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Belgium

WHITE COLLAR CRIME

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This country-specific Q&A provides an overview of white collar crime laws and regulations applicable in Belgium.

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BELGIUM
WHITE COLLAR CRIME

1. What are the key financial crime offences applicable to companies and their directors and officers? (E.g. Fraud, money laundering, false accounting, tax evasion, market abuse, corruption, sanctions.) Please explain the governing laws or regulations.

First and foremost, it should be emphasized that all criminal offences are applicable to both, companies as well as natural persons (**question 2**). Nevertheless, certain (financial crime) offences will be withheld more often towards companies than other offences (eg, companies will more often be prosecuted for fraud and money laundering than for drugs offences).

Furthermore, it should be noted that all criminal offences consist of several constituent elements, both material components as well as a moral component. These constituent elements have to be established on the part of the offender in order for him to be convicted. The material components are defined by law and describe the required criminal conduct. The moral component is the required criminal intent. The most common types of criminal intent are general intent (acting knowingly and willingly) and negligence (a lack of care or foresight while acting suffices). Moreover, a specific intent can be required, which means that one not only acts knowingly and willingly, but also with a particular motivation.

With regard to the sentencing, note that when the law stipulates a prison sentence, this sentence does not apply to legal entities. A conversion mechanism converts the prison sentences into penalties applicable to legal entities. In accordance with this conversion mechanism, when the law provides for an imprisonment (whether this is with or instead of a fine), the minimum fine for the legal entity will amount to EUR500 multiplied by the number of months of the minimum imprisonment (and cannot be lower than the minimum fine that was initially provided in the criminal provision). The maximum fine for the legal entity will amount to EUR2,000 multiplied by the number of the months of the maximum imprisonment (and cannot be lower than twice the maximum fine that was initially established). Additionally, the fines that are mentioned in the Criminal Code (CC) and in the other Belgian laws should be increased by a multiplication factor. Since 1 January 2017, this multiplication factor has been eight – eg, a fine of EUR50 mentioned in the law implies a fine of EUR400 in practice. The fines that are mentioned in this contribution have not been multiplied with this multiplication factor yet and should thus be increased by multiplication factor eight.

Finally, it should be stressed that although the relevant articles as such only mention a prison sentence and/or a fine, depending on the nature of the offence, other – and even more important – penalties can be imposed as well (eg, a conviction for certain offences can give rise to a professional ban, as well as/or to the confiscation of the means used for or the assets generated by the offence).

Criminal fraud

The constituent elements of criminal fraud (Article 496, CC) are:

- the handing over of money, movable property, obligations or discharges (of debt);
- caused by fraudulent means (such as a false name or forged documents);
- with the intention to obtain property that belongs to another person.

Criminal fraud may give rise to imprisonment from one month to five years and/or a fine ranging between EUR26–3,000 for natural persons, and to a fine ranging between EUR500–120,000 for legal entities. If the victim is in a vulnerable state, higher sentences can be imposed.

Money laundering

With regard to money laundering there are both a preventive framework as well as a repressive framework.

Preventive framework

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In accordance with the Act of 18 September 2017 (and the corresponding Directives of the European Union), several institutions (mostly professionals from the financial sector) have to fulfil a number of obligations to prevent money laundering, such as:

- identifying their customers, as well as these customer's agents and ultimate beneficial owners (which will give them the possibility to determine the risk their clients are or will be money laundering);
- detecting atypical operations of their clients; and
- reporting their suspicions.

When not fulfilling these obligations, the Financial Services and Markets Authority (FSMA) is competent to impose an administrative fine. Depending on the nature of the violation, one risks an administrative fine up to EUR5 million (to which the above-mentioned multiplication factor does not apply).

Furthermore, the Act of 18 September 2017 provides a criminal fine for companies that impede investigations and audits by public authorities or refuse to provide documents they are required to provide. The amount of this fine depends on the type of obliged entity. Whereas entities under the control of the Belgian National Bank or the FSMA risk a fine ranging between EUR250–2.5 million, other entities risk a fine ranging between EUR150–5,000.

