbitrators as a separate category. The overall figures appear in paragraphs 26 ff.

Bribery of domestic jurors (Article 1, section 3 and Article 5 of ETS 191)

65. Bribery of domestic jurors is an offence under articles 246 and 247 of the Criminal Code, which deal with domestic public officials in general. Article 249 paragraph 2 contains an aggravating circumstance applicable specifically to jurors.

> ***Art.249**. (…)*
> *§ 2. When the bribery specified in Article 246 concerns a non-presiding judge or juror and is related to his judicial*

23 See footnote 5.

function, the penalty shall be two to five years' imprisonment and a fine of 500 to 100 000 francs.
When, in the case specified in the previous paragraph, the request as specified in Article 246§1 is followed by an offer as specified in Article 246§2, and in cases where an offer as specified in Article 246§2 is accepted, the penalty shall be five to ten years' imprisonment and a fine of 500 to 100 000 francs.
(…)

66. The elements of the offence have already been considered in connection with the bribery of public officials. Article 249.2 uses the term "juror", which applies to proceedings in the assize court, as defined in the Code of Criminal Procedure. Under Article 249.2, the penalty is 2 to 5 years' imprisonment and a fine of 2 700 to 550 000 euros. If the request is followed by an offer or the offer is accepted, the penalty is 5 to 10 years' imprisonment and a fine of 2 750 to 550 000 euros. The ancillary penalties applicable to the bribery of public officials, including withdrawal of the right to serve as a juror (Article 31.4), are also applicable here.

67. The available statistics do not include bribing jurors as a separate category. The overall figures appear in paragraphs 26 ff.

Bribery of foreign jurors (Article 6 of ETS 191)

68. The Belgian authorities state that as with the bribery of foreign arbitrators, the offence of bribing foreign jurors stems from a combination of articles 249.2 and 250, which extends the scope of these offences to certain categories of foreign officials. The term does not appear as such in the legislation, but Article 250 refers to Article 249.2, which is concerned with domestic jurors. The elements of the offence and the penalties are the same as for national arbitrators.

69. The available statistics do not include bribing foreign jurors as a separate category. The overall figures appear in paragraphs 26 ff.

Other aspects

Participatory acts

70. The general part of the Criminal Code (articles 66 to 69) makes offences of various forms of participation in criminal acts, including co-operation, aid, assistance, use of gifts/promises/threats, and abuse of authority or power (these forms of participation are liable to the same penalties as the offence itself), and giving instructions and procuring instruments (complicity, for which the penalties are slightly less than those incurred by the main perpetrator of the offence).

Jurisdiction

71. Article 3 of the Criminal Code applies the territorial principle to criminal law.

Article 3 of the Criminal Code.
Offences committed on Belgian soil by Belgians or foreign nationals shall be tried in accordance with Belgian law.

72. All offences committed on Belgian territory are punishable under Belgian law, no matter how serious the offence or the nationality of the perpetrator or victim. The Belgian courts may also try

perpetrators, joint-perpetrators and accomplices who have taken part in an offence committed in Belgium, even if the forms of participation took place exclusively abroad[24].

73. The legal basis for the extraterritorial jurisdiction of Belgian courts differs according to whether the offence is one of (a) public sector bribery or trading in influence or (b) private sector bribery committed abroad.

Public sector active and passive bribery, including trading in influence, committed abroad

74. Article10quater of the introductory part of the Code of Criminal Procedure (IP CCP), replaced in May 2007[25], is applicable to public sector bribery.

> ***Article10quater***
>
> *§ 1. Criminal proceedings may be brought in Belgium against any person who has committed outside the country: 1° an offence specified in articles 246 to 249 of the Criminal Code; 2° an offence specified in Article.250 of the Code, when the person performing public duties in a foreign state or an international organisation is Belgian, or when the international organisation in which the person performs public duties has its headquarters in Belgium.*
> *§ 2. Any Belgian or any person whose main residence is in Belgium who, outside the territory of Belgium, has committed an offence specified in Article 250 of the Criminal Code may be prosecuted in Belgium, on condition that these events constitute an offence in the country where they were committed.*

75. Article 10quater §1.1 IP CCP states that Belgian courts have jurisdiction to try the offences in Articles 246 to 249 of the Criminal Code (active and passive bribery of national public officials, including the trading in influence specified in Article 247.4), whatever the nationality of the person committing them. The dual criminality requirement does not apply to cases involving persons performing public duties in Belgium. This jurisdiction is based on the principle of protection whereby a state can reserve the right to try offences committed abroad whose purpose is to harm that state's legal interests[26]. In addition, Article 10quater §1.2 gives jurisdiction to Belgian courts in respect of any offender who has committed abroad a crime under Article 250 the Criminal Code, when the person is a Belgian national and works as a foreign official or as an employee of an international organisation of public law, or where the international organisation employing the accused (a foreigner) has it seat in Belgium.

