

## Public Procurement and corruption in Belgium

Public Procurement and corruption often go together. Where government contracts have to be concluded, very often one encounters people – civilians or officials – who want to embezzle money for their own private sake. Often the financial stakes are substantial and enterprises taking part in procurement procedures will prefer to pay some bribes which are insignificant compared to the profit they can make if they are granted the contract.

### Corruption legislation in Belgium

In Belgium, corruption is governed by the Penal Code, which was amended by the law of 10 February 1999 concerning the punishment of corruption (which in itself has recently been modified by the law of 11 May 2007). More precisely, the articles 246 and following of the Penal Code deal with the public corruption, and the articles 504bis and following of the Penal Code concerning the private corruption..

### The Penal Code makes a distinction between following types of corruption :

**Passive public bribery** by Article 246 § 1 of the Criminal Code defines as: *"The fact that a person holding public office (or that candidate for such office, or who to believe such an office will exercise, or that, by using false qualities to believe such a mandate to exercise), directly or through intermediaries, for himself or for third, an offer, promise or advantage of any kind, or presumed to ask a in Article 247 (of the Criminal Code) to adopt specified practices (including any act or refrain from conduct in the performance of his duties or purpose of using his influence, etc.)."*

**Active public bribery** by Article 246 § 2 of the Criminal Code defines as: *"It directly or through intermediaries proposals (or assigning) a person holding public office (or that candidate for such office, or who do believe such an office will exercise, or by using false qualities, to believe such an office to exercise), an offer, promise or advantage of any kind for themselves or for third one in Article 247 (of the Criminal Code) conduct referred to them (in particular that an act or omission to carry out inspections at the performance of his duties or purpose of using his influence, etc.)."*

**Passive private bribery** by Article 504bis § 1 of the Criminal Code defines as: *"The fact that a person who is a director or manager of a corporation, agent or servant of a legal or a natural person, directly or through intermediaries, for himself or for third, an offer, promise or advantage of any kind ask or accept, without knowledge and without permission from, as appropriate, the Board of Directors or the General Assembly, the principal or employer, an act of its function or facilitated by his function to perform any act or refrain."*

**Active private bribery** by Article 504bis § 2 of the Criminal Code defines as: *"It directly or through intermediaries proposals (or grant) to a person who is a director or manager of a corporation, agent or servant of a legal or a natural person of an offer, promise or advantage of any kind for himself or for third without knowledge and without permission from, as appropriate, the Board of Directors or the General Assembly, the principal or employer, an act of its function or facilitated by his function to perform any act or refrain."*

### In addition, two levels of corruption can be distinguished:

Street-level corruption, which in classical manner consistent with the bribery committed by the ordinary citizen in its contacts with the administration (for example, a document, to obtain or to control or to a fine escape).

Top-level corruption, which refers to the higher economic spheres of society and which often, unlike the first level, mechanisms and many complex financial transactions must be used to ensure their inscrutability.

Finally, we point out that corruption, crime is once implementation begins, in other words, once the proposal that the question is formulated.

**Extortion** by Article 243 of the Criminal Code defines as: *"Any person holding public office, [...] which command is giving to duties, taxes, taxes, funds, income or interest, wages or salaries to collect or recover will or will receive, knowing that they are not due or payable beyond."*

**Interest Adjustments** by Article 245 of the Criminal Code defines as: *"Any person holding public office who either directly or through intermediaries or through scams, some interest, which it may be, takes or accepts in transactions, contracts, adoptions or work in which he directed at the time of the offense in whole or in part, the management or control had, or who, entrusted with the scheduling of the payment or settlement of a case, it takes enig belang. [...] The foregoing provision shall not apply to him in the circumstances his private interests through his position could not openly promote and acted."*

« Interest adjustment » or « taking of interests » can only be committed by a public officer. It supposes that he directly or indirectly obtained any interest, profit or gain in acts, contracts, enterprises or ventures over which he had, at the time of the crime, total or partial control. Doctrine accepts that this crime can also be committed by officials who had some power or influence in preparing the act, the contract, etc., although they had no influence on the final decision. The crime exists by the mere fact of interfering in the procedure, regardless of the result of such interference. Punishment is one year to five years and fine of 100 to 50.000 Euros.

**Embezzlement by an officer** by the articles 240 and 241 of the Criminal Code defines as: *"Any person holding public office, that public or private funds, money, securities, documents, securities, deeds, fixtures eclipses (in other words, purposes other than originally specified purpose) which he or power under his office has in its possession "or" Any person holding public office, such deeds or titles in that capacity that he is the custodian, who are concerned or which by virtue of his office has had access, or maliciously destroys or deceptive mislays. "*

### Fraud involving government grants

**Fraud with government grants** refers to the unauthorized and illegal use of the amount of a Government grant for purposes other than those for which the aid was granted. This subsidy may also be granted by a Government or other legal person governed by public law, the European Community or any other international organization.

