Groupe d'Etats contre la corruption
Group of States against corruption

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

DIRECTORATE GENERAL I – LEGAL AFFAIRS
DEPARTMENT OF CRIME PROBLEMS

Strasbourg, 2 December 2004

Public
Greco Eval II Rep (2004) 1E

Second Evaluation Round

Evaluation Report on Belgium

Adopted by GRECO
at its 21st Plenary Meeting
(Strasbourg, 29 November – 2 December 2004)

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I. INTRODUCTION

1. Belgium was the tenth GRECO member to be examined in the Second Evaluation Round. The GRECO Evaluation Team (hereafter referred to as the "GET") visited Brussels from 26 to 30 April. It was composed of Mrs Françoise ROSEN, First Deputy of the Luxembourg Prosecution Department (Luxembourg), Mrs Cornelia VICLEANSCHI, Prosecutor, Head of International Relations Section, Prosecution Department (Moldova) and Mr José Antonio MOURAZ LOPES, Judge, Anadia Regional Court (Portugal) and was accompanied by a member of the Council of Europe secretariat. Prior to the visit the GET experts were provided with a comprehensive reply to the Evaluation questionnaire (Greco Eval II (2003) 7F), requested documents and copies of relevant legislation.

2. The GET met representatives of the following authorities: Federal Justice Department (minister's private office, steering committee, directorate general of legislation and fundamental rights and freedoms, central seizure and confiscation office (OCSC) and network of experts on economic, financial and tax offences); financial intelligence unit (CETIF); federal police – judicial finance directorate (DJF); central anti-corruption unit (OCRC); central organised economic and financial crime office (OCDEFO), federal prosecution office, Brussels, Charleroi and Ghent prosecution departments; Brussels regional court; federal budget and management control department; inspectorate of finance; federal personnel and organisation department; federal economics and finance department (minister's private office and tax inspectorate); college of federal mediators (ombudsmen); minister of the Brussels-Capital Region. The GET also met representatives of the institute of business auditors, the professional institute of certified accountants and tax advisers and Transparency International.

3. It is recalled that GRECO agreed at its 10th Plenary meeting (July 2002), in accordance with Article 10.3 of its Statute, that the evaluation procedure would deal with the following themes:

   - **Theme I - Proceeds of corruption:** Guiding Principles 4 (seizure and confiscation of proceeds of corruption) and 19 (connections between corruption and money laundering/organised crime), as completed, for members having ratified the Criminal Law Convention on Corruption (ETS 173), by Articles 19 paragraph 3, 13 and 23 of the Convention[1];

   - **Theme II - Public administration and corruption:** Guiding Principles 9 (public administration) and 10 (public officials);

   - **Theme III - Legal persons and corruption:** Guiding Principles 5 (legal persons) and 8 (fiscal legislation), as completed, for members having ratified the Criminal Law Convention on Corruption (ETS 173), by Articles 14, 18 and 19, paragraph 2 of the Convention.

4. The present report was prepared on the basis of the replies to the questionnaire and the information provided during the on-site visit. The main objective of the report is to evaluate the effectiveness of measures adopted by the Belgian authorities in order to comply with the requirements deriving from the provisions indicated in paragraph 3. The report contains a description of the situation, followed by critical analysis. The conclusions include a list of

[1] Belgium ratified the Criminal Law Convention on Corruption on 23 March 2004. It came into force on 1.7.04. Belgium accepted to be evaluated on the basis of the Convention even though, at the time of the visit, the Convention had not yet entered into force in respect of Belgium.

recommendations adopted by GRECO and addressed to Belgium in order to improve its level of compliance with the provisions under consideration.

II. THEME I - PROCEEDS OF CORRUPTION

a. Description of the situation

Confiscation

5. Article 17 of the Belgian Constitution abolished the penalty of general confiscation, in which offenders were deprived of all their possessions. Articles 42 ff of the Criminal Code (CC) introduce a system of special confiscation. This is considered to be *ancillary to the principal penalty*[2]. It may be applied to items that were the object of the offence or were used to commit it if they belong to the perpetrator (Article 42.1 CC), the proceeds of the offence (Article 42.2 CC), or pecuniary benefits directly derived from the offence (primary benefits), assets and securities substituted for them (so-called substitute benefits) and any investment income from these assets and securities (Article 42.3 CC). The special confiscation of items covered by Articles 42.1 and 42.2 is mandatory whereas in the case of 42.3 it is optional and can only be imposed by the court in response to a written request from the crown prosecutor (Article 43bis.1 CC). Special confiscation of the object and/or instrumentality of the offence is only obligatory when it belongs to the perpetrator of the offence whereas the proceeds of offences and/or pecuniary benefits directly derived from it, assets and securities substituted for them and any investment income from these assets and securities may be confiscated even if they do not belong to the offender. Article 505.3 CC authorises confiscation of the object of the offence of laundering, even if it does not belong to the offender. Sections 4 and 16 of the Criminal Liability of Legal Persons Act of 4/5/99 also authorises the confiscation (and seizure) of assets belonging to legal persons.

6. Confiscation of the proceeds of corruption is dependent on a prior conviction for corruption. If it is not or is no longer possible to find the items covered by Article 42.3 CC in the perpetrator's property Article 43bis.2 CC authorises the courts to undertake a financial assessment and order the confiscation of an equivalent sum. Estimates of the value of the financial benefits from offences must take account of all the available information on direct and indirect benefits and any other factual material that may be relevant. In the absence of more precise information, the courts may also carry out such assessments *ex aequo et bono* (Court of Cassation 14/12/1994). Confiscation of an equivalent sum is subsidiary and may only be applied if assets or securities directly linked to the offence cannot or can no longer be found in the offender's property. Article 43quater CC provides for direct confiscation by equivalent with shared burden of proof, which is separate from the systems under Articles 42.3 and 43bis 1 and 2 CC. It authorises the confiscation of goods or securities. Securities may be confiscated directly. In other words, courts no longer have to establish whether a perpetrator's property includes financial assets but can directly order the confiscation of securities. This Article provides for a sharing of the burden of proof between the crown prosecutor and the accused regarding the unlawful origin of financial assets that are liable for confiscation. The crown prosecutor must first establish that there is a substantial difference between the perpetrator's assets over the relevant period and the assets he

[2] It is generally acknowledged that special confiscation may be an ancillary penalty or a preventive measure. As a preventive measure, confiscation is concerned with withdrawing harmful or dangerous objects. Following a decision of the Court of Cassation, confiscation only has this legal status if the legal provision concerned is unambiguous (C.Cass., 3 November 1987, R.W., 1987-88, 1055, note A. Vandeplas). According to certain case-law, preventive confiscation is not covered by the Criminal Code and may not therefore be ordered. At all events, Articles 42 ff of the Criminal Code are concerned with penalties. To avoid all discussion, it is better to refer to a form of sanction "ancillary to the principal penalty".

has probably acquired legally, having regard to his normal expenditure, and that there are serious and concrete grounds for thinking that this increase in wealth resulted from the offence of which the individual has been found guilty or an identical offence[3]. It is then the perpetrator's responsibility to show plausibly that this difference is not the result of the offence of which he has been convicted or identical offences[4]. Subject to the rights of third parties of good faith, the assets of a criminal organisation must be confiscated.

Third parties

7. Subject to the stipulations of Article 42.1 CC concerning the object and instrumentality of the offence, special confiscation under Articles 42.2, 42.3; 43bis and 43quater CC may be ordered even when the perpetrator does not own the unlawful assets. In a judgment of 29 May 2001, the Court of Cassation ruled that the personal nature of the penalty was not a barrier to confiscation from third parties. The only restriction on such confiscation derived from the rights that third parties could claim to such property by virtue of their legitimate possession. There is no presumption of third parties' bad faith but the latter have to take the initiative in claiming their property. Under Article 43bis.4 CC any third party claiming right of ownership over a confiscated item has 90 days from the day when the judgment entailing confiscation became final in which to enforce that right[5]. In the case of laundering, confiscation of the object of the laundering may be ordered, pursuant to Article 505.3 CC, even if the property does not belong to the offender, though without infringing third parties' rights of ownership of assets liable to be confiscated.