76. Moreover, under Article 10quater, §2 IP CCP, any Belgian or any person whose main residence is in Belgium who, outside the territory of Belgium, has committed an offence specified in Article 250 of the Criminal Code (active or passive corruption of foreign public officials and officials of international organisations) may be prosecuted in Belgium, on condition that these events constitute an offence in the country where they were committed. This condition is considered to have been met if the act is unlawful in the country where it was committed, even if it has a

[24] Both case-law and legal theory consider that the courts have jurisdiction to try offences that are partially committed in Belgium. It is merely sufficient for the material (and not purely intentional) elements of the offence and any aggravating circumstances to have taken place on Belgian soil, without the need for the entire offence to have been committed in Belgium or, in the event of a momentary offence involving a specific outcome, for it to have been completed there.
[25] Before the legislation of 11 May 2007, a distinction was made between public officials of EU member states and other foreign public officials. This distinction has been removed, on the recommendation of the OECD. The condition whereby bribery concerning persons performing public duties in Belgium must also be an offence in the legislation of the other country has also been abolished, as has the requirement that the authorities of the foreign state must give prior notice. The only condition that remains is that of dual criminality in Article 10quater, §2.
[26] Explanatory memorandum to the Act of 11 May 2007 (Doc.51-2677/001).

different legal classification. Nor is any complaint from the victim or official notification from the foreign authorities required [27].

Private sector bribery committed abroad

77. Here the traditional rules governing extraterritorial jurisdiction apply, as laid down in Article 7 of the IP CCP:

> *Art 7§1: Any Belgian or any person whose main residence is in Belgium who, outside the territory of Belgium, has committed an offence under Belgian law may be prosecuted in Belgium, on condition that these events constitute an offence in the country where they were committed.*
> *§ 2. If the offence was committed against a foreign national, the prosecution may only be launched at the request of the public prosecutor and must be preceded by a complaint from the foreign national concerned or his family, or by official notification to the Belgian authorities by the authorities of the country concerned that the offence has been committed.*
> *If the offence was committed in time of war against a national of a country allied to Belgium in accordance with Article 117 of the Criminal Code, the official notification may also be made by the authorities of the country of which the victim is a national.*

78. Under this provision governing capacity to bring proceedings, the Belgian courts have jurisdiction to try offences committed by Belgians or persons whose main residence (lawful or otherwise) is in Belgium, subject to the following conditions: dual criminality and, if the victim is a foreign national, at the request of the public prosecutor and following a complaint or official notification.

79. Under Article 12 IP CCP, prosecutions in such cases are only possible if the presumed perpetrator is in Belgium. This requirement is a condition not of jurisdiction but of the admissibility of criminal proceedings. It must be satisfied when proceedings are launched[28].

80. The Belgian authorities state that when Belgium does not have jurisdiction under Articles 10quater or 7, Article 12bis IP CCP authorises the Belgian courts to assume jurisdiction on the basis of any international convention ratified by Belgium, including therefore Article 17 of the Criminal Law Convention on Corruption.

> ***Art 12 bis***
> *1. Other than in cases specified in articles 6 to 11, the Belgian courts also have jurisdiction to try offences committed outside the territory of the Kingdom that are specified in rules of international law established by convention or custom or rules of European Union secondary law binding Belgium, when such rules require it, by whatever means, to bring the relevant case before the competent authorities to launch proceedings.*
> *2. The proceedings, including any judicial investigation, can only be brought at the request of the public prosecutor, who shall assess any complaints.*
> *3. When the federal prosecutor has received a complaint in accordance with the preceding paragraphs, he shall only ask the investigating judge to investigate the complaint, unless:*
> *1° the complaint is manifestly ill-founded; or*
> *2° the facts described in the complaint do not correspond to an offence as specified in the Criminal Code or any other international criminal offence specified in a treaty to which Belgium is a party; or*
> *3° the complaint cannot lead to an admissible criminal prosecution; or*
> *4° it appears from the practical circumstances of the case that, in the interests of the proper administration of justice and in accordance with Belgium's international obligations, the case should be brought before either an international court, the courts of the place where the offence was committed or the courts of the country of which the perpetrator is a national or of the country where he may be located, on condition that*

[27] Explanatory memorandum to the Act of 11 May 2007 (Doc.51-2677/001).
[28] Droit de la procédure pénale, Bosly and Vandermeerch, la Charte, 5th edition, 2008, p.109.

these courts offer the standards of independence, impartiality and fairness required under the international commitments linking Belgium to the state concerned.
4. If the federal prosecutor considers that one or more of the conditions specified in paragraph 3, 1°, 2° and 3° apply, he shall apply to the criminal section of the court of appeal to declare that the case should not be prosecuted or that criminal proceedings are inadmissible. Only the federal prosecutor shall be heard.
5. If the criminal section of the court of appeal decides that none of the conditions specified in paragraph 3, 1°, 2° and 3° apply, it shall nominate the investigating judge with territorial jurisdiction and inform him of the facts that should be investigated. The proceedings shall then continue in accordance with the law.
6. The federal prosecutor may appeal on points of law against decisions handed down in accordance with paragraphs 4 and 5. Such appeals must be lodged within fifteen days of the handing down of the decision.
7. In cases specified in paragraph 3, 3°, the federal prosecutor shall notify the Minister of Justice of the decision of the criminal section, once it is no longer subject to appeal. In the case of offences committed after 30 June 2002 that fall within the material jurisdiction of the International Criminal Court, the Minister of Justice shall inform that Court of the facts of the case.
8. In cases specified in paragraph 3, 4°, the federal prosecutor shall take no further action on the case and notify his decision to the Minister of Justice. No appeals may be lodged against such decisions. In the case of offences committed after 30 June 2002 that fall within the material jurisdiction of the International Criminal Court, the Minister of Justice shall inform that Court of the facts of the case.
(NOTE: In its decision no. 62/2005 du 23-03-2005 (MB. 08-04-2005, p. 14835-14838), the Administrative Jurisdiction and Procedure Court set aside Section 18, 4° of L 2003-08-05/32)

81. According to the Belgian authorities, if Article 12bis IP CCP applies, there is no requirement for dual criminality, a complaint or official notification, and the admissibility condition in Article 12 IP CCP (that the perpetrator is present in Belgium) is not applicable. At the time of the visit, a draft ministerial circular to judges was being prepared to draw their attention to the jurisdiction of the courts based on Article 12bis IP CCP for cases under Article 17 of the Convention, which would fall outside the scope of articles 10quater and 7 IP CCP.

