

Bribery & Corruption

Second Edition

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Brief overview of the law and enforcement regime

In Belgium, the offence of bribery is governed by articles 246-252 (public bribery) and 504*bis* and *ter* (private bribery) of the Belgian Criminal Code (**BCC**).

These anti-bribery provisions of the BCC were significantly modified in 1999¹ and mainly result from the implementation of international conventions ratified by Belgium, and in particular the OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions (the **OECD Convention**), the Council of Europe Criminal Law Convention on Corruption (ETS 173) (the **GRECO Convention**), and the United Nations Convention against corruption.²

The fact that these provisions are, to an important extent, recently implemented is one of the reasons why case law is so scarce on this topic.

Public bribery

Under Belgian law, public bribery exists where a person directly or indirectly proposes to a person exercising public duties (in Belgium or abroad), an offer, a promise or an advantage, of whatever nature for that person or for a third party, in order to perform or omit to perform an act which falls within the scope of that person's function, or which is facilitated by that person's function. Both paying, offering to pay and soliciting or accepting such a bribe are unlawful, whether this is done directly or indirectly.

The scope of articles 246 and following of the BCC is very broad, as it refers to persons performing public duties, which is interpreted very widely. It is the public nature of the duties performed which is relevant, not the status of the person.

During the preparatory works, the Belgian legislator stated that the notion of public duties or public service (*fonction publique/openbare functie*) in Belgium covers all categories of persons, irrespective of status, performing public duties, whether these be federal or local civil servants and other public officials, elected members, professional officers, other persons exercising permanent or temporary public authority, and persons, including private individuals, carrying out a public service function. Consequently, private individuals performing public duties can also fall within the scope of articles 246 *et seq.* of the BCC (e.g. an architect who advises a public authority).

Belgian law is more encompassing than the OECD Convention, as it also applies to candidates for public officials' positions.

Private bribery

Private bribery exists where a person directly or indirectly proposes to a person who is a director, proxy-holder or employee of a corporate entity or of a physical person, an offer, a

promise or an advantage, of whatever nature, for that person or for a third party, in order to, without knowledge or authorisation of the board of directors, the shareholders' meeting, the attorney in fact or the employer, to perform or omit to perform an act which falls within the scope of his or her function, or which is facilitated by his or her function. As for public bribery, both paying, offering to pay and soliciting or accepting such a bribe are unlawful, whether this is done directly or indirectly.

The board of directors, or the shareholders' meeting, or the employer, must be unaware of and must not have authorised the bribery.³ The authorisation of the board may take any form. The burden of proving the absence of authorisation lies with the prosecution. If the approval was given after the committing of the offence, such approval could constitute aiding and abetting. In practice, the timing of the approval will often be very difficult to find out.

In both types of bribery, a promise to provide an advantage is sufficient to qualify as bribery (i.e. the actual delivery of the advantage is not required), and attempts to commit bribery also qualify as criminal offences.

Penalties and other sanctions

Public bribery may give rise to imprisonment, of six months up to 15 years, and/or a fine of €600 up to €600,000⁴ (for legal entities, the maximum fine is €1,200,000).

Private bribery is sanctioned with imprisonment of between 6 months and 3 years and/or a fine of between €600 and €300,000 (for legal entities, the maximum fine is €600,000).

Ancillary sanctions may also apply, such as: confiscation; the withdrawal of certain civil and political rights; restrictions on the right to vote and to eligibility; prohibition from continuing to exercise certain functions (such as director of a corporate entity); withdrawal of specific state-granted regulatory licences (such as a banking licence); or a ban on public procurement.

Anyone who sustains a prejudice as a result of bribery can file a criminal complaint and start a civil claim for damages.

The statute of limitations for public and private bribery is five years (and sometimes more), subject to suspension or extension under specific circumstances.

Overview of enforcement activity and policy during the past two years

The investigating and enforcing authorities are members of the federal police, the prosecution office and investigating judges. Under article 29 of the Belgian Criminal Investigation Code, public officials must report all criminal offences, including bribery, which they are aware of, to the prosecutor.

In 1998, the fight against corruption was made a priority in the agenda of Belgian public authorities: a special department was established within the national judiciary police to investigate corruption cases (the "Central Anti-Corruption Law Enforcement Office").

Despite these efforts, in the 2013 Transparency International Index, Belgium ranked 15th out of 175 countries with a rating of 75 out of 100 (with 1 being the most corrupt), which led Transparency International to note that Belgium is not among the best in class within Northern Europe. This ranking is nevertheless a small improvement compared to previous years (Belgium ranked 16th in 2012, 19th in 2011 and 22nd in 2010).