Interim measures and means of investigation

8. Under Belgian law, criminal seizure refers to any measure to prevent the owner or possessor from freely disposing of an item pending judicial proceedings. Criminal seizure is governed by Articles 35 ff and Article 89 of the Code of Criminal Investigation (CCI). It may be ordered by the crown prosecutor at the police investigation stage or the investigating judge at the judicial investigation stage. Seizure may be applied to any potential items covered by Article 42 CC or anything that might serve to uncover the facts. These provisions authorise the seizure of objects, instruments and proceeds of corruption and any financial benefits derived from corruption offences, assets and securities that have been substituted for them and income from investment of these benefits. Article 35bis CCI authorises preventive seizure of immovable property and, since the legislation of 19/12/02 extending the options for criminal seizure and confiscation, Article 35ter has extended this power to preventive seizure of an equivalent amount. Seizures are only possible under Articles 35 and 35bis CCI if a link can be shown between the offence and the items seized whereas Article 35ter also authorises seizure of items owned by a perpetrator that are not direct proceeds of the offence or for which no link has been established. At the administrative level, the financial intelligence unit (CTIF) can suspend the application of a financial transaction for two working days.

[3] Identical offences are ones that come into one of the categories in Article 43quater of the Criminal Code and come into either the same category as the conviction or a related category appearing under the same sub-heading of paragraph 1 of Article 43quater.

[4] This mechanism is limited to three categories of offence: ones that cause major social disruption or that are particularly designed to secure a profit, such as drug trafficking, public or private corruption and trafficking in hormones, various forms of participation in organised crime or various offences committed by organised gangs, and serious and organised international tax fraud, such as VAT carousels.

[5] Royal decree of 9.8.91 governing the deadline and arrangements for third parties to claim right of possession of confiscated items.

9. There are no systematic asset investigations aimed at detecting, freezing and seizing proceeds of corruption. However with a view to identifying unlawful additions to assets linked to suspected corruption (aside from cases of "petty" corruption), in most cases the crown prosecutor or the investigating judge will order an assets investigation. The Act of 19/12/02 also authorises specific investigations of the financial assets covered by Articles 42.3, 43bis and 43quater CC (Article 534bis and ter CCI), with a view to their confiscation. Following a request from the prosecutor, a court that finds the accused guilty as charged may order such an investigation. It is conducted by the central organised economic and financial crime unit (OCDEFO) or any other police department, under the direction and supervision of the crown prosecutor, who is ultimately responsible. Like the central anti-corruption unit (OCRC), the OCDEFO is one of the three economic and financial crime directorates (DJF Ecofin) in the directorate general of police. The establishment of a shell companies unit marks the start of closer collaboration between the police and tax authorities into offences committed by legal persons. In addition, the Act of 29/11/01 makes it easier to secure telephone taps in corruption cases and that of 6/1/03 transforms into legislation the previous ministerial decree on special investigation methods. Finally, although banking secrecy is enforceable against third parties, including the tax authorities (except in regard to tax evasion), it does not apply to the judicial authorities[6], the CTIF and the banking, finance and insurance commission.

10. The management of seized assets[7] is governed by sections 12 to 14 of the legislation of 26/3/03 establishing a central seizure and confiscation body (OCSC), with provision for the management of seized assets at constant values and the application of certain property-related penalties. Constant value management consists of either 1) maintaining or storing the seized assets, subject to available resources, with a view to their restitution or confiscation, in a state comparable to that at the time of seizure, or 2) the transfer or restitution subject to compensatory payment of the seized assets, in which case the seizure applies to the proceeds obtained. Transfer or restitution subject to compensatory payment relieves the judicial authorities of the burden of maintaining or preventing a fall in the value of seized assets. Since 1 September 2003, any cash sum seized must be assigned to OCSC management unless it has been assigned instead to a particular financial institution or manager or has already been seized or blocked in such an institution. In other cases, the crown prosecutor or investigating judge may assign management of assets to the OCSC. Sums seized before 1 September 2003 and those already entrusted to a financial institution or a specific manager before that date or that were seized or blocked in that institution or other agency may be assigned to the OCSC. Similarly, the crown prosecutor or investigating judge may ask the OCSC to manage all the pecuniary assets not subject to compulsory OCSC management (such as sums blocked in a third party and securities) and any assets requiring special management. This management will be undertaken by the OCSC or an agent or manager nominated by and answerable to it. At the time of the GET's visit the OCSC's annual budget was about € 650 000.

Statistics

11. Over the period 1996-2000 and on the basis of five public works cases dealt with by the OCSC, the total benefit earned by the corrupters was € 12 985 115. The data bank on organised crime reveals 28 cases between 1998 and 2002 in which criminal organisations were involved in laundering and corruption as main (20) or accessory (8) activities. The GET was unable to find

[6] Under section 13 of the Act of 6/1/03 on special search methods and other inquiry methods, the crown prosecutor may demand a list of bank accounts and transactions, if there are serious grounds for suspecting offences liable to at least one year's imprisonment. Banks must co-operate with such requests immediately.
[7] In particular assets referred to in Articles 42.3, 43bis, 43ter, 43quater and 505 CC.

any other statistical information on the seizure and confiscation of the proceeds of corruption. However, the OCSC has now been charged with collecting and processing such information, which will be available in the future. When GRECO examined the report, the OCSC had opened some fifteen "seizure" files concerned with preventing corruption.

International co-operation

12. International mutual legal assistance on seizure and confiscation is governed by the Act of 20/5/97 on international co-operation on carrying out seizures and confiscations (as amended and supplemented by acts of 19/12/02 and 19/3/03) and by the relevant international treaties[8]. Foreign seizure decisions must meet the following criteria to be applicable: the request must come from a judicial authority, the underlying circumstances must amount to offences in both Belgian and foreign law, the person concerned must not have been tried in Belgium for the same offence and it must be possible under domestic law for the Belgian judicial authority to impose the measure sought in similar circumstances[9]. Section 4 of the Act of 20/5/97 establishes the conditions under which a foreign confiscation order may be executed in Belgium: the decision must be based on a conviction in proceedings where the rights of the defence were respected and the confiscation order is final and enforceable, the penalty must not be time-barred under Belgian law, the circumstances in question must constitute an offence in both countries and the *non bis in idem* (double jeopardy) principle applies[10]. Belgium may also transmit requests for implementation of Belgian confiscation orders to other countries. Article 43ter of the Criminal Code authorises the courts to order confiscation of items covered by Articles 42, 43bis and 43quater CC when they are outside Belgian territory[11]. The Act of 26.3.03 requires the OCSC to assist requests for international mutual legal assistance on seizure, confiscation and enforcement of judgments concerning assets linked to offences. It must establish and maintain working relations and co-operation agreements with counterpart institutions in other countries.

13. At the administrative level, the financial intelligence unit (CTIF) co-operates fully with its foreign counterparts and is a member of the Egmont network. Belgium is also linked through the OCSC to the CARIN network, an informal network between national contact points to gather information and encourage mutual assistance in such areas as detection, freezing, seizure, confiscation and the implementation of confiscation decisions abroad.

Money laundering

14. Laundering is an offence that is independent of any principal offence. It is therefore unnecessary to establish the principal offence to prosecute for laundering. The confiscation of laundered financial benefits may therefore be ordered after any offence, including the offence of corruption. Article 505 CC authorises the confiscation of items that are the object of the offence of laundering

[8] In particular the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters, the European Convention on Mutual Assistance in Criminal Matters (ETS 30), the Schengen Agreement, the Vienna Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS 141) and the Criminal Law Convention on Corruption (ETS 173), once it has come into force in Belgium.

[9] Applications to execute foreign decisions are taken in camera by the court of first instance of the place where the seizure would be carried out. The decision must be within five days of referral. In urgent cases, the investigating judge of the place where the items in question are located may order immediate seizure, and the decision must be then confirmed by the court sitting in camera within five days, failing which the decision lapses.

[10] Execution of the decision must be ordered by the criminal court of the place where the items for confiscation are located. All parties must be represented in the proceedings.

[11] The procedure to be followed in such cases is laid down in Articles 165, 197, 197bis and 376 of the Code of Criminal Investigation. The state prosecutor advises the OCSC and sends it copies of the relevant case documents. These are then forwarded to the Ministry of Justice (Article 165).

(within the meaning of Article 42.1 CC) and refers to items covered by Article 42.3 CC, even if they are not the property of the offender. Equivalent confiscation (Article 43bis.2 CC) is not possible for the object of laundering, but is possible for the financial benefits that flow from it.