Reservation

82. In 2004, in accordance with Article 37, paragraph 2, of the Convention, Belgium reserved the right to apply Article 17, paragraphs 1 b and c, only if the offence also constituted an offence under the legislation of the state party in which it has been committed, unless the offence concerned a person holding a public function in a state member of the European Union. The reservation was renewed in April 2007. The Belgian authorities state that Article 17, § 1 b provides for much wider jurisdiction than the introductory part of the Code of Criminal Procedure, particularly Article 10quater. It also states that this reservation is not however appropriate in the case of Article 12bis IP CCP, which allows the Belgian courts to assume jurisdiction under Article 17 of the Convention for cases not covered by Articles 10quater or 7 IP CCP.

Offences involving certain categories of persons

83. Article 10quater is applicable to public sector passive bribery, including trading in influence, committed abroad in the following circumstances: a. the bribery involves an official or a member of a domestic public assembly of the country concerned, who must therefore necessarily be a national: under Article 10 quater.1.1, the protection principle applies, whereby a state can reserve the right to try offences committed abroad whose purpose is to harm that state's legal interests[29]; b. the bribery involves an official of Belgian nationality working for an international organisation: Article 10quater.1.2 is applicable and the dual criminality requirement does not apply.

84. Under Article 12 IP CCP, prosecutions in these cases are only possible if the presumed perpetrator is in Belgium. This is an admissibility condition that must be satisfied when

[29] Explanatory memorandum to the Act of 11 May 2007 (Doc.51-2677/001).

proceedings are launched[30]. The Belgian authorities take the view that Article 12bis IP CCP also exempts the courts from this condition. The Belgian courts also have jurisdiction for offences concerning international organisations whose headquarters are in Belgium, even if the official concerned is not Belgian, without the requirement for dual criminality.

85. As previously noted, in 2004 in accordance with Article 37, paragraph 2, of the Convention, Belgium reserved the right to apply Article 17, paragraphs 1 b and c only in certain cases, but the Belgian authorities consider that this reservation is no longer appropriate.

Limitation period for prosecutions

86. The principles governing the limitation period are laid down in articles 20 to 29 of the introductory part of the Code of Criminal Procedure. Article 21 specifies the basic periods.

> *Article 21: Other than for offences specified in articles 136bis, 136ter and 136quater of the Criminal Code, the limitation periods for prosecutions are 10 years, 5 years and 6 months from the date the offence was committed, depending on whether it is classified as serious, lesser or petty.*
> *However, the period will be 15 years in the case of serious offences that cannot be prosecuted as lesser offences, in accordance with section 2 of the Extenuating Circumstances Act of 4 October 1867.*
> *When an offence can be prosecuted as a lesser offence, the period will be one year.*

87. Under Belgian law, it is possible, for example where there are extenuating circumstances, to reduce the charges from serious to lesser or from lesser to petty offences, with a view to reducing the sentence.

88. The penalties for bribery normally make it a lesser offence (*délit*), which means that the limitation period is five years from the date of commission. Active and passive bribery of judges and bribes offered and accepted concerning non-presiding judges or jurors (Article 249) constitute serious offences (*crime*). If the charge is not reduced to a less serious one [by virtue of the *correctionalisation* mechanism], the limitation period is ten years from the date of commission. These periods can be suspended or interrupted by investigative measures or steps in the proceedings carried out before these deadlines. These measures result in a new limitation period of the same duration. The maximum period for launching a prosecution is therefore 10 or 20 years after the events. Since bribery is a complex offence, the limitation period only starts after the final ingredient of the case has occurred. The on-site meetings showed that many bribery cases recently heard or still under way go back to before 1999 and are therefore judged under the former system under which sentences were more favourable. This is in application of the principle of non-retroactivity of criminal laws, except when they are less severe.

Defences

89. There are no specific grounds of defence for bribery and trading in influence offences apart from the usual forms of evidence provided for in the Criminal Code, such as ordered by law and on the orders of a superior (Article 70); mental disorder and force majeure (Article 71) or acts that are excused by the law (Article 78).

Other aspects

[30] Droit de la procédure pénale, Bosly and Vandermeerch, la Charte, 5th edition, 2008, p.109.

90. By virtue of the discretionary prosecution principle, the crown prosecutor may terminate a case before proceedings have been launched. Thereafter it is for the courts, either in chambers or sitting as a trial or appeal court, to take account of the particular circumstances of each case, on the basis of the crown prosecutor's submissions. The prosecution service is not therefore able to give cases any priority when setting the date for a hearing.

91. There are certain exemptions from jurisdiction. A special procedure may be used to prosecute and try certain categories of persons, such as judges and ministers.

III. ANALYSIS

General introduction

92. The prosecution of bribery offences has changed considerably following the amendments in the anti-corruption legislation of 10 February 1999. These were the result of the international undertakings entered into by the country, and of experience of the handling of certain important cases at the time that received extensive media coverage. Traditionally, no real distinction was made between active and passive bribery and evidence was required of what was known in theory – as in certain neighbouring countries – as a "bribery/corruption agreement", or a meeting of minds, to secure a conviction. In practice though, even at the time a certain distinction was drawn between the parties and by combining the charges with the general provisions of the Criminal Code it was possible to prosecute attempted active bribery even if the offer was not necessarily accepted. However, attempted passive bribery, in the form of requests for bribes, was not covered.