In the allocation of subsidies, just as in the case of public procurement are the amounts in question, and therefore any offered bribes or misconduct misappropriation, often very high. And because these subsidies are regularly granted in sensitive sectors (from environmental and socio-economic point of view, for example), the Eclipse its worse. The damage is not only financial but also the human, because not investment can be where it was considered essential.

### Fraud in public works contracts

Fraud in public procurement, finally, crimes or irregularities in the preparation, allocation or execution of the contracts concluded with the Government for the adoption of works, supplies and services. Such misappropriation, in particular, from the preparation and use of false documents, the disruption of free competition, misappropriation, fraud involving the quality or quantity, etc.

In addition, a strategic analysis of 2002 that corruption is regularly used for a public procurement procedure. The financial loss resulting from acts of corruption, should be greater in the sectors where there is a lot of public contracts, and even greater if the amounts in question are very high. For the entrepreneur, the supplier or service provider is corruption, therefore, a way to contract in or the ratio between the costs and to improve the profit by committing various irregularities in its implementation.

The laws relating to fraud in public procurement is very complex and comprehensive. The most important texts related to this matter are:

- The law of 24 december 1993 on public procurement and some commands for adoption of works, supplies and services.
- The Royal Decree of 8 January 1996 on the adoption of public works contracts, public supply contracts and public services and concessions for public works.
- The Royal Decree of 26 september 1996 concerning the provision of the General implementing rules of public procurement and concessions for public works.

In addition, we would point out that *«there is a penallaw provision specifically applicable to public procurement. With regard to article 314 of the Penal Code (as amended by the law of 24 december 1993), , that those are punished who, in any way, hindered the freedom of making bids in a tender procedure or have falsified tender procedures. Under this provision fall, among others, the pre-created agreements between entrepreneurs, with or without the collusion of members of the administration. »* [Corruption and public procurement, Federal Police Department, FGP Liège, Financial examinations, Corruption & procurement Team, Atrium News n ° 8, June 2007]. This disposition wants to protect the equality among all candidates taking part in a public tender.

## Corruption in international treaties

At the international level, several treaties related to corruption:

- The Criminal Law Convention on corruption (Council of Europe, January 27, 1999).
- The civil law Convention on corruption (Council of Europe, 4 november 1999).
- The Convention for the Suppression of corruption of foreign officials in international business transactions (OECD, 17 December 1997).
- The Convention on the fight against corruption involving officials of the European communities or officials of Member States of the European Union (Council of the European Union, 26 May 1997).
- The Convention against corruption (United Nations, 31 October 2003).

The 4 first treaties were ratified by Belgium. They are therefore applicable in Belgian law. Currently, the ratification of the UN Agreement subject to a legislative proposal.

## European law : directive 2004/18/EC, 31 March 2004

This directive knows several grounds of exclusion from tender procedures based upon the personal situation of the candidate or tenderer. Can be excluded :

1. Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below shall be excluded from participation in a public contract:
  - (a) participation in a criminal organisation, as defined in Article 2(1) of Council Joint Action 98/733/JHA 1;
  - (b) corruption, as defined in Article 3 of the Council Act of 26 May 1997 2 and Article 3(1) of Council Joint Action 98/742/JHA 3 respectively;
  - (c) fraud within the meaning of Article 1 of the Convention relating to the protection of the financial interests of the European Communities 4;
  - (d) money laundering, as defined in Article 1 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering 1.

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.

They may provide for a derogation from the requirement referred to in the first subparagraph for overriding requirements in the general interest.

For the purposes of this paragraph, the contracting authorities shall, where appropriate, ask candidates or tenderers to supply the documents referred to in paragraph 3 and may, where they have doubts concerning the personal situation of such candidates or tenderers, also apply to the competent authorities to obtain any information they consider necessary on the personal situation of the candidates or tenderers concerned. Where the information concerns a candidate or tenderer established in a State other than that of the contracting authority, the contracting authority may seek the cooperation of the competent authorities. Having regard for the national laws of the Member State where the candidates or tenderers are established, such requests shall relate to legal and/or natural persons, including, if appropriate, company directors and any person having powers of representation, decision or control in respect of the candidate or tenderer.

