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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS**

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PHASE 3 EVALUATION OF BELGIUM: ADDITIONAL WRITTEN REPORT

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PHASE 3 EVALUATION OF BELGIUM: ADDITIONAL WRITTEN REPORT JUNE 2018

Name of Country:	BELGIUM
Date of approval of the Phase 3 evaluation report:	11 October 2013
Date on which information provided:	16 May 2018

In December 2017, the Working Group on Bribery asked Belgium to provide a written report on the three key recommendations concerning the liability of legal persons, the limitation period and the protection of whistle-blowers.

Text of recommendation 2:

With respect to the liability of legal persons, the Working Group recommends that Belgium, take the necessary measures to bring its legal framework into compliance with the Convention and 2009 Recommendation, as already recommended in Phase 2, (i) by clarifying the attribution of the intentional element of the foreign bribery offence and (ii) by eliminating the element of mutually exclusive liability between the natural and legal person [Convention, Article 2 ; 2009 Recommendation, Annex I.B.].

Actions taken as of the date of the written report to implement this recommendation:

(a) Two bills have already been brought before the Chamber of Representatives, in January and April 2015 respectively, in order to propose the following:

- <http://www.dekamer.be/FLWB/PDF/54/0816/54K0816001.pdf>: a bill amending the Penal Code with regard to the criminal liability of legal persons. The bill abolishes criminal immunity for communes and other public legal persons. In future, it will therefore be possible to prosecute both local representatives and public legal persons. The rule regarding mutually exclusive liability is also abolished. This rule is considered to be doctrinally complex and can be described as being practically unique compared to neighbouring countries.
- <http://www.dekamer.be/FLWB/PDF/54/1031/54K1031001.pdf>: a bill amending the Penal Code with regard to the criminal liability of certain public legal persons. This bill is aimed at initiating proceedings against the legal person in the case of minor offences, while the representative remains personally responsible for serious or repeated offences. Furthermore, this bill also proposes abolishing the rule of mutually exclusive liability, according to which, when the liability of the legal person is incurred solely as a result of the actions of a known natural person, only the person who committed the most serious offence can be convicted.

The aim of both bills is therefore to repeal the rule regarding mutually exclusive liability, meaning that henceforth whenever a legal person and a natural person commit the same offence, they will both in principle be criminally liable.

The opinion of the Council of State (on the two bills) was given on 8 October 2015 and circulated on 12 October 2015: <http://www.dekamer.be/FLWB/PDF/54/0816/54K0816002.pdf>.

The Belgian Ministry of Justice's strategy unit also asked the College of Prosecutors-General to give an opinion. The College declared that it was in favour of abolishing mutually exclusive liability.

These bills were primarily intended to address the issue of the criminal liability of local officers who, as a result of the criminal immunity for public entities with an elected body, and the impossibility, in principle, of arguing mutually exclusive liability, are frequently the only persons to be prosecuted and convicted for actions likely to be attributed *de facto* to the public authority concerned.

(b) Further to publication of the Belgium follow-up report in December 2017, the competent department in SPF Justice contacted the strategy unit in the Ministry of Justice to determine what could be done to move forward with the amendment of the rule on mutually exclusive liability.

The follow-up report of December 2017 had already noted that an expert committee, whose work was still on-going, was also working on the reform of the Belgian Penal Code. This committee had already reached agreement on amending the rules relating to the liability of legal persons, and more precisely on

abolishing the rule of mutually exclusive liability. The new text proposed by the expert committee on the reform of the Penal Code reads as follows:

Offences can be committed by natural persons and legal persons.

All legal persons are criminally liable for offences that are intrinsically connected with the attainment of their purpose or the defence of their interests, or for offences that concrete evidence shows to have been committed on their behalf.

The following are considered to be legal persons:

1° temporary associations and joint ventures;

2° companies referred to in Article 2, para. 3, of the co-ordinated Acts on companies, as well as companies in the process of being established;

3° civil partnerships that have not been constituted as a company.

The following are not considered to be legal persons criminally liable for the purpose of the present Article: the federal State, the regions, communities, (the provinces, emergency service zones, pre-zones, Brussels and its suburbs, communes, multi-district zones, intra-communal territorial bodies, the French Community Commission, the Flemish Community Commission, the Joint Community Commission and public welfare centres).