93. Since 1999, articles 246 and 247 of the Criminal Code have drawn a clear distinction between active and passive bribery, with no need to establish the existence of an agreement between the parties. Instead, by making the offering and then the accepting of bribes by either party separate offences and increasing the severity of the punishments, parliament has clearly established that both active and passive bribery are offences, even if the other party does not approve. This makes them genuinely autonomous offences[31], as the Criminal Law Convention on Corruption intends. This reading of the legislation was confirmed in on-site meetings with both the drafters of the legislation and practitioners, which revealed no major problems of interpretation or application in practice[32]. Finally, both legal theory and the courts agree that under the 1999 changes, the decision or action sought in exchange for the bribe does not have to have been carried out after the act of bribery[33]. This has a major consequence, namely that it is not necessary for the person receiving the bribe to have actually supplied the consideration.

94. Additionally, evidence is discretionary in Belgian procedural law and discussions have shown that the standard of proof may be largely based on the factual objective circumstances and accumulated evidence[34] to show, or even infer, the existence of the material and/or non-material

[31] Even though in practice investigators still look for a possible agreement – though as a supplementary measure – in order to maximise the charges, since cases where bribes are offered *and* accepted carry heavier penalties.

[32] Although certain practitioners still use the expression "attempted bribery", it appears that this is essentially for linguistic convenience rather than to describe a unilateral action. It is also a consequence of the fact that many bribery cases are long-standing and are still being dealt with today under the pre-1999 legislation, in accordance with the traditional principle of non-retroactivity of criminal laws, since both the definition of the offences and the penalties were less severe before 1999. Law enforcement officials are therefore required to apply both the pre-1999 and the current legislation at the same time.

[33] "Traité de Droit pénal des affaires" by Spreutel, Rogge and Roger, quoted in a judgment of Charleroi criminal court of 26 June 2008.

[34] Such as inappropriate relationships (suspects seen together in a restaurant), the length of the relationship or the advantage conceded, the receipt of advantages by persons exposed to the risk of corruption, breach of his rights and duties

elements of bribery, though the non-material elements remain a matter for the personal conviction and assessment of the court itself. The use of objective circumstances may also make it possible to deal with bribery cases that occurred long in the past, particularly when the evidence of corruption is repeated. All this is particular important because corruption is generally designated a hidden offence. It is therefore not always necessary for the investigators to produce written or explicit evidence, or to rely on *flagrante delicto*-based evidence (obtained with or without covert investigative techniques) or confessions. Nevertheless, it is clearly easier to show that there was some form of agreement if they can produce tangible evidence, such as faxes, text messages or emails, or the results of telephone intercepts.

Offences

95. Under Belgian law, the offence of bribing public officials is mainly compatible with the Criminal Law Convention on Corruption (hereafter "the Convention"). The term used in Belgium since 1999 to designate public officials, namely all persons performing public duties (*toute personne exerçant une fonction publique*) has a very broad meaning and has to be interpreted from a functional rather than an organic standpoint. For example, it covers established and contractual public officials, judges, jurors, elected members at the various levels of the state and local and regional authorities and the staff of private undertakings carrying out a public service function. The parliamentary proceedings on the Act of 10 February 1999 confirm parliament's intention by making it clear that the term performing public duties even applies to persons doing so on a temporary basis, such as contractual and non-established officials. Article 246.1 goes even further than the Convention because the officials performing public duties include candidates for such posts and persons who claim to perform such functions. Belgian law also gives a broad definition to the public decisions and actions that are the subject of corruption, since they include not only official duties but also actions and decisions facilitated by them. It also makes a further distinction, unlike the Convention, between lawful and wrongful decisions. When a bribe is intended to secure a wrongful decision this is an aggravating circumstance. In practice this is generally taken to mean unlawful or not based on the objective circumstances of the case or the public interest. As noted in the descriptive part, bribery offences refer not to unfair advantage but to any advantage whatever. the Belgian authorities explain that this avoids making the difficult distinction between advantages that would and ones that would not be acceptable, thus complying with the 1997 Convention to fight corruption involving European officials or national officials of member states of the European Union.

96. In connection with active bribery and in reply to the OECD second evaluation round, the Belgian parliament introduced an interpretative provision[35] to make it clear that the expression "offering (*proposer*) ... promises or advantages of any nature" in Article 246.1 of the Criminal Code had to include the notion of giving or granting (*octroyer*) an advantage. Subsequent judgments on post-1999 cases show that the courts are very broad in their application of the provisions on active bribery, including spontaneous bribes or sweeteners, and the offering of such advantages, a notion that sometimes causes problems in other countries[36].

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by this same person or unjustified advantage conceded to a potential bribe giver. In a judgment of 21 September 1998 the Bruges criminal court had been told that one of the gifts received by an engineer of the Flemish authorities from a company in exchange for the commission of offences (forgery) was in repayment of the costs of his daughter's marriage. The court found that there could be no sensible and reasonable explanation for this gift other than the participation of the official in the commission of offences for the benefit of the complicit company.

[35] As noted in the descriptive part, this was section 2 of the Act of 11 May 2007 amending the anti-corruption legislation - MB 8 June 2007.