There is little published case law on bribery and, to our knowledge, only a few enforcement cases per year. The most notorious (but not recent) example remains the conviction of

Belgian ministers in charge of the decision to purchase new army helicopters: a bribe was paid by Agusta SPA to political parties, in violation of public procurement rules (1998). A case involving 12 public officials of the “*Régie des Bâtiments/Regie der Gebouwen*” (which manages the real estate of the Belgian State) who may have received bribes by more than 50 building contractors from 1998 to 2006 is pleaded this month (i.e. October 2014) before the Brussels Criminal Court.

There are not as many high-profile cases of private corruption, as companies tend to deal with it outside of the public eye by: (i) sanctioning those involved; and (ii) amicably compensating third parties who suffer prejudice.

The statistics of the judicial police on criminal convictions reveal that in 2011, there have been only 24 convictions for public bribery (47 in 2010), and four convictions for private bribery (2 in 2010).

The Belgian Financial Intelligence Processing Unit (*Cellule de Traitement des Informations Financières/Cel voor Financiële Informatieverwerking*, or **CTIF-CFI**) in charge of the processing of suspicious financial transactions related to money laundering and terrorist financing, has reported in recent years a number of investigations of cases of money laundering and corruption: (i) 9 cases in 2010 (€5.96m); (ii) 23 cases in 2011 (€23.35m); (iii) 15 cases in 2012 (€84.32m); and (iv) 9 cases (€6.06m).

Law and policy relating to issues such as facilitation payments and hospitality

The outsourcing of bribery through the use of (foreign) agents and intermediaries has come under increased scrutiny by the prosecutors.

The terms “offer, promise or advantage of whatever nature” used in the Belgian anti-bribery provisions should be interpreted broadly, and do not only include pecuniary offers.

For example, it includes: luxury holidays or city trips; dinners or gifts which exceed what is customary in the local business community; benefits in kind (e.g. renovation works to a private residence, car leasing at more favourable terms than the standard terms); and benefits to third parties (e.g. contributions to political parties).

The value of the bribe is irrelevant. What matters is the intention to cause the recipient to behave in a specific way in the context of that person’s function. Therefore, theoretically, small gifts or advantages in the ordinary course of business may involve bribery, provided it can be proven that they were offered with this specific intent. Practically, small value advantages will be held to exclude such an intent. Therefore, isolated small value gifts such as flowers, a lunch, a pen with the logo of the company or a bottle of wine are generally ruled not to constitute bribes.

As a matter of principle and based on the above, facilitation payments are not allowed under Belgian law.

Hospitality will be tolerated if it does not exceed what is standard business practice in the local business community.

In addition to those general principles, certain sector-specific regulations must be taken into account. For example, article 10 of the Act of 25 March 1964 (the act governing the advertising of pharmaceutical products) prohibits gifts or benefits in kind (except of inexpensive value) to wholesalers, health professionals and institutions where pharmaceutical products are prescribed, supplied or administered. Article 10 of this act provides for exceptions regarding hospitality, subject to a number of cumulative conditions.⁵

Key issues relating to investigation, decision making and enforcement procedures

Reporting and enforcement

Investigations and enforcement related to bribery offences mainly emanate from the police and the prosecutor's services, and potential victims' complaints in Belgium, as there is no such thing as statutorily organised whistle-blowing or self-reporting under Belgian law.

As a matter of principle, reporting oneself or someone else to the authorities has technically no impact on the penalty applied by a court; however in practice, courts arguably are inclined to be more lenient with cooperative and constructive defendants.

Reporting is nevertheless mandatory in two cases:

- Within the scope of the Belgian Anti-Money Laundering Act of 11 January 1993 (Belgian AML Act), which requires, among others, financial institutions and, to a certain extent, auditors, tax advisers, notaries or accountants, to report their suspicions of money laundering to the CTIF-CFI. Only suspicions of money laundering which arise out of a limitative list of criminal offences must be reported under the AML Act, among which is bribery.
- Under article 29 of the Belgian Criminal Investigation Code, public officials must report all criminal offences, including bribery, which they are aware of to the prosecutor.

Civil actions

Any party who sustains damage as a result of bribery can file a criminal complaint, combined with a civil suit for damages, before the competent investigating magistrate. This combined complaint will initiate an investigation and potentially a criminal suit, which will be heard by a criminal court, which will try both the criminal and the civil aspects. A victim could also choose to start civil proceedings to recover the damages it sustained as a result of the bribery before a civil court. In that case, the civil proceedings will be stalled if a criminal suit is initiated prior to or during the civil proceedings, until the end of the criminal suit.