15. The persons and institutions that are obliged to identify themselves are listed in sections 2.1-19 and 2bis of the Use of the Financial System for Laundering Act of 11/1/93, as amended by the Act of 12/2/04. The CTIF centralises information on laundering, assesses reported or suspected offences, including those of corruption, and if necessary forwards them to the judicial authorities. However, there are no directives on the identification of the proceeds of corruption particularly concerned with legal persons or those who are politically vulnerable.

b. Analysis

16. Belgium has a well developed seizure and confiscation system. Special seizure and confiscation by equivalent is applied with no condition of ownership, though subject to the rights of third parties. Under Article 35ter of the Code of Criminal Investigation on seizure by equivalent and Articles 42.3 and 43quater of the Criminal Code on confiscation by equivalent offenders may be deprived of their assets or their corresponding value if they were acquired as a consequence of criminal offences. It is unnecessary to establish a link between the offence and the asset seized. Article 43quater introduces a sharing of the burden of proof between the crown prosecutor and the offender regarding the source of unlawful financial benefits.

17. The law relating to the special confiscation of laundered assets has led to divergent judicial interpretations. Article 505.3 CC does not explicitly authorise confiscation equivalent on the perpetrators' assets when the laundered money cannot or can no longer be found.

18. The notion of financial benefits must be distinguished from that of financial assets. The legislation refers to financial benefits drawn directly from the offence, by which is meant any asset or security obtained by the perpetrator of the offence when committing it. Given its brevity, this notion has proved difficult to apply and has led to disagreement. Following a Court of Cassation judgment of 22/10/03, it is now considered that when, pursuant to Articles 42.3 and 43bis CC, courts assess the financial benefits accruing from an offence, they can treat tax avoided as such a benefit and this benefit does not disappear simply because the sum concerned is registered for taxation. Banks are worried that this decision might mean that they are guilty of laundering unpaid taxes, particularly in tax evasion cases. The notion of pecuniary assets was defined in circular 7/2004 of the board of crown prosecutors, which gives interim and practical directives to judges and the police. The notion must be taken to mean all legally negotiable moveable and immoveable assets, both tangible and intangible, in an individual's or legal person's possessions above a certain value specified in the circular (currently € 2 500). The choice of provision on which the seizure is based (Article 42, 1°, 2°, 3°, 43bis, 43ter, 43 quater CC) is of little relevance. It has also emerged that the courts find it difficult to distinguish in practice between, on the one hand, optional and equivalent seizures/confiscations of financial benefits arising from an offence and, on the other hand, mandatory seizures/confiscations of the object and proceeds of the offence. The wider range of possibilities of seizure and confiscation and the new requirement for judges to manage seized assets at a constant value have resulted in more applications. This has caused a logjam in the appeal courts as they are asked to rule on decisions taken at first instance. Proposed amendments to the legislation have been drawn up to fill the gaps in Article 505 CC and supplement and simplify the seizure and confiscation system. **The GET recommends that current legislative activities aimed at supplementing and simplifying the current provisions on seizure and confiscation be actively pursued.**

19. There are no systematic asset investigations when corruption offences are identified. However crown prosecutors or investigating judges do order such investigations in the most important cases at the start of police or judicial inquiries, to assess the value of the assets to be seized. Crown prosecutors may also apply to trial courts after conviction for a special investigation of the financial benefits concerned, with a view to their confiscation. Launching investigations at this stage means that the court judgment is not delayed by a financial investigation and gives crown prosecutors an additional period in which to assess the assets without delaying the proceedings. The assets investigations section of the economic and financial crime unit (OCDEFO) regularly carries out both sorts of investigation but has no statistics. In the interviews with judges no specific cases were identified. DJF Ecofin listed the most important cases dealt with by its departments (mainly OCDEFO and OCRC) in its 2001/2002 report but with no information on their outcome. The combination of assets and specific investigations allows information on holdings to be updated between the start of inquiries and the end of the judicial proceedings.

20. With regard to legal persons, the police have started to take action against shell and other companies. Nevertheless, it was confirmed that the 1999 legislation on legal persons' criminal liability and the confiscation of their assets is rarely applied in practice, with just one judgment on corruption and another on handling stolen goods. The GET notes that the difficulties in applying the seizure and confiscation provisions of the 1999 legislation is being considered by a working group established by the federal justice department and in the regular professional working meetings of the country's judges.

21. Another benefit of the existing system is the close collaboration between the various parties concerned with the identification, seizure, freezing and confiscation of assets. Examples include the use of DJF Ecofin liaison officers with the CTIF and OCSC, the use of informers under the legislation of 6/1/03 and the establishment of contact points between the OCRC and various government departments with which it has concluded agreements. DJF Ecofin is supervised by a federal judge to ensure collaboration with the courts. The OCDEFO laundering section co-operates with the CTIF and the prosecuting authorities on transactions to which the CTIF has objected. Liaison officers seconded to the CTIF ensure co-operation between it and the OCDEFO, particularly in the case of hit and run operations in which funds can be immediately blocked. Increasing to two working days the period for which the CTIF can block funds has given it more room for manoeuvre, particularly regarding applications to the courts for seizures.

22. Belgium is one of the first countries to establish a seizure and confiscation office, the OCSC, part of the crown prosecutor's department, under the Act of 26/3/03. The OCSC takes over from the courts responsibility for a number of seized assets, which it manages at constant values. It offers training to prosecutors as part of its assistance and support activities. It has also established and manages a data bank on seized and confiscated assets. Judges and prosecutors are required to notify the OCSC of seizures and confiscations of assets. This requirement is necessary because the OCSC is responsible for co-ordinating confiscation orders. At the time of the evaluation visit, it was already managing cash assets of more than € 16 000 000. It also stated that compared with confiscation decisions and orders to a total of € 200 000 000 for all offences, those actually implemented only amounted to € 4 000 000. The OCSC considers that it is inadequately financed and staffed.

23. There are arrangements for international administrative, police and judicial co-operation. However, the GET was unable to establish how extensive or effective these were in the absence

of concrete examples, particularly of requests for mutual assistance with implementing foreign seizure or confiscation decisions or asset sharing.

24. Although the existing legislation on seizure and confiscation seems generally satisfactory, it is impossible to know to what extent the perpetrators of corruption offences, including legal persons, are deprived of the illicit benefits secured, because of a lack of statistics. Thanks to the OCSC, such statistics will be available in future. However, there is also an absence of statistics on financial investigations, international co-operation and sanctions for failure to notify cases of corruption or laundering by institutions that are obliged to do so. *The GET observes that the availability of statistics, for example on the number of preventive measures and confiscations, the number of investigations, prosecutions and convictions for corruption or money laundering linked to corruption, and international mutual assistance, could contribute to a more focused anti-corruption policy.*

III. THEME II - PUBLIC ADMINISTRATION AND CORRUPTION

a. Description of the situation

Administrative organisation and oversight

25. Government in Belgium is divided between the federal state, three communities (Flemish, French and German-speaking), three regions (Wallonia, Flanders and Brussels-Capital[12]), 10 provinces and 589 municipalities. Under the Constitution, the federal public service takes three distinct forms: the general civil service (Article 107.2), officials of the crown prosecution service, the police and the army (Article 107.3), and decentralised services, that is ones with legal personality and thus management autonomy, public corporations, semi-public corporations, autonomous public enterprises and other public law institutions. Like the other two regions and the three communities, Brussels-Capital Region has a parliament and government and exercises sovereign powers. The Constitution does not provide any hierarchy of standards. As a result, and by way of example, the decrees and orders issued by, respectively, the communities and the regions, are not subordinate to federal legislation. Nor may the latter interfere with the management of regional or community affairs.

26. Measures to prevent corruption are strengthened by such devices as provincial and local non-binding referendums, public inquiries[13], requests for opinions, joint decision making and publicising decisions. Appeals against administrative actions (or failure to act) may be made to the authority concerned, its immediate hierarchical superior or the authority with ultimate responsibility for that service, or to the courts – the lower administrative court, the *Conseil d'Etat* or the ordinary courts. As well as parliamentary scrutiny, monitoring is also carried out internally[14], for example by the federal finance inspectorate, and externally, by the court of auditors, the college of federal mediators (ombudsmen) (considered in GRECO's first cycle evaluation report) and other specific statutory bodies. The communities and regions have their administrative and

[12] Following Decision no. 19 of GRECO 15 (17/10/03), in which it took note of the opinion of Bureau 21 on the organisation of evaluation proceedings and visits in federal states, the evaluation visit only considered the situation in Brussels-Capital.

[13] In the case of compulsory purchase for public works, legislation on dangerous, unhealthy or unsuitable premises, urban and land use planning and environmental impact studies.

[14] A royal decree of 26/5/02 introduces an internal monitoring system operated by and applicable to the governing body, management and staff of each federal department or agency. It comprises a series of measures to avoid risks, such as the risk of corruption, and secure the objectives of operational effectiveness, credible financial and management information and compliance with legislation and regulations.

budgetary control systems, with finance inspectors answerable to them. It should be noted that the court of auditors has a preventive function.