[36] For example, in a judgment of 10 May 2000, the Termonde criminal court sentenced the accused to one month's suspended sentence and a fine for arranging the delivery of a bouquet of flowers and a bottle of whisky to a labour court

97. The wording of the offences of passive bribery in both the public sector (Article 246.1) and the private sector (Article 504bis.1) include the words requests or accepts (*solliciter ou accepter*) an offer, promise or advantage of any nature. The GET notes that the notion of "receiving" within the meaning of Article 3 of the Convention (with a criminal intent) is not explicitly covered.

98. It was generally maintained in the on-site discussions that receiving, as such, an advantage would be considered to be covered (though one practitioner expressed a different view). However, the arguments put forward in support of this view sometimes varied. Some thought that it was necessary to read the whole of the expression used in Article 246.1, in which the notion of acceptance referred not only to an offer or promise (*offre ou promesse*), but also to an advantage, which implied the receipt of such an advantage. Others said that since acceptance of an offer (*offre*) is covered, then by extension the subsequent receiving of the advantage agreed must also be covered. However, the GET considers that this latter position is different from the notion of receipt in the Convention.

99. The theoretical articles that the GET has consulted confirm these uncertainties. For example, certain writers believe that if prior to a particular act or attitude on the part of the person performing public duties, s/he received no request (for an offer, promise or advantage of any nature) and no such offer was made to him/her, there would not be any question of the offence of [passive] bribery[37]. Others consider that making an offence of acceptance as a unilateral act, in other words in the absence of a meeting of minds between the parties (for example in accordance with the combined affects of articles 247.1 and 246) constitutes an anomaly[38]. The parliamentary proceedings on the Act of 10 February 1999 offer no insight into whether this really is an anomaly or whether parliament intended acceptance to also include the notion of "receipt", something the GET thinks would be quite logical. The GET has the impression that the attention of members of parliament and of legal theorists was entirely taken up by the new offence of requesting an advantage, which at the time was intended to fill a significant legal vacuum. It notes finally that court judgments do not offer convincing evidence that “receiving” an advantage is clearly seen to be unlawful. In view of the above, the GET recommends **that necessary measures, such as circulars, interpretative material or training, be introduced to recall that the intentional "receipt" of an advantage, within the meaning of the Criminal Law Convention on Corruption (ETS 173), is unlawful in respect of the various offences of passive bribery.**

100. Overall, it would appear that the broad interpretation of the term used in Article 250 - person performing public duties in a foreign state or an organisation governed by public international law – does apply to the various categories of non-national officials specified in the Criminal Law Convention (foreign public officials, members of foreign public assemblies, officials of international organisations, members of international parliamentary assemblies and judges and

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judge in charge of the case against him, concerning breaches of employment legislation, and a month later giving the judge's sister fresh asparagus, eggs and a bottle of white wine, with the request that she pass them on to her brother.
In a judgment of 18 May 2001 the Oudenaarde criminal court considered that the question put by a person to the policeman accompanying him in the police car for a breathalyser test after a serious road accident ("Couldn't something be arranged? It's just the two of us") could be deemed to be an offer under the 19999 legislation. The individual was convicted, *inter alia*, of active bribery.

[37] Dirk Dewandeleer "Corruption publique" in DPPP, suppl.1 (1 March 2001), p.170

[38] Because the notion of acceptance can only be understood in a strict sense and with reference to a prior offer, which means that it can only be considered in the context of an agreement between the parties (Daniel Flore "La Corruption" in *Les infractions contre les biens*, Collection droit pénal, Larcier, 2008). The writer concludes by noting that, despite this anomaly, acceptance is nevertheless covered as a unilateral act, but he does not go on to draw the consequences, such as that the notion of acceptance as a unilateral act could be synonymous with "receipt" (of an advantage).

officials of international courts). Regarding the additional Protocol to the Convention, the Belgian authorities have stated that the types of duties performed by jurors and arbitrators are still public whatever the circumstances, for example when arbitrators act under an *ad hoc* agreement between two private companies or operate outside the framework of a permanent arbitration court.

101. Since the amendments to the February 1999 legislation, bribery in the private sector has been an offence in Belgium (Article 504bis of the Criminal Code), based on similar arrangements to those applicable to the bribery of public officials. The offence goes beyond the purely economic or commercial sphere, and thus the Convention. Given the problems sometime affecting certain voluntary or charitable organisations and associations, this is to be welcomed. However, the GET considers that the wording of the offence is more concerned with protecting individual companies, rather than the general economy or society at large, against the dangers of corruption[39]. Thus, according to Article 504bis, the offence must have been committed unbeknown to and without the authorisation of, as appropriate, the board of directors or annual general meeting, the principal or the employer. This is fairly similar to the notion of "acting ... in breach of their duties" in articles 7 and 8 of the Convention. However, this approach is not entirely satisfactory, as the 1999 parliamentary proceedings themselves record. For example, it might exclude cases of bribery agreements between the governing bodies of two organisations, such as sports clubs or associations, to bend the rules of the game or the market. In the field of sport, at least, there have been such cases in Belgium. The GET also thinks that there is a risk of employees being covered or exonerated after committing a corruption offence, by their superiors claiming that they were aware of these unlawful actions. These risks were also considered in the parliamentary debates. It was suggested to the GET that safeguards did exist. For example managers who exonerated employees after the event might then be prosecuted themselves for complicity or as joint perpetrators. However, in this case there would have to be a main offender and there was a danger that the courts would not automatically follow this approach. At all events, as noted in the descriptive part (see paragraph 37), Belgium has entered a reservation to articles 7 and 8 of the Convention, to enable it to adopt a different approach to the offence of private sector bribery. Given the potential, and sometimes established, problems associated with the existing offence of bribery in the private sector, the GET recommends **that consideration be given to i) revising the offence of bribery in the private sector in Article 504bis of the Criminal Code to ensure that the requirement that managers or employers not be aware of or approve the offender's actions cannot be misused to permit agreements between different organisations or bodies or enable them to exonerate persons being prosecuted after the event, and therefore ii) withdrawing or not renewing the reservation concerning articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173).**