Repressive framework

Article 505 of the CC distinguishes three different offences relating to money laundering:

- the act of buying, receiving, exchanging, possessing, keeping, or managing assets with an illicit origin, while the offender knew or should have known about that origin;
- the act of converting or transferring assets with an illicit origin, whereby the offender must have the intent to conceal the illicit nature of the assets or to help any person involved in the predicate offence to avoid legal consequences; and
- the act of concealing or disguising the nature, the origin, the location, the disposition, the movement, or the ownership of assets with an illicit origin, while the offender knew or should have known about this illicit origin.

These offences can give rise to imprisonment of 15 days to five years and/or a fine ranging between EUR26–100,000 for natural persons and a fine ranging between EUR500–200,000 for legal persons, as well as to special confiscation.

Forgery and the use of forged documents

Forgery (Article 193 and following, CC) requires:

- the manipulation;
- of a written document that imposes itself on the public trust (ie, the people taking cognizance of it can trust in its veracity – there is no verification requirement as with an invoice);
- with fraudulent intent or with the intent to harm;
- which can cause prejudice.

Forging a document suffices: even when the forged document is not used, one is criminally liable. Furthermore, the (intentional) use of a forged document is a criminal offence itself.

The sanctions for these offences vary according to a number of elements, such as the offender's capacity (eg, public servant or not) and the nature of the document(s) (eg, authentic, bank and/or private). In accordance with the CC, forgery of commercial documents and the use of such documents by a private natural person can give rise to imprisonment from five to ten years (but in practice, a criminal court will always accept mitigating circumstances for this offence and impose an imprisonment ranging from one month to five years). Taking into account mitigating circumstances, legal entities may be punished by a fine ranging between EUR500–120,000.

Tax fraud

Article 449 of the Income Tax Code 1992 (ITC) criminalises any violation of the ITC that has been committed with fraudulent intent or with the intent to harm. Such offence may give rise to imprisonment of eight days to two years (five years in case of 'serious tax fraud') and/or a fine ranging between EUR250–500,000 for natural persons, and a fine ranging between EUR500–1 million for legal entities.

Furthermore, Article 450 of the ITC criminalises the forgery and the use of forged documents, committed with the view of committing the offences described in Article 449 ITC. The constituent elements are the same as for normal forgery and use of forged documents, with this nuance that this must be done with a view to committing tax fraud. These criminal offences can lead to imprisonment of one month to five years and/or a fine ranging between EUR250–500,000 for natural persons, and a fine ranging between EUR500–1 million for legal persons.

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There are similar criminal provisions with regard to the VAT and corporate tax legislation.

Market abuse

Market abuse is criminalised by Article 39 of the Act of 2 August 2002 on the supervision of the financial sector and on financial services. Market abuse can take several forms, such as entering into a transaction, placing an order to trade or any other behaviour which (i) gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument, a related spot commodity contract or an auctioned product based on emission allowances; or (ii) secures, or is likely to secure, the price of one or several financial instruments, a related spot commodity contract or an auctioned product based on emission allowances at an abnormal or artificial level.

Market abuse may give rise to imprisonment from one month to four years and/or a fine ranging between EUR300–10,000 for natural persons, and to a fine ranging between EUR500–96,000 for legal entities. Furthermore, as for insider dealing, the offender may be ordered to pay a sum corresponding to no more than the triple of the amount of the financial benefit that they derived directly or indirectly from this market abuse.

Corruption

With regard to bribery, there is a distinction between:

- active bribery – the act whereby one proposes directly or through intermediaries, to a person, an offer, promise or benefit of any kind in favor of this person or a third party to have certain acts performed or to refrain from certain acts; and
- passive bribery – requesting, accepting or receiving, directly or through intermediaries, in favor of theirselves or a third party, an offer, a promise or a benefit of any kind to perform certain acts or to refrain from performing certain acts.

Furthermore, a distinction has to be made between public bribery which concerns domestic and foreign public officials (Article 246 and following, CC) and private bribery, which concerns private persons (Article 504bis and following, CC).