Anti-corruption policy

27. There is no genuine anti-corruption action plan or general strategy. However, at federal level the Belgian authorities have established an "integrity monitoring" department in the Federal Public Department (Ministry) on “Budget and management control authority". The new department advises and provides operational support to all federal departments (FD) and proposes measures to prevent corruption. More targeted initiatives have been introduced in the federal police and the federal finance department. For example, the federal police director general of personnel has launched an integrity action plan. Finally, the Anti-Corruption Act of 10/2/99 has strengthened the penalties for public officials found guilty of corruption. There is no general system for assessing the effectiveness of anti-corruption measures concerning the public service as a whole. According to the Belgian authorities, such a system would be meaningless. It could not enforce its decisions on all the entities, as Belgium does not have an overall administrative structure but as many systems as it has entities, which have sovereign powers, at least as far as communities and regions are concerned.

Transparency

28. Pursuant to Article 32 of the Constitution, the federal, regional and community parliaments have established arrangements to publicise administrative activities within their jurisdiction, and these also extend to local authorities. In the case of the federal authorities, the Administrative Information Act of 11/4/94 establishes a system of actively providing information and responding to requests for it. Citizens are entitled to have inaccurate or incomplete information corrected. If they encounter difficulties they may consult the commission on access to administrative documents and benefit from a "reconsideration procedure". They may then appeal against any decision taken to the *Conseil d'Etat*. Since the Formal Reasons for Administrative Decisions Act of 29/7/92, reasons must be given for any unilateral legal action or decision concerning individuals taken by government. The only exceptions concern external state security, public order, the right of privacy and professional confidentiality.

Status, recruitment and careers of public officials

29. Public officials may be established or contractual staff. There are about 60 000 federal officials, of whom 30 000 work in the federal finance department. Certain departments use a lot of contractual staff, for example Interior, where they form 45.5% of the total. Under the Constitution, the King appoints individuals to general administrative functions. The staff of ministries are in principle state officials, and as such are subject to the Royal Decree of 2/10/37 on the status of state officials. Staff of the general civil or administrative service are hierarchically responsible to the King and to their departmental minister. The King also appoints officials of the special administrative services, the crown prosecution service, the police and the army. In the Brussels-Capital region officials' rights and duties are laid down in the regional government decree of 6/5/99 on the administrative and financial status of ministerial staff and the decree of 26/9/02 on the staff of other public agencies and bodies. These decrees refer in turn to the royal decree of 22/12/00 establishing the general principles of the administrative and financial status of regional and community officials[15].

[15] Under section 87 of the Special Institutional Reform Act of 8/8/80, each regional government establishes its own staffing arrangements, appoints officials and determines their administrative and financial status. Paragraph 4 states that a royal

30. The recruitment and selection of state officials is covered in part III of the staff regulations for state officials (Articles 15 to 44). Persons may not be appointed as state officials unless they meet the general admission conditions such as conduct compatible with the requirements of the post and entitlement to full civil and political rights (Article 16). When they are recruited, established and contractual staff must supply a certificate of good conduct and moral standing. Article 17 also authorises special conditions of appointment, while Article 17.2 authorises additional conditions for posts open to corruption. For regional appointments, it is normal to examine criminal records for all posts, not just those open to corruption. Article 1.2 of the royal decree of 22/12/00 lays down the conditions for recruitment to Brussels-Capital Region government departments and other public agencies and bodies. As at the federal level, established staff must be recruited via the permanent secretariat for state staff recruitment (SELOR).

31. At federal level, as part of their preparation prior to formal appointment, established officials receive training on the staff regulations. This reflects the government's intention to develop in each department or agency an information and training function or unit answerable to the aforementioned integrity monitoring department. The project originated in a government agreement dated July 2003 (point 3). There are certain specific features of the training received by regional and local officials. During their preparatory course, future officials of the Brussels-Capital Region government and other public bodies are introduced to the rights and duties applicable to them during their careers.

Ethical codes/codes of conduct

32. The first federal code of conduct was approved in 2004 for the FEDICT (the computer department), the prime minister's office, budget and management control, and personnel and organisation. At the time of the GET visit, draft codes had also been prepared for public tendering (federal defence department), federal communicators and the federal police. As already noted the integrity monitoring department now assists all federal departments to draw up and assess codes of conduct. It now plans to take a series of steps to put these codes into practice in the field. Examples include training in leadership ethics for different groups of managers, poster information campaigns, videos and so on. In Brussels-Capital Region, staff rights and duties are laid down in the aforementioned government decrees of 6/5/99 and 26/11/03 and royal decree of 22/12/00.

33. At federal level, breaches of the ethical rules in the government codes of conduct are liable to disciplinary sanctions, under Articles 7 and 13 of the staff regulations. Article 77 lays down the following sanctions, which remain in individual staff files for periods of at least six months to three years: warning, reprimand, withholding of salary, disciplinary transfer, disciplinary suspension, relegation in step, downgrading and removal from post, with or without loss of pension rights. The avenues of appeal are laid down in Articles 82 to 95. Officials of Brussels-Capital Region are

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decree with council of ministers' approval shall determine which general principles of the administrative and financial status of state officials shall apply to regional and community officials. The decree was approved on 22/12/00 and establishes the principle that officials shall have an established status, subject to exceptions specified in its Article 2. Articles 4 and 5 lay down a series of ethical duties. The government of Brussels-Region derives its power to determine the status of officials of other public bodies in the region, by analogy, from section 11 of the Act of 16/3/54 concerning the supervision of certain public bodies, which grants the Crown (and thus the government of Brussels-Region) the power to establish the status of these officials. The staff regulations for regional public bodies of 26/9/02 extended the application of Articles 4 to 8 (specifying officials' rights and duties) of the royal decree of 22/12/00 to these regional officials and established the same conditions for their appointment.

liable to the same sanctions, other than reprimand, disciplinary transfer and removal from post while retaining pension rights. There are no central data on the use of these sanctions but the integrity monitoring department hopes to introduce systematic recording in a central register as part of its proposed integrity policy for federal government.

Conflicts of interest

34. Articles 49 and 52 of the state staff regulations forbid state officials or trainees from undertaking any activity, either directly or through an intermediary, liable to interfere with the discharge of their duties or incompatible with the dignity of their office. The same applies in Brussels-Capital Region. Officials in breach of these provisions are liable to disciplinary sanctions. The GET was informed that the proposed integrity policy for federal government also contains provisions that are largely based on OECD recommendations on conflicts of interest and incompatibility.

35. Two acts of 2/5/95 – one of which applies *inter alia* to general officials of the regional and community governments - makes it obligatory for those concerned to make a declaration of any elective posts, management functions or other occupations exercised or held and a declaration of assets, in order to prevent and punish corruption through an *a posteriori* investigation of their activities and assets, in the event of suspected corruption. However the legislation had not yet come into force at the time of the visit in the absence of the qualified majority required for the necessary implementing legislation[16].

36. There are no specific rules governing conflicts of interest when officials leave their posts or improper moves to the private sector. However, Article 10 of the staff regulations prohibits improper disclosure of facts and information acquired in the course of professional activities. Article 6.2 of the royal decree of 22/12/00 creates a similar obligation for Brussels-Capital.

Gifts

37. At the federal level, Article 8.2 of the staff regulations prohibits state officials from seeking, demanding or receiving, directly or via an intermediary, gifts, gratuities or other donations, even outside their professional duties if the action is connected to them. The equivalent regional provision is Article 5.2.2 of the royal decree of 22/12/00.

Staff rotation

38. In the absence of any explicit provision arrangements for the regular rotation of federal staff are based on Articles 37 and 102.2 of the Constitution, which authorise the crown to determine the status of state officials. The recent regulations applicable to government and other public officials of the federal State and the Brussels-Capital Region have introduced a series of postings for senior staff in managerial positions. As a result, these managerial posts are not filled by permanent appointments but by temporary and renewable postings, which creates a *de facto* rotation of the posts concerned.

Reporting corruption

[16] The Belgian authorities have announced that the special act and the act of 2 May 1995 on the obligation to lodge a list of elective offices, functions and professions and a declaration of assets have been implemented and extended by a special act and an act of 26 June 2004, under which the aforementioned obligations will come into force on 1 January 2005.