102. Trading in influence is an offence under Article 247.4 of the Criminal Code. It uses the same legal approach as bribery of a public official and is closely related to active and passive bribery (bribing a person performing public duties to use his real or supposed influence arising from his position to obtain an action or decision from a public authority or ensure that no such decision is made). The offence of trading in influence calls for a number of observations. a). First, the offence is limited to the influence exercised by intermediate persons performing public duties. It does not

[39] Legal theory has tended to support this contention. According to Windey, by making it a condition of bribery that the individual concerned has acted unbeknown to and without the authorisation of his principal, the legislation shows that parliament's main concern was to protect companies against external abuse. In contrast, there is no reference in the legislation to protecting the interests of what might euphemistically be called the stakeholders, such as minority shareholders, outside contractors, employees or even the region. (J. Windey, "La lutte contre la corruption en Belgique, les bonnes pratiques d'entreprise", Proceeds of a seminar in Brussels on 5 October 2005 organised by ICC Belgium, Transparency International Belgium and Willkie Farr Et Gallagher LLP, Bruylant, 2008, no. 25, p. 151).

therefore cover cases of trading in influence committed by private individuals, or "anyone" within the meaning of article 12 of the Convention. Belgium has therefore entered a reservation to that Article. At the time of the visit, legislation was being drafted to introduce a new Article 317 into the Criminal Code to fill this gap and cover trading in influence by persons not performing public duties. If this amendment is passed, the reservation will presumably no longer be required; b) The second observation concerns the final objective of the influence by the intermediary, which is to obtain an action or decision from a public authority, so it needs to be established whether this covers fully all the categories of persons in articles 2, 4 to 6 and 9 to 11 of the Convention. The parliamentary proceedings showed that members of parliament were sometimes unsure whether it extended to elected members and officials, but on the basis of an opinion from the *Conseil d'Etat*, the parliament made it clear that the scope of the concept is broad[40]; c) the third observation is that the offence specified in Article 247.4, of the Criminal Code, and in the new Article 317, does not make it clear that the offence has been committed *whether or not the influence is exerted* or *whether or not the supposed influence leads to the intended result*, as specified in article 12 of the Convention. The Belgian authorities state that the first of these points is taken into account in the penalties, which under Article 247.4.3 vary according to whether or not the influence has actually been exerted. However, the GET notes that this does not appear to be the case with the draft Article 317, which is intended to make trading in influence by persons in the private sector an offence; d) The final observation concerns the difficulty of distinguishing between trading in influence by public persons and private individuals. The on-site discussions showed that in practice this can be a difficult distinction to make, particularly in the case of certain private individuals or bodies performing public duties. Having regard to this and to the other observations, it might therefore be preferable, for the sake of consistency and clarity, for trading in influence to be the subject of a single and separate provision. The GET therefore recommends **that consideration be given to i) establishing an offence of trading in influence that is compatible with the various elements of Article 12 of the Criminal Law Convention on Corruption (ETS 173), by specifying that the "influence peddler" need not be a public official, that the categories of person targeted are those specified in the Convention and that it is irrelevant whether or not the influence is exercised or achieves the intended result, and therefore ii) withdrawing or not renewing the reservation concerning Article 12 of the Convention.**

Penalties

103. Belgian law imposes imprisonment and fines for the various offences of bribery and trading in influence. In the great majority of cases the fine has to be as well as the prison sentence. Only rarely has the court the option of imposing one or other penalty, as in the case of an act that is lawful but for which no remuneration is payable (Articles 247.1), bribery involving non-presiding judges or jurors (Article 249.2) and bribery in the private sector (Article 504ter). There appears to be no explanation for this slight lack of consistency and it might be desirable, when the legislation is next reviewed, to take a fresh look at these provisions.

104. The available prison sentences can be up to five years and sometimes more (10 to 15 years where a judge is involved) for bribery offences in the public sector and up to three years for private sector bribery and trading in influence. This seems to reflect the seriousness of the offences bearing in mind that lower limits of six months' imprisonment or more are always provided for. The upper limits for fines seem fairly high and in a few cases reach 550 000 euros. The lower limit is sometimes considered rather low (550 to 2750 euros, depending on the case).

[40] It covers notably non normative acts which fall within the competence of the legislative, non judicial acts of judicial authorities or persons working for the justice system, as well as acts of the *Conseil d'Etat* and the Arbitration Court.

According to those whom the GET spoke to this makes it possible to prosecute bribery cases even when the amounts involved are very small. All forms of corruption are, in principle, liable to prosecution since the resulting social harm is deemed to outweigh any considerations based on the size and nature of the bribes, thus including, for example, gifts and meals. This is illustrated by a number of convictions[41] and the GET has been conscious of the consistently held view of both the authorities and practitioners that petty bribery can gradually open the way to much larger-scale corruption. Overall, the penalties appear to be both proportionate and dissuasive.