The sentencing depends on the nature of the bribery, as well as of the targeted person and the purpose of the bribery. It ranges from EUR100-500,000 and/or an imprisonment of six months to three years for natural persons, and EUR3,000-360,000 for legal entities. Furthermore, the offender risks a professional ban, a special confiscation and the loss of civil and political rights for a certain period of time.

Sanctions

The violation of financial sanctions can mostly be found in several United Nations Resolutions and EU Council Regulations. The latter directly apply in Belgium and their violation has been criminalised by the Act of 13 May 2003 implementing the restrictive measures taken by the Council of the European Union against states, certain individuals and entities. In accordance with this Act, the violation of these European Regulations can give rise to (i) an administrative fine ranging between EUR250–2.5 million or (ii) imprisonment of eight days to five years and a (criminal) fine ranging between EUR25–25,000 for a natural person, or a (criminal) fine ranging between EUR500–120,000 for a legal entity.

2. Can corporates be held criminally liable? If yes, how is this determined/attributed?

Yes. On 2 July 1999, corporate criminal liability was introduced in Belgium for all criminal offences. Whereas initially, only a limited number of (mostly private law) legal entities could be held criminally liable, all legal entities can be held criminally liable since 30 July 2018. Nonetheless, for certain public law legal entities that can be found criminally liable, a court cannot impose any criminal sanction on them (Article 7bis CC). Their criminal conviction is nevertheless important, since this means that the criminal court can convict them to pay compensation for the damage that has been caused by the offences committed by them.

In addition to legal entities in the strict sense, Article 5 CC lists a number of entities which do not have legal personality but can be held criminally liable as well.

The attribution of a criminal offence to a legal entity requires that both the material and the moral constituent element(s) of this offence are established on its own part. It does not suffice that these elements are established on the part of its directors or employees.

3. What are the commonly prosecuted offences personally applicable to company directors and officers?

When a company is prosecuted, their director(s) will usually be prosecuted along with them, and for the same offences. We therefore refer to the first question.

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4. Who are the lead prosecuting authorities which investigate and prosecute financial crime and what are their responsibilities?

Both the public prosecutor's office and the investigating judge have investigative powers.

Therefore, white-collar offences can be the subject of two types of investigations: a preliminary inquiry (under the supervision of the public prosecutor's office) and a judicial inquiry (led by the investigating judge).

Whereas the investigating judge has to seek evidence both against as well as in favor of the offender, the public prosecutor's office will mostly confine itself to investigating incriminating elements. The investigating judge has more extensive powers and can order more far-reaching measures than the public prosecutor's office.

The investigating judge's role is limited to conducting the judicial inquiry. Once this inquiry is done, this judge sends his file to the public prosecutor's office. The latter then assesses whether there are indications of guilt or not, and if so, on whose part. The public prosecutor's office will summon the people against whom such indications exist to appear before the council chamber, who will decide whether or not there are indeed enough indications of guilt on the part of the accused person(s) to refer them to the criminal court. If not, the case will be dismissed.

In case of a preliminary inquiry, the public prosecutor's office can summon the (alleged) prosecutor directly before the criminal court.

When an (alleged) offender has to appear before the criminal court (whether it is after a preliminary inquiry or after a judicial inquiry), the public prosecutor's office will request their conviction (or, if appropriate, acquittal) and the penalties it considers appropriate for the offences committed. The final decision, however, lies with the court.

5. Which courts hear cases of financial crime? Are trials held by jury?

In principle, financial offences are treated by the criminal court in first instance. There are one or three judges in the criminal court. In case a party appeals the judgment of the criminal court, the case will be heard for a second time by the court of appeal. There are always three judges in the court of appeal. Neither the criminal court nor the court of appeal has a jury.

6. How do the authorities initiate an investigation? (E.g. Are raids common, are there compulsory document production or evidence taking powers?)

A preliminary inquiry can be initiated:

- by a victim or a witness, who reports an offence to the police (Article 48, Code of Criminal Procedure (CCP)) or directly to the public prosecutor's office (Article 31, CCP); and
- at the public prosecutor's office own initiative.