39. Under Article 29 of the Code of Criminal Investigation, all civil servants are under a duty to disclose to the crown prosecutor any offences of which they become aware in the exercise of their duties and to supply him with any related information, reports or other documents. Under Article 29.2 CCI, tax officials may not report offences under the tax legislation to the crown prosecutor without the prior approval of their departmental director. Tax officials are authorised to inform the crown prosecutor directly of cases of corruption, trading in influence or laundering committed by individuals or legal persons. In the case of conduct that does not constitute an offence, that is misconduct and other forms of behaviour incompatible with ethical or professional standards, the federal integrity policy establishes a procedure for passing on the information to either an internal or an external government body (FDs) while ensuring that the identity of the "whistle blower" remains confidential. Subject to the aforementioned provisions of the Code of Criminal Investigation, in Brussels-Capital Region officials are not bound by any explicit regulations, simply the duty of any citizen to report offences, misconduct, suspected corruption or breaches of ethics. No special steps are taken to protect staff who report such conduct although officials enjoy the same protection as any other citizen offered by investigating judges or courts under the Anonymous Witnesses Act of 8/4/03 or the legislation of 7/7/02 on rules to protect threatened witnesses.

Disciplinary procedures (Articles 78-95bis of the staff regulations of 2/10/37 and 265 ff of the decree of 6/5/99)

40. At federal level, enquiries into such reports are carried out by the reporting official's hierarchical superior, who if appropriate then proposes a penalty to the governing body of the federal department concerned. The latter in turn makes its own proposal, either to the authority with power of appointment for level 2, 3 and 4 officials or to the minister in the case of level 1 officials, though only the crown can order dismissal or reduction in grade. The authorities make the final decision. Staff must be heard and can be assisted by an adviser at each stage of the proceedings. A report of the proceedings is drawn up on which the official concerned can comment (Articles 78.2 and 79). Staff can appeal against governing bodies' proposed penalties to an appeals body (Articles 79.5, 82, 86-94), of which there is one in each Federal department (FD). These bodies have jurisdiction for staff on levels 2 to 4. There is also an appeals body for the most senior staff and an interdepartmental one for all level 1 officials of FDs. These bodies are chaired by a judge and composed of assessors, half of whom are appointed by the authorities and half from among staff appointed by the representative trade unions. The equivalent procedures in Brussels-Capital are governed by Articles 265 ff of a regional government decree of 6/5/99. In Brussels-Capital there is no intermediate governing body between the hierarchical official who undertakes the disciplinary enquiry (Article 275) and the authority that first orders the penalty (Articles 276 and 277). Staff are entitled to challenge members of appeals bodies. Appeals bodies do not make a ruling if officials have been unable to defend themselves properly or the file is not complete (Article 290).

41. Criminal actions result in the suspension of disciplinary proceedings, including the ordering of penalties. The staff regulations authorise the suspension of officials subject to criminal proceedings, with a right to challenge the decision in the *Conseil d'Etat*. Whatever, the outcome of such proceedings, the administrative authority remains responsible for any disciplinary sanctions (Article 81.3 of the royal decree of 2/10/37). In the event of criminal proceedings, once the crown prosecutor has communicated the courts' final decision to the minister of the official concerned, disciplinary proceedings must start within six months of the date of communication (Article 81.5). At regional level, criminal and disciplinary proceedings are independent of each other. Under Article 272.2 of the Brussels-Capital Region staff regulations, criminal acquittal does

not prevent the authorities from imposing disciplinary penalties, so long as the grounds are not incompatible with the court's decision. Nor are the authorities bound by courts' assessment of officials' conduct in connection with accusations against them.

b. Analysis

42. Belgium's institutional arrangements are extremely complex. The division of powers between the various entities is laid down in the Constitution. Monetary and financial policy, defence, police and justice are all exclusively federal domains. In other areas, responsibilities are shared. For example, the federal authorities lay down the general rules governing public procurement or the organisation of the economy, but the regions can then expand on them. Finally, each region decides on the rules governing its staffing arrangements, appoints its own officials and establishes staff regulations. In areas where they have specific powers, the communities may also be involved in this process. Sometimes there is a certain overlap of functions. At the time of the GET visit, the federal authorities acknowledged that the existence of various independent administrative levels of federal government made it impossible to offer a complete picture of the arrangements for preventing and combating corruption in all areas of Belgian administrations. At the sub-federal level, the assessment of guiding principles 9 and 10 has focused on Brussels-Capital Region. The GET has the impression that anti-corruption policy places more emphasis on the federal level than on the Brussels-Capital Region.

43. Federal government officials are normally covered by the staff regulations established by the royal decree of 2/10/37. These lay down the rights and duties of established officials (*agents statutaires*) but also include a fairly long list of exceptions such as those in Article 2. Besides these rights and duties, drawn up in 1937, are stated in very general terms and could be clearer about the risk of corruption and offences and breaches of ethics. In the case of contractual staff under the Act of 20/2/90, ethical requirements are included in their employment contracts, such as those of the FD of Finance employees. In Brussels-Capital Region, the staff of government and other public agencies and bodies have their own staff regulations, laid down in government decrees implementing the royal decree of 22/12/00 and section 87.4 of the Special Institutional Reform Act of 8/8/80. The GET was unable to establish whether the same rules were applied to all staff, including non-established officials of the various departments, public industrial and commercial undertakings, and semi-public and local bodies. Contractual employees are numerous in certain departments (for example 45.5% of the FD of the Interior staff). It is therefore important for ethical rules and awareness of the risks of corruption to be extended to all government employees. None of the aforementioned statutes and regulations refer to corruption or the practical risks of corruption and the ethical training received by new recruits, or subsequently by existing officials, is therefore likely to be very general as regards the risk of corruption. As yet, there are no codes of conduct either at federal level or in Brussels-Capital dealing explicitly with corruption, e.g. along the lines of Council of Europe Recommendation R (2000) 10[17]. However such codes were under preparation at the time of the visit (for example in the FD Defence and federal police and for federal communicators). **The GET recommends that consideration be given to supplementing existing rules on ethical conduct for public officials, whether or not established (*statutaires*), notably by explicit references to corruption; that the authorities continue to adopt, particularly in potentially vulnerable**

[17] However working groups were set up in 2004 to consider values that were common across government. The aim is to draw up a code of values or conduct applicable to all officials. It will include values such as integrity and it is planned to make explicit reference to corruption. What makes this approach original is that it is being carried out by working groups of staff members, who will be invited to decide themselves what values apply to all of them and what they represent, to take account of their content and significance. This is therefore also an awareness raising exercise.

sectors, codes of conduct concerned with personal integrity and the risks of corruption, and that practical training be offered in these areas, based on concrete examples.

44. The GET notes that the general integrity and conduct of the public service are of great importance. Nevertheless, general rules of probity and even training may not be sufficient. Steps must be taken to ensure that they are observed in practice. This is probably one of the reasons why the government has established the integrity monitoring department. At the time of the visit, the department was preparing a major programme concerned with both corruption prevention measures and support for federal institutions in drawing up codes of conduct. The question then arose as to whether it should also monitor their implementation. In July 2003, a government agreement was reached on a major programme – "A creative Belgium based on solidarity. A breath of wind for the country" – one of whose aims was to improve the efficiency of government and the quality of service to citizens. However, no reference is made to preventing and combating corruption. However, the fight against corruption is one of the priorities of the police as stated in the 2004-2007 national security plan. At meetings with the GET, emphasis was placed on certain sectors of administration that were particularly exposed to corruption, such as the tax authorities, public procurement, town planning and the armed forces. There is no system of overall risk evaluation that would offer an improved understanding of corruption and help to assess the effectiveness of existing measures and arrangements. Nevertheless, Appendix E of the 2001-2002 national security plan contained a strategic analysis of the risk of corruption in Belgium and a similar analysis of the risks of corruption in public procurement and tendering will be completed in the first half of 2005. The GET welcomes the Belgian authorities' decision to carry out such analyses. Following the 2003 government agreement, the justice and interior departments drew up an outline memorandum on comprehensive security, one of whose objectives was to develop an appropriate, multidisciplinary and co-ordinated approach to the various factors that facilitated and encouraged corruption. At the time of the visit there had been no equivalent approach in Brussels-Capital. Such an approach, coupled with the activities of the integrity monitoring department, could be broadened and extended to all departments. **The GET recommends to undertake a more systematic assessment of the risks of corruption in public administration and the evaluation of the measures introduced to combat corruption.**

45. Turning to conflicts of interest, Article 49 of the royal decree of 2/10/37 simply makes it incompatible for officials to engage in any occupation that might interfere with the performance of their duties. There were no detailed regulations at the time of the visit on incompatibility, multiple office-holding and ancillary activities, whether paid or not, other than certain specific royal decrees[18] and occasional individual ministerial instructions such as instruction No. 1 of 3/1/97 of the ministry of finance on the administration of value added tax, registration and areas where multiple office-holding is prohibited without prior authority[19]. In Brussels-Capital, Article 312 of the staff regulations is fairly flexible and as far as incompatibility and multiple office-holding are concerned only relates to occupations that yield a taxable income and are not an inherent part of the performance of duties. The legislation of 2/5/95 making it a requirement to file a statement of offices, functions and occupations and a declaration of assets had not yet come into force at the time of the visit because the implementing legislation and machinery had not been approved. The current opportunities for conflicts of interest and lack of adequate means of oversight called for the immediate application of the legislation of 2/5/95 and the special act, arrangements for filing

[18] Royal decree 46 of 10.6.82 on multiple professional activities in certain public services and the royal decree of 8.3.04 establishing special conditions for the recruitment of established and contractual staff of the federal agency for the safety of the food chain, aimed at preventing conflicts of interest.