2. Any economic operator may be excluded from participation in a contract where that economic operator:
  - (a) is bankrupt or is being wound up, where his affairs are being administered by the court, where he has entered into an arrangement with creditors, where he has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations;
  - (b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or of an arrangement with creditors or of any other similar proceedings under national laws and regulations;
  - (c) has been convicted by a judgment which has the force of res judicata in accordance with the legal provisions of the country of any offence concerning his professional conduct;
  - (d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate;

(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(g) is guilty of serious misrepresentation in supplying the information required under this Section or has not supplied such information.

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.

3. Contracting authorities shall accept the following as sufficient evidence that none of the cases specified in paragraphs 1 or 2(a), (b), (c), (e) or (f) applies to the economic operator:

(a) as regards paragraphs 1 and 2(a), (b) and (c), the production of an extract from the "judicial record" or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or the country whence that person comes showing that these requirements have been met;

(b) as regards paragraph 2(e) and (f), a certificate issued by the competent authority in the Member State concerned.

Where the country in question does not issue such documents or certificates, or where these do not cover all the cases specified in paragraphs 1 and 2(a), (b) and (c), they may be replaced by a declaration on oath or, in Member States where there is no provision for declarations on oath, by a solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body, in the country of origin or in the country whence that person comes.

4. Member States shall designate the authorities and bodies competent to issue the documents, certificates or declarations referred to in paragraph 3 and shall inform the Commission thereof. Such notification shall be without prejudice to data protection law.

## **Specialized services : CDBC/OCRC (Central Service for Combating Corruption / Office Central pour la Recherche de la Corruption)**

The CDBC is the successor of the « High Committee for Supervision » (« Comité Supérieur de Contrôle »). This Committee was established in 1920 as a specialized corps of people who were Legal, technical and administrative experts and could investigate fraud at request of the administration, local bodies, the government or the Legal authorities. The Committee could also act on its own initiative to prevent crime. Commissioners could ask to see all relevant documents p.ex. concerning a public tender. The HCT was abolished in the early 90's due to some so-called 'scandals » Although many people have plead to reinstate it.

The CDBC is a centralized service within the federal police with an operational power. This means that the members of this service, judicial studies (home visits, seize items, interrogations, detentions, pv's, etc.), autonomous or support, or in cooperation with the decentralised judicial management (FGP's) in the districts. This is, depending on the seriousness of the examination, the delicate nature of the function held by the perpetrators, the complexity of the requested actions, etc.

Rather, "the CDBC is responsible for detecting and provision of support for the detection of criminal offences to the detriment of the interests of the State, as well as the serious and complex crimes of corruption. In addition, it serves as a pilot in the context of the fight against abuse and criminal behaviour in the field of public procurement legislation, subsidies, accreditation and licensing. "

The research work of the CDBC be, above all, the following offences: the bribery allegations, knevelarij, interests and embezzlement in the field of public contracts, grants, licences and approvals. Corruption has been, must therefore be considered in the broadest sense of the word, namely the crimes be brought to justice by the law of 10 February 1999 concerning the punishment of corruption. The existence of these operational capacity at central level is essential for the following reasons:

The county (and local) bodies may not always be a matter of priority importance to the fight against corruption (given the other crime phenomena which must be combated).

In some districts, we propose a certain lack of expertise and, above all, to capacity.

It is necessary to have a dedicated research department which is sufficiently independent and complex and delicate investigations or international studies.

In addition, acts as a central service CDBC the following commands:

At the operational area:

Coordination of the operations at the national level.

Support of the other police services (assistance, consultancy, advice, etc.).

Strategically:

Management of the National security plan priorities.

Research and development.

### **The various partners of the CDBC are:**

The other departments of the Executive Committee on economic and financial crime

In specific cases, particularly in the case of large-scale operations, can be helped by the CDBC colleagues in other departments of the Executive Committee on economic and financial crime, in particular by members of the Central Service for combating organized economic and financial Crime (CDGEFID). In some cases, it is also the CDBC itself that such support to CDGEFID.

The other departments of the Federal Police

The investigations of corruption, embezzlement, fraud or fraud in public contracts with government grants are not exclusive of the CDBC. Such studies can also be carried out by the decentralised judicial management (FGP's) in the districts, which often have a division for economic and financial crime

The services of the local police

Although no such cooperation cannot be ruled out, it is the main partner of the local police in the area of corruption the FGP of the judicial arrondissement of Paris. The FGP can the question as to whether the information may be passed on to the CDBC.

The foreign police services

In international cases (in particular on the European institutions) is the cooperation with foreign police services are essential, particularly for international letters rogatory, if any, should be carried out.