A judicial inquiry can be initiated both by the (alleged) victim or by the public prosecutor's office and requires more formal acts. If this inquiry is initiated by the (alleged) victim, they must file a criminal complaint (Article 63 CCP) and pay a security deposit. Exceptionally, investigating judges can initiate a judicial inquiry themselves (Articles 28septies and 59 CCP).

Both the public prosecutor's office and the investigating judge can ask the person concerned to provide certain documents that they consider to be helpful to uncover the truth. However, they cannot force a suspect to handover documents. Furthermore, they can ask a third party to hand over these documents. Finally, when it concerns a judicial inquiry, the investigating judge can also impose a search of premises. Such search requires that there are reasons to believe that (i) evidence of a committed offence will be found, or (ii) items susceptible for confiscation are present.

Nevertheless, should certain documents be found or handed over (both by the suspect or a third party), they can be seized both by the public prosecutor's office and the investigating judge.

7. What powers do the authorities have to conduct interviews?

The public prosecutor's office and the investigating judge can interrogate any suspect, victim or witness.

8. What rights do interviewees have regarding the interview process? (E.g. Is there a right to be represented by a lawyer at an interview? Is there an absolute or qualified right to silence? Is there a right to pre-interview disclosure? Are interviews recorded or transcribed?)

Both suspects and witnesses have to be informed at the

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beginning of the interrogation about certain rights, such as the right to be under no circumstances obliged to incriminate themselves. In principle, the interview is (only) transcribed. Only in exceptional situations the interviews will be recorded.

Furthermore, suspects have some additional rights, such as the right to be assisted by a lawyer during the interrogation and the right to be informed in advance about the subject(s) of the interrogation. This right to be informed is limited and only concerns the nature and timing of the offences, the suspect does not have a right to access the file prior to their interrogation.

9. Do some or all the laws or regulations governing financial crime have extraterritorial effect so as to catch conduct of nationals or companies operating overseas?

A criminal offence is deemed to have been committed in Belgium if at least one of its material constituent elements can be located in Belgium. Therefore, Belgian courts have jurisdiction with regard to criminal offences that took place either wholly or partially on Belgian territory.

However, Belgian courts can enforce their authority with regard to certain offences that have been committed abroad, if certain conditions are met (regarding amongst others the nationality of the offender and the nature of the offences). These situations are listed in Articles 6–12 of the Preliminary Title of the Code of Criminal Procedure (PT CCP).

10. What are the rules regarding legal professional privilege? Does it protect communications from being produced/seized by financial crime authorities?

In Belgium, the concept of legal professional privilege exists and is considered to be fundamental to the legal order of Belgium and a pillar of the right of defence. It includes attorney-client privilege. Therefore, documents and information that have been exchanged for the purpose of legal assistance may not be consulted or copied by any person other than the addressee(s), nor may they be seized by the authorities or the courts, eg as part of a search of premises. In case there is discussion about the confidential nature of documents, they will have to be seized under closed envelope. It will then be necessary to verify, in the presence of a representative of the Bar Association, whether or not they are covered by legal privilege. The violation of legal professional privilege is criminally sanctioned (Art. 458 CC).

Advice and related communications by in-house lawyers also are covered by a certain protection, but its exact scope is still disputed.

11. What rights do companies and individuals have in relation to privacy or data protection in the context of a financial crime investigation?

The preliminary or judicial inquiry is secret and can only be consulted with the authorization of the public prosecutor’s office or the investigating judge. Intentionally disclosing information from such records to the detriment of one of the persons concerned is punishable (Article 460ter CC).

12. Is there a doctrine of successor criminal liability? For instance in mergers and acquisitions?

In accordance with Article 20 PT CCP, criminal proceedings against legal persons are in principle no longer admissible after the closing of a liquidation, upon judicial dissolution or upon dissolution without liquidation (eg, merger or acquisition).

However, exceptions are foreseen, eg, when one can prove that the liquidation, judicial dissolution or dissolution without liquidation was organised to avoid prosecution or when the legal entity has been referred to the criminal court by a pre-trial court prior to the loss of legal personality.