[19] The Belgian authorities have announced that the special act and the act of 2 May 1995 have been implemented and extended by a special act and an act of 26 June 2004, which will come into force on 1 January 2005.

and monitoring declarations of assets and the power to take criminal action against those deliberately presenting false information[20]. The GET notes with satisfaction that the integrity monitoring department plans to deal with the problem of conflicts of interest based on international standards, although its jurisdiction is confined to federal departments (FDs). There are no explicit provisions on the rotation of staff and the current system of office holding for senior officials in management posts only partially meets the preventive purpose of rotation systems. Many of those spoken to thought that one of the most effective, and even necessary, means of preventing conflicts of interest and corruption was to rotate officials, at least in the case of posts potentially vulnerable to corruption. The federal and Brussels-Capital staff regulations also prohibit state officials from seeking or receiving gifts, gratuities or other donations. This absolute ban, which is sometimes ignored in the case of hospitality or symbolic gifts, makes no explicit reference to the penalties for corruption in the Criminal Code and does not specify the conduct expected of each official. Finally, apart from the aforementioned instruction No. 1 of 3/1/97, there are no regulations governing improper moves by officials to the private sector. **The GET therefore recommends that conflicts of interest be subject to stricter regulation, in particular i) the legislation of 2/5/95 (requirement to file a statement of offices, functions and occupations and a declaration of assets) should be rapidly implemented; ii) the conditions governing the performance of ancillary activities should be tightened or further clarified; iii) provision should possibly be made for the rotation of officials most exposed to the risk of corruption; iv) guidance should be provided to public officials regarding the existing ban on seeking or receiving gifts, and finally, v) "pantouflage" (i.e. the improper movement of public officials to the private sector) should be regulated, with a view to prohibiting.**

46. Article 29 of the Code of Criminal Investigation requires civil servants to inform the crown prosecutor of any crime or misdemeanour that come to their attention in the exercise of their duties. However, it appears that it is difficult to make such reports in practice. According to those whom the GET spoke to, reporting such suspicions presupposes an ability to provide solid evidence of an offence in order to avoid the possible risk of being exposed to prosecution for making false accusations or of suffering adverse career effects. In addition, officials are reluctant to complain about colleagues to their superior officers, since they believe that disciplinary proceedings have little likelihood of success, either owing to lack of evidence or adequate means for carrying out enquiries (e.g., the superior officer is often responsible for carrying out the inquiry alone). To deal with the latter problem the Belgian authorities have stated that it is possible to ask the competent auditing services to evaluate the efficiency of disciplinary procedures[21]. Finally, they should also put in place mechanisms of formal protection for whistle blowers acting in good faith, and appoint confidential advisers on the basis of the draft prepared by the integrity monitoring department[22]. **The GET therefore recommends that i) officials are informed of their duty to report any possible corruption offences to the prosecution authorities, pursuant to Article 29 of the Code of Criminal Investigation, and of the consequences of failure to comply; ii) the relevant auditing services are called upon to carry out evaluations of the efficiency of disciplinary procedures; and finally, iii) machinery is established to offer formal protection to whistle blowers acting in good faith and that a procedure to appoint confidential advisers is put in place.**

[20] *Ibid*.

[21] In the case of the Brussels-Capital Region, the Belgian authorities have reported that an internal audit department has been established since the GET's visit and a team has been specially created for that purpose. It is supervised by an external committee. Its purpose is to analyse the organisation and procedures of Brussels-Capital government departments. The analysis of procedures could eventually cover corruption risks and disciplinary procedures. Even though these areas have not yet been the subject of audits, the body that could carry them out is in place.

[22] which had prepared certain principles concerning the reporting of illegal acts.

47. The rules governing transparency of the administration seem to be effective at federal level. The GET has insufficient information to judge the situation in the other entities. The rare criticisms heard during the visit concerned the impossibility of gaining access to the results of audits or certain appraisals of the court of auditors (which is not a judicial body), other than via the annual reports to the parliamentary assemblies. According to the Belgian authorities, this is to protect professional confidentiality and the system of government checks and balances. Relations between the court of auditors and the judicial authorities were considered in GRECO's First Round reports.

IV. THEME III - LEGAL PERSONS AND CORRUPTION

a. Description of the situation

Definition of legal persons

48. There are several types of legal person under Belgian law. Private law legal persons include companies and associations (non-profit making associations and transitory and joint venture associations). Under Article 2 of the Companies Code of 7/5/99, companies may include commercial partnerships (SNC), limited partnerships (SCS), limited liability companies (SPRL), co-operative societies[23] with limited liability (SCRL) or unlimited liability (SCRI), public limited companies (SA), limited partnerships with shares (SCA) and economic interest groupings (GIE). Agricultural companies may also be established in the form of occupational civil companies. There are three forms of company (*de droit commun*, *momentanée* and *interne*) that have no legal personality. Trade unions, like political parties, are *de facto* associations. They are not legal persons and those who constitute them have individual civil and criminal liability. Public law legal persons other than ones considered in Part III – the semi-public sector – include different forms of state-run business and public corporations, with varying degrees of autonomy, and semi-public corporations. The federal state leaves these institutions considerable discretion to manage their own affairs while retaining oversight responsibilities. Each region has its own legislation on the status of associations of public authorities within its jurisdiction and oversees their activities.

Formation

49. The Companies Code and the Non-Profit Making Associations Act of 27/6/21 lay down general conditions governing the establishment of legal persons as well as general and detailed conditions relating to formalities (officially notarised or private documentation, publication in the appendices of the Belgian official journal) and to substance (object, authorised capital, shareholdings[24], number and status of directors and members).

[23] These societies are composed of members whose contributions vary. The shares are not represented by negotiable securities and can only be transferred if certain strict conditions are met. The authorised capital is variable, which means that new members can be admitted.

[24] The Act of 2/3/89 on the public disclosure of significant shareholdings in companies quoted on the stock exchange and regulating takeover bids makes it obligatory to declare and publish details of significant shareholdings in quoted Belgian companies. Any private individual or company acquiring securities, whether or not representing equity capital, that confer voting rights in the company concerned, must declare to the banking and finance commission the number of shares it possesses when the voting rights attached to these shares represent at least 5% of the total voting rights. Similar declarations must be made for any additional acquisitions taking the owner over further 5 percentage point thresholds (10, 15, 20% and so on). When the shares are quoted for the first time, such declarations must be made by any individual or company owning the specified percentages. This concerns Belgian companies whose shares conferring voting rights are officially quoted, in whole or in part, in a stock exchange in a European Union member state.

Registration

50. The Companies Code and the Non-Profit Making Associations Act also establish a system of registration of private law legal persons. They are recorded on the companies data bank. To be granted legal personality, bodies must lodge with the registrar of the commercial court a formal document containing certain pieces of key information about the company, its founders and the persons authorised to administer and represent it. The documents lodged are kept in a file maintained in the registry for each company. The formal document referred to is published in the Belgian official journal. If one of the details in this document is no longer accurate this fact must also be published and remain permanently on record. Non-profit making associations acquire legal personality from the day when their constitution and the official documents relating to their administrators and, where appropriate, the persons authorised to represent them are lodged with the court registrar.

Accounting requirements

51. Under the Accounting Act of 17/7/75, all commercial and related undertakings and public bodies of a commercial, financial or industrial nature have to retain their accounting books and any supporting documents offering evidence of relations with third parties for 10 years (sections 6 and 9). There are rules governing the preparation of annual accounts and the publication of balance sheets. Since 2002, non-profit making associations have been required to keep simplified accounts unless they meet certain other criteria (see section 17 of the Act of 27/6/21), in which case they must maintain their books and prepare annual accounts in compliance with the 1975 legislation.