105. However, the GET was also told that because of prison overcrowding, for several years sentences of under 6 months have not been enforced. As the situation has continued to get worse, it has reportedly become necessary to raise this limit to one year. This being said, the other sanctions possibly imposed in practice (for instance fines, where these are cumulative) are not affected. The statistics on sentences presented to the GET show that terms of imprisonment can often exceed three years, but in the majority of cases the actual period served, after application of the rules on suspension of part or all of the sentence for first offenders and so on, is often less than one year[42]. Without entering into the debate on the relative merits of imprisonment and alternatives to prison, the current situation undoubtedly raises a number of issues. However, the GET is unable to give more detailed consideration to this difficult question, whose context is much broader than simply the fight against corruption. At the very least, though, it might be hoped that prosecution submissions in corruption cases will take this into account, for example by calling for higher fines.

106. Belgium has secured undoubted results in terms of prosecutions and convictions, and this includes cases involving leading figures. Those whom the GET spoke to did not deny that, despite these evident successes, Belgium remains exposed – particularly at local and regional level – to risks. These particularly take the form of nepotism, patronage and political and other friendships. It has been suggested that the close links that such relationships create may sometimes have a real influence on the course of prosecutions in particular cases, sometimes culminating in no further action when an accused person is politically or economically influential. It has also been alleged that in certain cases it is easy to deny the relevant prosecutors or investigating judges the necessary resources for their inquiries[43]. The attention of the Belgian authorities is drawn to the risks of undue influence that can affect the effectiveness of the anti-corruption enforcement machinery and, ultimately, of the available sanctions.

107. The discussions revealed that cases currently being dealt with by the judicial system could go back as far as 1991, which shows that considerable flexibility is applied in determining the legal limitation period. Despite that, prosecutions are sometimes discontinued because they are time-barred and above all because they take an unreasonable time (in line with the case law of the European Court of Human Rights). Practitioners explained this in terms of the sometimes limited resources available in a given case. The attention of the Belgian authorities is drawn to this aspect of criminal proceedings.

Jurisdiction

108. The general rules in Article 3 of the Criminal Code grant Belgium jurisdiction for all offences committed in its territory, irrespective of the offender's nationality.

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[41] See the 10 May 2000 judgment of the Termonde criminal court, referred to in footnote 36.

[42] It emerges from information supplied that fines are often imposed in addition to imprisonment. The amount varies but in recent years has generally been less than or equal to 5 500 euros.

[43] The central anti-corruption office, which has 64 investigators for the whole country, is often considered to be understaffed, even though it is very, or even too, frequently called on because of its level of expertise.

109. As noted in paragraphs 77 ff of the descriptive part, the extraterritoriality rules applicable to private sector corruption are the general rules in Article 7 of the Preliminary Title of the Code of Criminal Procedure (PT CCP), on offences committed abroad by Belgian nationals, or persons whose main residence is in Belgium. The current arrangements have certain disadvantages since serious and lesser offences committed by Belgians or foreign residents outside Belgium are covered by Belgian law, but subject to the dual criminality condition. Moreover, for acts committed against foreign nationals, such as active private sector bribery committed by a Belgian abroad, to be heard by the Belgian courts two conditions must be met: there must a complaint from the foreign national concerned (or his family) or official notification from the authorities of the country where the offence was committed, and a request from the prosecution service. These conditions constitute a series of constraints and are unlikely to be fully met in practice. They are again more restrictive than Article 17.1 of the Criminal Law Convention. However the Belgian authorities have indicated on a number of occasions that Article 12bis.1 PT CCP may also be applied to grant the judicial authorities jurisdiction in cases where it would not apply under Article 7 PT CCP (or even the aforementioned Article 10 quarter PT CCP on the bribery of public officials). Even though Article 12 bis PT CCP was inserted primarily to adapt to the evolution of international humanitarian law, its first paragraph would allow the Belgian authorities to assume jurisdiction in accordance with any international treaty, including the Criminal Law Convention. This would then avoid the requirements of dual criminality or a prior complaint from the victim. However, the use of Article 12 bis requires the intervention of the federal prosecution service, giving it a monopoly of prosecutions. The GET considers that there is a lack of clarity concerning extraterritoriality and private sector corruption, the arrangements for which do not so far appear to have been tested. The matter calls for closer attention domestically. It is pleased that the authorities at least plan to circulate an explanatory note on this matter to all Belgian courts. Ideally, the world of business and ordinary citizens themselves should also be aware of the situation so that they can assess the implications of their actions, thus ensuring greater all-round certainty of the law.

110. The jurisdiction rules governing the bribery of public officials are less restrictive since Article 10 quater PT CCP, as amended in 2007, provides for special jurisdiction. Paragraph 1, subparagraph 1 authorises Belgium to prosecute any persons committing bribery offences under articles 246 to 249 of the Criminal Code abroad, which in particular covers passive bribery committed abroad by Belgian public officials and active bribery of Belgian public officials committed abroad by foreign nationals. The offender's nationality is therefore irrelevant when an offence committed abroad involves a Belgian public official or a member of a Belgian public assembly, as specified in Article 17.1.b of the Convention. In addition, paragraph 1 subparagraph 2 of article 10 quarter PT CCP, in combination with article 250 of the Criminal Code enables Belgium to also deal with corruption offences committed abroad by Belgian nationals serving as public officials in a foreign country or as employees of an international organisation of public law; if the employee of the international organisation is not a Belgian national, Belgium nevertheless retains jurisdiction insofar as the organisation's seat is located in the country (as a consequence, Belgium handles in principle the cases forwarded by European Community bodies). This being said, under Article 10 quater, §2 PT CCP, any Belgian or any person whose main residence is in Belgium who, outside the territory of Belgium, has committed an offence specified in Article 250 (active or passive corruption of foreign public officials and officials of international organisations) may only be prosecuted in Belgium if these events constitute an offence in the country where they were committed. This dual criminality condition might create problems when foreign public officials are bribed by Belgian nationals if this takes place in a country where bribery is not a sufficiently well established offence. The Belgian authorities maintain that, here too, Article 12

bis.1 PT CCP can be used to get round this requirement by referring to the rules of jurisdiction in the Convention.