In case one of these exceptions applies, the initial legal entity’s successor can be held criminally liable for the criminal offences committed by its predecessor.

For the sake of completeness, it should be stressed that in case of a partially acquisition (eg, of certain assets), the criminal liability for the offences that have been committed before this acquisition rests in principle with the initial offender and do not transfer to the acquirer.

13. What factors must prosecuting authorities consider when deciding whether to charge?

With regard to a judicial inquiry, the public prosecutor’s office does not have a discretionary authority. The

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suspects of such inquiry have to be heard by the council chamber, who will decide whether or not there are indications of guilt on the part of the (alleged) offender and if so, to refer the matter to the criminal court.

However, the public prosecutor's office has a certain discretionary authority in case of preliminary inquiries.

First and foremost the existence of sufficient evidence will play a significant role in this, but it is not the only factor that will be taken into account. Other factors can be, amongst others:

- the National Security Plan that has been validated by the Minister of Justice and the Minister of Internal Affairs, determining for which offences prosecution is a priority on a national level;
- the prosecution priorities that have been determined on the territory of the investigating public prosecution's office (taking into account amongst others the available resources).

14. What is the evidential standard required to secure conviction?

To be convicted, one must be deemed to have committed the offences they are charged with beyond any reasonable doubt.

15. Is there a statute of limitations for criminal matters? If so, are there any exceptions?

The statute of limitations period depends on the nature of the criminal offence. In principle the statute of limitations expires:

- after six months for infractions;
- after five years for misdemeanours; and
- after ten years for crimes.

There are exceptions on this statute of limitations periods, but these do not apply to (purely) financial crime offences.

The statute of limitations period runs, in principle, continuously. Nevertheless, this period can be interrupted or suspended. Interruption, on the one hand, means that although a part of the initial period has expired, this is no longer taken into account and can be caused by acts of investigation and acts of prosecution. Suspension, on the other hand, means that this period is put on hold because of a legal impossibility to prosecute.

Several acts of interruption may succeed each other, but they only will have consequences if they have been performed during the initial limitation period.

Taking into account the rules concerning interruption and suspension of the statute of limitations period, this period can in practice take more than twice as long as provided for in the regulations.

16. Are there any mechanisms commonly used to resolve financial crime issues falling short of a prosecution? (E.g. Deferred prosecution agreements, non-prosecution agreements, civil recovery orders, etc.) If yes, what factors are relevant and what approvals are required by the court?

A financial crime issue can also be resolved through an amicable settlement (Article 216bis, CCP), which means that one pays a lump sum in exchange for the charges being dropped.

The conclusion of such an amicable settlement is subject to a number of conditions and one can be concluded only if the criminal court has not yet pronounced its final judgment and if the offender has acknowledged in writing their civil liability for the damaging event and has compensated the uncontested part of the harm that was suffered by the victim of this event.

Special conditions apply for tax or social law offences.

When all conditions are met, the public prosecutor's office can propose that the offender pays a lump sum, which cannot exceed the maximum fine imposed by the law for the offence in question. In addition, confiscation is also possible.

Finally, the settlement must be approved by a judicial body. Which judicial body is competent to approve the settlement depends on the stage of the criminal proceeding.

17. Is there a mechanism for plea bargaining?

In accordance with Article 216, CPP, an offender can admit their guilt in exchange for an agreed-upon sentence, provided that certain conditions are met.

If so, the public prosecutor's office can propose (i) a lower penalty than it would have claimed if the offender had not acknowledged their guilt; or (ii) a (wholly or

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partly) suspended penalty, whether or not subject to the fulfilment of certain conditions.

If the offender agrees with the proposed penalty, an agreement is concluded. This agreement must be approved by the criminal court.

18. Is there any requirement or benefit to a corporate for voluntary disclosure to a prosecuting authority? Is there any guidance?

Although this can be taken into consideration when determining the penalty, Belgian law does not explicitly provide any benefit for a person or entity that voluntary discloses (information with regard to) offences that they have committed itself.