Professional disqualifications – good repute

52. Royal decree No 22 of 24/10/34 on the disqualification of certain convicted offenders and bankrupts from exercising certain duties, professions or activities, as amended by the acts of 4/8/78 and 2/6/98, establishes general arrangements for professional disqualification. The tax laws and certain regulations, mainly concerning the financial, insurance and consumer sectors, add a number of specific prohibitions.

Liability of legal persons

53. Article 5 of the Criminal Code, introduced by section 2 of the Act of 4/5/99, makes legal persons criminally liable for offences that are related to their purpose or interests or are committed on its behalf. It also determines how liability is apportioned between the legal person and individuals acting on its behalf in committing the offence. In principle, joint prosecution is excluded in the case of *involuntary offences*. The courts must decide whether the individual or the legal person has committed the more serious offence, on the basis of which one or other party will be convicted. In the case of *intentional offences*, as it is commonly the case in most cases of corruption, trading in influence and money laundering-related offences, joint prosecution is possible. Legal persons under foreign law may be prosecuted and convicted for offences committed under Belgian law.

54. Legal persons may be prosecuted for any type of offence, but the law lays down particular conditions under which they may be held liable for active corruption in the private sector (giving bribes) (Article 504bis CC), trading in influence (or misuse of office) (Article 247.4 CC) and

laundering (Article 505 CC). With regard to active corruption offences in the private sector, Article 504bis CC, introduced by section 5 of the Corruption Act of 10/2/99, makes it an offence for private sector employees, officials, directors, managers or representatives to propose or agree to a particular conduct in exchange for remuneration, without the knowledge or approval of their employer, his authorised agent, board or general meeting. The purpose of this provision is to i) avoid penalising companies in the conduct of their business and instead penalise directors, managers, authorised agents or principals who harm their own companies, ii) avoid making an offence of dishonest practices that sometimes border on corruption but are current practice and authorised, even implicitly, by the board of directors. At the same time, failure to exercise supervision within the legal person, and thus facilitating the commission of the offence, can be sanctioned. There is thus a moral element to the responsibility of a legal person (in French *personne morale*). It has to be shown either that the offence was the consequence of a deliberate decision taken by the legal person or that the latter displayed negligence, thus encouraging the offence. Any fault has to be assessed with regard to the specific circumstances. An offence may have been made possible by defective internal organisational arrangements, inadequate security measures or unreasonable financial restrictions. The courts reach their decision on the basis of the legal person's actions, the material facts relating to the conduct of its employees and agents, the risks and the measures taken. As noted earlier, between July 1999 and April 2004, only one judgment concerned corruption and one other the handling of stolen goods.

Penalties and other measures applicable to legal persons

55. Under Article 7bis CC, legal persons may be liable to fines[25], special confiscation, winding up[26], disqualification from performing an activity relating to the object of the company, closure and publication or dissemination of the decision. In the case of private corruption, Article 504ter CC provides for six months' to two years' imprisonment and a fine of € 100 to 10 000. In the case of a corrupt pact, the maximum term of imprisonment is three years and the maximum fine € 50 000. Corruption may entail civil as well as criminal penalties bearing on the relationship between an individual convicted of corruption and the legal or physical person employing him (termination of contract). Finally, the Corruption Act of 10/2/99 has amended section 19.1 of the act of 20/3/91 which lays down the conditions for approval to tender for public works. It adds as grounds for declassification or suspension of approval non-compliance with the ban on any action, agreement or understanding aimed at violating the normal rules of competition provided for in section 11 of the Public Procurement Act of 24/12/93, including acts of corruption. There is no register of companies found guilty of corruption in Belgium[27].

Tax deductibility

56. Section 57.1 of the Income Tax Code (CIR 92) makes commissions, brokerage fees, discounts, fees, honoraria and bonuses tax deductible if they are justified by individual forms showing the name and position of the beneficiary and a financial summary[28]. Commissions not exceeding €

[25] Article 41bis of the Criminal Code provides for the conversion of sentences of imprisonment for individuals into equivalent fines for legal persons.

[26] Under Article 35 of the Criminal Code, legal persons may only be wound up if they were deliberately established to commit the offences of which they have been convicted or if their legitimate purpose was deliberately ignored in favour of such activities.

[27] However, following the GET visit the Belgian authorities announced that a working group of officials from the FD of Justice and judges was preparing preliminary draft legislation on a register of convicted legal persons. The resulting bill should be laid before parliament in March 2005.

[28] These individual forms, which show the amount of the commission and the beneficiary's name and address, are sent by the debtor to the Belgian tax authorities. If the debtor fails to prepare such a form, the commission is not tax deductible (if the

125 per annum per beneficiary are exempt from the requirement to provide such forms. In addition, under Article 58 of the Income Tax Code, the minister of finance may allow sums disbursed by companies as secret commissions to be considered as professional expenses, when the granting of such commissions is recognised as normal practice, under the condition that they do not exceed the normal limits, that the company pays the relevant taxes calculated by the minister at an agreed rate that may not be less than 20% and that such commissions are necessary with a view to tackling foreign competition, upon request to the Ministry of Finance. Under the Corruption Act of 10/2/99, this authorisation may not be granted for the securing or retaining of public contracts or administrative authorisations.

Tax authorities

57. Tax investigations are generally conducted by the special tax inspectorate (ISI). It has about 400 officials throughout the country, drawn from the income tax, customs and VAT departments. Pursuant to Article 29 of the Code of Criminal Investigation, tax officials are authorised to inform the crown prosecutor directly of cases of corruption, trading in influence or laundering committed by individuals or legal persons (but not criminal offences under the tax legislation and its implementing instruments, pursuant to Article 29.2 of the Code of Criminal Investigation). Under their general powers of investigation, prosecutors or investigating judges may ask the tax authorities for any necessary information. Such information may come from the income tax authorities (buildings belonging to the person liable for tax, moveable assets, tax assessments carried out, precise description of company activities, accounts, remuneration of directors and staff, business relationships and addresses or premises occupied), the VAT authorities (annual records of sales to Belgian and foreign clients liable for tax, notifications of certain offences, irregularities identified in checks), the land and property registry (purchase and sale of buildings, loans, estates) and the customs (import and export details and records of major VAT offences). Legislation of 28/4/99 obliges prosecutors, though only with the authorisation of the crown prosecutor, to inform the minister of finance of criminal cases showing evidence of tax fraud so that he can order investigations if deemed appropriate.

Penalties for accounting offences

58. Accounting offences incur perpetrators' civil, administrative and criminal liability. Criminal penalties may be imposed for forging documents and use of forged documents (Articles 193, 196 and 197 of the Criminal Code), tax evasion (Articles 73 and 73bis of the VAT Code, ie false VAT declaration); false tax declaration (Articles 449 and 450 of the Income Tax Code) and false annual accounts to the general shareholders' meeting (section 127 of the Companies Act). Concealment or destruction of accounts is liable to penalties laid down in section 16 of the 1975 act (one month's to one year's imprisonment and/or a fine of fifty to ten thousand francs). The same penalties apply to various categories of auditors or accountants who approve such accounts in the knowledge that they contain irregularities.

Role of accountants and company auditors

59. Company auditors (royal decree of 10/1/94), chartered accountants (royal decree of 1/3/98) and other certified accountants must comply with relevant legislation and regulations and the rules of

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debtor is an individual) or is liable to a special contribution at a rate of 309%, (if the debtor is a company). Under the arrangements for exchanging information in agreements to avoid double taxation, the Belgian tax authorities send these individual forms to the tax authorities of the country where the beneficiary of the commission is resident, which enables these authorities to establish whether the individual concerned has met his tax obligations in his country of residence.

their professions but are not specifically instructed to identify offences. Under Article 458 of the Criminal Code which deals with breaches of professional confidentiality and section 27.2 of the Act of 22 July 1953 establishing an institute of company auditors, collaboration with the judicial authorities is limited to what is strictly provided for in law, namely the obligation to report laundering under section 2bis of the Act of 11/1/93 and those applicable to any citizen, such as reporting any infringements of state security or offences against the life or property of individuals, under Article 30 of the Code of Criminal Investigation, breach of which is liable to eight days' to six months' imprisonment and a fine of € 12.5 to 62.5 multiplied by a coefficient of five, and to the communication of various forms of declaration and certification with the written agreement of the undertaking in which they are operating. The institute of company auditors approved a recommendation of 5/6/98 to its members on the detection and reporting of accounting offences and illegal acts, though without explicitly mentioning corruption. Nevertheless, this institute and the institute of accountants and financial advisers are bound by ISA (International Standards of Audit) standards 240 and 250 of the International Federation of Accountants. ISA 240 concerns the auditor's responsibility to consider fraud and error in an audit of financial statements and ISA 250 consideration of laws and regulations in an audit of financial statements. According to the Belgian authorities, these extend to cases of corruption.

b. Analysis

60. The visit showed that the Belgian authorities had made significant progress in enacting legislation laying down precise rules on the establishment, registration, transparent functioning and supervision of legal persons, on the criminal liability of legal persons, coupled with sanctions theoretically compatible with Convention ETS 173, and the use of the tax authorities to combat corruption, laundering and accounting offences. Nevertheless, certain aspects could be improved in order to be made fully operational and more effective.