111. Finally, it appears that Belgium's extraterritorial jurisdiction over foreign nationals is subject to the conditions in Article 12 of the PT CCP, whereby prosecutions can only be launched if the suspected offender is in Belgium. Once again, this restriction may be got round by relying on Article 12bis PT CCP and the Convention. Finally, as noted in paragraph 82 of the descriptive part, Belgium has reserved the right to apply Article 17, paragraphs 1 b and c of the Convention, only if the offence also constitutes an offence under the legislation of the state party in which it has been committed, unless the offence concerns a person holding a public function in a state member of the European Union. This reservation is considered by the Belgian authorities themselves to be redundant since Article 12bis PT CCP would enable to fill any potential gaps arising from the special jurisdiction arrangements in Article 12quarter and the general arrangements in Article 7 PT CCP. Nevertheless, as things stand at present, this reservation implies a restrictive reading of the legislation in Belgium, thus neutralising the benefits of Article 12bis PT CCP.

112. The GET concludes that in general terms Belgium appears to satisfy the requirements of Article 17 paragraph 1 of the Convention. However, this calls for the use of a combination of provisions that may in practice cause problems of understanding for those working in the field, with the consequent risk that the law will not always be applied in accordance with the Convention. Finally, the reservation to Article 17 of the Convention no longer appears to be justified, particularly if additional clarifications are made. The GET therefore recommends **i) to take the necessary steps in order to clarify, notably for practitioners, the scope of Article 12bis of the Code of Criminal Procedure, which enables Belgium to assume jurisdiction on the basis of Article 17 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173) in any case where the domestic rules of law fail to satisfy that provision, and make it clear that dual criminality is not a requirement in cases of bribery and trading in influence; ii) to consider withdrawing or not renewing the reservation concerning Article 17 of the Convention.**

IV. CONCLUSIONS

113. Numerous aspects of Belgian law on corruption offences meet the requirements of the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191). Moreover, Belgian practice reflects the country's genuine capacity to bring various corrupt activities before the courts, particularly since the abandonment in 1999 of the need to establish that there was a prior agreement between the two parties or that the proposal of one had been accepted by the other. Removing all doubt that receiving an advantage – within the meaning of the Convention – is an offence, even in the absence of a proposed or agreed consideration, or of a consideration actually supplied, could strengthen still further the effectiveness of the law on passive bribery. Offences such as trading in influence and bribery in the private sector, about which Belgium has entered reservations to the Convention, still contain certain shortcomings and the country is invited to amend the relevant legislation and to withdraw or not renew its reservations. Finally, in the area of jurisdiction, even if it is already broad in respect of corruption involving public officials, Belgium secures compatibility with the requirements of the Convention thanks to the possibility for practitioners to apply directly the jurisdiction principles of the Convention; but besides the fact that the reservation made by Belgium in this respect appears at present to be unjustified, it would be desirable to clarify by the appropriate means certain aspects of the articulation between domestic provisions and those of the Convention.

114. In the light of the foregoing, the GET addresses the following recommendations to Belgium:

i. **that necessary measures, such as circulars, interpretative material or training, be introduced to recall that the intentional "receipt" of an advantage, within the meaning of the Criminal Law Convention on Corruption (ETS 173), is unlawful in respect of the various offences of passive bribery** (paragraph 99);

ii. **that consideration be given to i) revising the offence of bribery in the private sector in Article 504bis of the Criminal Code to ensure that the requirement that managers or employers not be aware of or approve the offender's actions cannot be misused to permit agreements between different organisations or bodies or enable them to exonerate persons being prosecuted after the event, and therefore ii) withdrawing or not renewing the reservation concerning articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173)** (paragraph 101);

iii. **that consideration be given to i) establishing an offence of trading in influence that is compatible with the various elements of Article 12 of the Criminal Law Convention on Corruption (ETS 173), by specifying that the "influence peddler" need not be a public official, that the categories of person targeted are those specified in the Convention and that it is irrelevant whether or not the influence is exercised or achieves the intended result, and therefore ii) withdrawing or not renewing the reservation concerning Article 12 of the Convention** (paragraph 102);

iv. **i) to take the necessary steps in order to clarify, notably for practitioners, the scope of Article 12bis of the Code of Criminal Procedure, which enables Belgium to assume jurisdiction on the basis of Article 17 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173) in any case where the domestic rules of law fail to satisfy that provision, and make it clear that dual criminality is not a requirement in cases of bribery and trading in influence; ii) to consider withdrawing or not renewing the reservation concerning Article 17 of the Convention** (paragraph 112).

115. Pursuant to Rule 30.2 of the Rules of Procedure, GRECO invites the Belgian authorities to present a report on the implementation of the above-mentioned recommendations by 30 November 2010.

116. Finally, GRECO invites the Belgian authorities to authorise publication of this report as soon as possible, translate it into Dutch (and possibly German) and to make this (these) translation(s) public.