Settlement

Plea bargaining is not possible under Belgian law; however, settlements with the prosecutor are possible at all stages of the proceedings, even when the case is on trial or at the appeal stage. The settlement puts an end to the criminal action of the prosecution, provided an amount set forth by the prosecutor is paid. The settlement amount is capped at the maximum of the fine applicable to the offence at stake. Any settlement is contingent upon full compensation of the victims of the offence for the damage sustained as a result, or at least a written admission of civil liability which they can enforce in court.

Overview of cross-border issues

The UK and US long-arm jurisdiction mechanisms enshrined in the UK Bribery Act and the US Federal Corrupt Practices Act (FCPA) are so well known across the world that in Belgium, it is easy to forget that the BCC (further to the requirements of the GRECO Convention) also provides for comparable mechanisms in respect of bribery.

As a matter of principle, persons involved in bribery may be sued in Belgium regardless of their citizenship if at least one constitutive element of the offence was committed in Belgium. This rule applies to any offence under the BCC.

In addition to this, provided that the defendant is found on Belgian territory, public bribery committed outside of Belgian territory may also be sued in Belgium if: (i) it concerns

Belgian public officials; or (ii) it concerns foreign officials who are Belgian citizens or who work for an international organisation based in Belgium.

Furthermore, provided that the defendant is found on Belgian territory, public and private bribery committed outside of Belgian territory may be sued in Belgium if the offence was committed by a Belgian citizen, provided the facts are also characterised as bribery under local law (in specific cases, prosecution in Belgium and/or the filing of a complaint in Belgium are required in addition to these conditions).

Article 12*bis* of the Belgian code of criminal procedure provides that, besides the abovementioned rules, the Belgian courts also have jurisdiction over cross-border bribery to the extent provided by international treaties and conventions. Combined with the provisions of the criminal GRECO Convention (which set forth broader jurisdiction rules than Belgian law), article 12*bis* could therefore have the effect of extending the abovementioned jurisdiction rules to Belgian citizens who committed a bribery offence outside of the Belgian territory, regardless of whether the facts characterise as bribery under local law, and regardless of whether the person has been found in Belgium. Similarly, article 12*bis* entails that the abovementioned jurisdiction rules should apply to non-Belgian defendants, regardless of whether the defendant was found in Belgium.

Corporate liability for bribery and corruption offences

Under article 5 of the BCC, a legal entity can be held criminally liable.

Yet, the criminal liability of the legal entity does not exclude the criminal liability of the individuals involved in the offence, if the individuals have committed the offence knowingly and wilfully.

If the offence has not been committed knowingly and wilfully, either the legal entity or the individual will be held criminally liable, depending on who committed the “most material fault”.

However, technically, Belgian case law considers that an offence which has been committed by negligence may be committed “knowingly and wilfully”. Therefore, in most of the cases, the individual may be held criminally liable jointly with the legal entity.

Practically, courts will focus on facts rather than on the theoretical intentional character of the offence: if it appears from the facts that the offence has been committed intentionally, although the law does not require such intent for criminal liability to be withheld, the individual may be held criminally liable jointly with the legal entity.

Therefore, joint criminal liability of individuals and legal entities is often upheld and, more importantly, in most cases, both the individuals and the legal entity are criminally prosecuted.

Proposed reforms / The year ahead

No important reform is expected in respect to bribery in Belgium.

Following the recommendations made in August 2014 by the GRECO to Belgium, in order to prevent corruption of members of parliament, judges and prosecutors, the Belgian authorities must submit a report on the measures taken to implement the GRECO’s recommendations by 30 September 2015 (notably with respect to the adoption of rules for Members of Parliament on how to engage relationships with lobbyists and other parties seeking to influence the parliamentary process).

Endnotes

1. Act of 10 February 1999 regarding the fighting of corruption. Before the entry into force of this law, private bribery was not an offence under Belgian law.
2. The evaluation reports of the OECD and the GRECO (Group of States against Corruption) are useful sources in English.
3. This approach led Belgium to make a reservation with respect to the offence of private bribery as defined in the OECD Convention.
4. When the bribery concerns a police officer, a person exercising judicial police functions or a member of the prosecution office, the maximum penalty is twice as big, i.e. €1,200,000.
5. Article 10 provides for, prior to any scientific meeting which requires at least one overnight stay, the potential sponsor to request authorisation from Mdeon, which is a common ethical platform, constituted of healthcare professionals, and the pharmaceutical and medical devices industry. See www.mdeon.be.

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