The criminal liability of legal persons does not exclude the criminal liability of natural persons who have committed or taken part in the same offences.

Following consultations between the SPF Justice and the strategy unit, it was decided to introduce this text in the form of an amendment to the two above-mentioned bills when the latter were due to be discussed by the Belgian Chamber Committee on Justice. After discussions within the government, the text was slightly modified and brought before Parliament. The text of the amendment is attached in Annex 1 and is referred to as amendment No. 4 in this document.

The discussions in the Committee on Justice took place on 2, 9 and 16 May 2018. The amendment was adopted at its first reading by the Committee on 16 May. After adoption in the second reading (within 15 days), the amended bill will be adopted in a plenary session. Once signed by the King, the new Law will be published in the *Moniteur belge*.

(c) With regard to the method of application:

It was decided in the course of discussions on the amendment modifying Article 6 of the Penal Code on the criminal liability of legal persons that, rather than simply deleting or replacing the paragraph relating to the rule on mutually exclusive liability, Article 5 would be replaced in its entirety, as provided for in the new Article drafted as part of the reform of the Penal Code. In this way it was possible to clarify the method of application of the intentional element of the offence in the justification of the amendment. Reference can therefore be made to the text of the justification of amendment No. 4 attached in the Annex.

Belgium considers that recommendation 2, regarding the liability of legal persons, has now been fully implemented.

Text of recommendation 6:

With respect to the limitation period the Working Group recommends that Belgium urgently take all necessary measures to extend the possibilities for suspending the limitation period to allow adequate time for foreign bribery investigations and prosecutions [Convention, Article 6].

Actions taken as of the date of the written report to implement this recommendation:

The limitation period is an issue that falls within the scope of the discussions of an expert committee on the reform of the Code of Criminal Procedure. The limitation period is a subject dealt with at a general level and not simply in relation to the bribery of foreign officials. The same applies to the possible grounds on which the limitation period can be suspended.

The position adopted by this expert committee on the reform of the Code of Criminal Procedure is as follows: provide for an initial period of limitation, established *in abstracto* in the Law, which would start to run from the time of commission of the acts brought before the trial judge by the prosecution. Contrary to the current provisions, it should no longer be possible to interrupt this limitation period. It could at most be suspended in the event of a legal obstacle to initiating proceedings. The limitation period for public action ceases to run as of the date of the direct summons to court, the written summons to appear or the voluntary appearance before the jurisdiction of the ruling. Once proceedings have been initiated, solely the reasonable period of limitation, determined *in concreto*, should still be guaranteed, although any failure to respect this period could still lead, not only to the simple handing down of a guilty verdict, but also to the summary termination of the public prosecution.

It was shown in the previous follow-up report, in the form of a note by the College of Prosecutors-General, that there are already many grounds on which the period of limitation can be suspended.

The expert committee on the reform of the Code of Criminal Procedure has not yet completed its work. There are therefore no new actions to implement this recommendation to report. Belgium considers that the issue of the limitation period must be addressed in general terms as part of this reform.

Text of recommendation 12.b:

With respect to reporting acts of foreign bribery, the Working Group recommends that Belgium:

b) Promptly take appropriate measures to protect public and private sector employees who report suspected acts of foreign bribery to the competent authorities from any discriminatory or disciplinary action [2009 Recommendation, IX (i) and (iii)].

Actions taken as of the date of the written report to implement this recommendation:

What already exists in Belgium:

- **The Flanders Region** has protected its whistle-blowing civil servants since 2004. The relevant provisions are set out in the Decree establishing the status of Flemish civil servants. Flemish civil servants can report misconduct either internally or to the internal audit if the official's line management is implicated. An application is made to the Mediator if the official fears reprisals. The Mediator offers a channel of communication and protection to persons who are not in a position to bear witness at their own place of work. The Flemish Parliament strengthened these provisions further in a Decree issued in 2012. While previously the Mediator was obliged to inform the head of the administration of the name of the whistle-blower, the new Decree allows the Mediator to keep the name of the whistle-blower confidential for a certain period of time and makes provision for the latter to be transferred to other duties, in another organisation within the Flemish administration, in a post at the same level and without any loss of earnings. On 9 May 2014 the Flemish government signed a protocol with the Flemish Mediator regarding the protection of whistle-blowers. This protocol contains rules on the length of the protection period, the protection measures, the suspension of disciplinary measures, and the transfer to another post.
- **The Law on reporting a suspected integrity violation in a federal administrative authority by a staff member of 15 September 2013.** This legislation allows officials of these authorities to confidentially report violations of integrity, including acts of bribery, to the Integrity Centre attached to the Federal Mediator. Federal officials who avail themselves of this procedure are exempted from their obligation to inform the Public Prosecutor. To make the procedure easier to use, all federal authorities are required to designate one or more "trustworthy persons of integrity" by linguistic group. The Law automatically protects whistle-blowers, persons assisting with the enquiry into the violations reported and their advisers from any sanction or act of reprisal. Abusive reporting is subject to sanctions. http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2013091506&table_name=loi
- Civil servants in the **German-speaking Community** are also protected (the Mediator for the Community is responsible for checking reports and protecting whistle-blowers).
- The special committee on the "**Panama Papers**", an affair also brought to light by an anonymous whistle-blower (recommendations approved on 16 November 2017). The committee also examined the concept of whistle-blowing and formulated the following recommendations in this regard:
 - (1) An effort must be made to develop a general mechanism to protect whistle-blowers in both the private and the public sectors, after consulting civil society. Such a system would provide for the creation of a point of contact offering whistle-blowers advice and support. It would need to be strictly regulated by law and a careful balance would need to be struck between the rights of all parties (those of the whistle-blower, those of the persons reported for a violation of integrity and those of the institutions whose information has been used, but also the public interest, etc.). This system would make it possible to avoid unsubstantiated reporting of violations.
 - (2) Firms providing tax, legal and financial services must proactively inform their employees of the existence of the regulations relating to whistle-blowers and the contact point.
 - (3) It is recommended that a legal status be introduced for whistle-blowers. This status must be the subject of an open debate that will draw on legal experiences observed abroad.
 - (4) On the understanding that whistle-blowers must act disinterestedly, and in the general

interest, it might be advisable to provide for indemnification of the damage suffered in the event that the reported events are confirmed and the whistle-blower wishes to leave the institution for which he or she is working in view of the probable deterioration of the relationship.

<http://www.lachambre.be/FLWB/PDF/54/2749/54K2749001.pdf>

- On 31 July 2017, the **Law on the supervision of the financial sector and on financial services** was amended with a view in particular to introducing an Article *69bis* requesting the financial services and markets watchdog (FSMA) to put in place effective mechanisms to allow workers in this sector to confidentially report possible infringements of the financial legislation whose compliance it monitors. These informants in good faith are protected against reprisals. A point of contact for whistle-blowers has been created on this authority's web site. http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2017073110&table_name=loi
- On 17 November 2017, the Parliament of the **Brussels-Capital Region** adopted a resolution on the protection of whistle-blowers.
- In Belgium, other whistle-blowers **employed in the private sector** are not protected by either the law, a code of good governance or collective bargaining agreements.
- There is a working group in the SPF Foreign Affairs whose remit is to take stock of the situation regarding the protection of whistle-blowers at both the national and the international level. Issues regarding the status of whistle-blowers, their protection and possible reward, fall within the purview of government. A working group on the same subject also exists in the SPF Finance.

It should also be recalled that in the absence of comprehensive legislation regarding whistle-blowers, reference can be made to Article 29 of the Code of Criminal Procedure for civil servants and to Articles 30 and 31 of the same Code. Any person, including civil servants outside the course of their duties, who has been witness to an attack, either against public safety or against the life or property of an individual, will likewise be held to inform the King's Prosecutor of the place where the crime was committed or the place where the accused may be found. This is a general provision.

On 23 April 2018, the European Commission issued a communication and a draft directive on the protection of whistle-blowers at the European level. It aims to ensure minimum protection for all workers with a view to protecting the financial interests of the Union and the operation of the internal market in the EU's areas of competence. Belgium took part in both meetings of the expert committees consulted with a view to reflecting on development of this project. Meetings aimed at co-ordinating the Belgian position have already taken place. Belgium will also participate in the ensuing legislative process.

Negotiations regarding the draft directive are due to begin on 12 June.