However, with regard to the involvement of third parties, there is the possibility for an offender to co-operate with the authorities and to make substantial, revealing, truthful and complete statements regarding the involvement of these parties (and, where appropriate, their own involvement) in committed or attempted criminal offences in exchange for certain concessions (such as a lower penalty) from the public prosecutor's office (Article 216/1 and following, CCP).

19. What rules or guidelines determine sentencing? Are there any leniency or discount policies? If so, how are these applied?

Every criminal provision provides a minimum and a maximum sentence, which leaves a margin of appreciation to the courts. The courts can take into account anything they consider relevant (eg, a (clean) criminal record and the co-operation with the authorities). In cases of repeat-offending or aggravating of mitigating circumstances, courts can deviate from these legal caps.

Courts are (within the limits mentioned above) free to determine sentences, there are no policies governing the extent to which certain factors, such as a defendant's possible cooperation, would affect sentencing.

20. In relation to corporate liability, how are compliance procedures evaluated by the financial crime authorities and how can businesses best protect themselves?

It is advisable to have not only a policy, but also to have taken all necessary measures to ensure compliance with this policy, in order to be able to prove that, as a company, one has done everything possible to avoid possible offences.

21. What penalties do the courts typically impose on individuals and corporates in relation to the key offences listed at Q1?

First and foremost, natural persons risk a fine, possibly in combination with suspended imprisonment. Furthermore, they risk for the proceeds of crime to be confiscated, as well as a professional ban.

For legal entities, the most commonly imposed sanction is also a fine, whether or not together with a confiscation. Furthermore, they risk a temporary or permanent prohibition from carrying out an activity that is part of its object and a temporary or permanent closure of one or more establishments.

22. What rights of appeal are there?

The public prosecution's office, the convicted defendant and the victim can appeal the criminal court's judgment. Such appeals bring the matter before the court of appeal. The scope of the court of appeal's jurisdiction will depend on the parties appealing, and exactly which parts of the judgment they appealed against. With regard to the appealed aspects, the court of appeal has full jurisdiction.

Furthermore, parties can appeal the judgment of the court of appeal. Such appeal brings the matter before the Supreme Court. However, the latter does not have full jurisdiction, but can only assess whether the law has been applied correctly, without examining the facts. In case the Supreme Court judges that the law has not been applied correctly, it will refer the matter to another court of appeal.

23. How active are the authorities in tackling financial crime?

Although efforts are being made here and this is one of the prosecution priorities, there is no denying that there is a lack of resources, which makes successful prosecution often difficult.

24. In the last 5 years, have you seen any trends or focus on particular types of offences, sectors and/or industries?

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The Minister of Justice and the Minister of Internal Affairs have validated a National Security Plan in 2022. This plan covers the security themes that require special attention from the police between 2022 and 2026 and mentions, inter alia, social and tax fraud, corruption and cybercrime.

In addition, there are voices calling for stiffer punishment for corruption. One of the consequences of this social pressure is that amicable settlements relating to this matter are currently difficult and that the public prosecution's office will often take such cases to court.

Nevertheless, with regard to both (other) financial offences, as well as environmental offences, certain public prosecution's offices have announced increased efforts to use the plea bargain.

25. Have there been any landmark or notable cases, investigations or developments in the past year?

Currently, a lot of investigative resources go into a very large-scale investigation into drug offences and the use of encrypted communication networks, often pushing other investigations somewhat into the background.

26. Are there any planned developments to the legal, regulatory and/or enforcement framework?

A proposal for a new Criminal Code has been introduced in 2022. It aims to respond to the evolution that criminal law has undergone since the introduction of the previous Criminal Code by modernizing and simplifying both the criminal offences that are at present contained in this Code, as well as the sentencing rules.

Furthermore, a proposal has been introduced regarding the amicable settlement, proposing to always disclose all details of amicable settlements and to allow the public prosecutor's office to (also) impose a professional ban on the accused in case of such settlement.

27. Are there any gaps or areas for improvement in the financial crime legal framework?

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