61. There is a system for registering convicted persons who have been professionally disqualified but no register of legal persons found guilty of criminal offences. **The GET recommends the establishment of a register of legal persons with criminal convictions.**

62. The introduction into Belgian law in 1999 of criminal liability for legal persons is to be greatly welcomed. However, it could be concluded from the opinions of the persons met during the visit (judges/prosecutors and police officers) that it is still rarely applied due to several difficulties. Some of these difficulties relate to ambiguities in the existing mechanisms foreseen in Articles 5 and 504bis of the Criminal Code and to the current structure for establishing liability. The GET was informed that these difficulties are taken into account in the context of the evaluations carried out by the Department of Criminal Policy of the Federal Department of Justice, and the exchange of professional experience among judges/prosecutors with a view to improving the existing legislation. The sanctions provided for by law therefore appear to be effective, proportionate and dissuasive. However, the GET was told that there were no statistics available on sanctions imposed on legal persons. There has only been one conviction of a legal person for corruption. Consequently, the GET could not assess whether the sanctions applied were effective, proportionate and dissuasive.

63. Subject to strict and narrowly defined conditions, the Belgian system allows certain secret commissions paid by taxpayers to be offset against taxes. It does so by authorising payment of taxes determined in advance and establishing a fixed rate on these commissions. The Belgian authorities state that they have changed the existing arrangements in response to OECD observations and with a view to their forthcoming re-examination in the second round.

Nevertheless they consider these commissions legal since a firm would not take the risk of completing an individual request for a tax deduction containing all the information about the commission paid if it had been used to bribe an identifiable public official. However, it is still possible for such an official to secure such a commission through several intermediaries or front companies. The GET considers that the current arrangements making secret commissions tax-deductible do not facilitate the fight against corruption. **The GET recommends to amend legislation in order to exclude tax-deductibility of undue advantages (including secret commissions in commercial transactions).**

64. The GET considers that the methods used by the tax authorities have proved successful in combating tax evasion. The judicial authorities could benefit from the information held by the tax authorities in all the corruption, trading in influence and laundering cases and they could thus supplement their own information and send it on in turn, subject to statutory safeguards, to the tax authorities. There are no reported cases where the crown prosecutor has refused to authorise the transmission of relevant penal information that is not excessive to the tax authorities. Officials receive special training and directives on information likely to point to tax evasion but nothing concerning corruption. The tax authorities have also acknowledged that directives, such as those in the OECD handbook, and training would be helpful in this respect. **The GET recommends that the tax authorities pay particular attention to the problem of corruption, particularly through directives and specific training modules on the detection of corruption offences and enforcement of the relevant legislation.**

65. It appears from the GET's meetings with auditors and accountants that their contribution to preventing and combating corruption is mainly based on Article 30 of the Code of Criminal Investigation. In the GET's view, this provision concerns the general obligation for any individual to report infringements of state security or offences against the life or property of individuals – breach of which is liable to eight days' to six months' imprisonment and a fine of € 12.5 to 62.5, increased by the multiple in force, and it questions its relevance to combating corruption. In contrast, auditors and accountants do have a special obligation to report cases of money laundering. The GET considers that these professionals have a key role to play in detecting and reporting irregularities committed by offending companies, as shown by the legislation on laundering and the 1998 institute of company auditors recommendation, whether these be cases of tax evasion or other illegal activities, for which legal persons might even incur criminal liability. Yet it appears that there is currently no way in which – without in any way forfeiting the confidence of their board of directors or other supervisory bodies to which they are accountable, and whose confidence must be retained – these professionals can enter into direct contact with the authorities, bypassing the company's decision making bodies, where they have identified serious criminal offences, particularly evidence of corruption. These professionals must be made more aware of the risks of corruption in the private sector and its effects on company accounts. Finally, their representative bodies should issue directives to their members on the detection and reporting of corruption offences and agree strict rules regarding integrity, conflict of interest and the reporting of corruption, as well as on supervision and penalties for less scrupulous practitioners. There should be training in these areas. **The GET recommends that arrangements be introduced to enable auditors and accountants to report corruption offences directly to the relevant authorities and that these professions' representative bodies be encouraged to issue directives and organise training on the detection and reporting of corruption, accompanied by rules of conduct and appropriate sanctions.**

V. CONCLUSIONS

66. The Belgian legal system is well equipped to deal with the detection, seizure and confiscation of the proceeds of corruption. Belgium was one of the first countries to have a body responsible for seizure and confiscation and to allow the optimal use of seized and confiscated funds and property. The public administrations are concerned that officials should carry out their duties honestly and effectively. The situation would be strengthened still further by more precise regulations on conflicts of interest. However, Belgium's complex institutional arrangements appear to make it difficult to adopt a uniform strategy and measures to combat corruption in the administration. General progress in Belgium will therefore probably be relatively slow to emerge. The system for supervising legal persons and the contribution of the tax authorities and financial professions to detecting and combating corruption are also important assets. Belgium enacted legislation on the criminal liability of legal persons in 1999. In all these areas, a number of changes to the existing law, coupled with stricter enforcement, education and training and more detailed statistics should help to achieve the desired results.

67. In the light of the foregoing, GRECO makes the following recommendations to the Belgian authorities. It also invites the federal authorities to draw recommendations ii, iii, iv and v to the attention of the Brussels-Capital Region:

i. **that current legislative activities aimed at supplementing and simplifying the current provisions on seizure and confiscation be actively pursued** (paragraph 18);

ii. **that consideration be given to supplementing existing rules on ethical conduct for public officials, whether or not established (*statutaires*), notably by explicit references to corruption; that the authorities continue to adopt, particularly in potentially vulnerable sectors, codes of conduct concerned with personal integrity and the risks of corruption, and that practical training be offered in these areas, based on concrete examples** (paragraph 43);

iii. **to undertake a more systematic assessment of the risks of corruption in public administration and the evaluation of the measures introduced to combat corruption** (paragraph 44);

iv. **that conflicts of interest be subject to stricter regulation, in particular i) the legislation of 2/5/95 (requirement to file a statement of offices, functions and occupations and a declaration of assets) should be rapidly implemented; ii) the conditions governing the performance of ancillary activities should be tightened or further clarified; iii) provision should possibly be made for the rotation of officials most exposed to the risk of corruption; iv) guidance should be provided to public officials regarding the existing ban on seeking or receiving gifts, and finally, v) "pantouflage" (i.e. the improper movement of public officials to the private sector) should be regulated, with a view to prohibiting** (paragraph 45);

v. **that i) officials are informed of their duty to report any possible corruption offences to the prosecution authorities, pursuant to Article 29 of the Code of Criminal Investigation, and of the consequences of failure to comply; ii) the relevant auditing services are called upon to carry out evaluations of the efficiency of disciplinary procedures; and finally, iii) machinery is established to offer formal protection to**

whistle blowers acting in good faith and that a procedure to appoint confidential advisers is put in place (paragraph 46);

vi. **to establish a register of legal persons with criminal convictions** (paragraph 61);

vii. **to amend legislation in order to exclude tax-deductibility of undue advantages (including secret commissions in commercial transactions)** (paragraph 63);

viii. **that the tax authorities pay particular attention to the problem of corruption, particularly through directives and specific training modules on the detection of corruption offences and enforcement of the relevant legislation** (paragraph 64);

ix. **that arrangements be introduced to enable auditors and accountants to report corruption offences directly to the relevant authorities and that these professions' representative bodies be encouraged to issue directives and organise training on the detection and reporting of corruption, accompanied by rules of conduct and appropriate sanctions** (paragraph 65).

68. Moreover, GRECO invites the Belgian authorities to take account of the *observation* (paragraph 24) in the analytical part of this report.

69. Finally, 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 31 May 2006.