



PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN LUXEMBOURG

June 2011

This Phase 3 Report on Luxembourg by the OECD Working Group on Bribery evaluates and makes recommendations on Luxembourg's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the Working Group on 23 June 2011.

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EXECUTIVE SUMMARY

The Phase 3 report on the Grand Duchy of Luxembourg, by the Working Group on Bribery, assesses and makes recommendations in respect of the implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. This phase is centred on key horizontal issues of interest to the Working Group, with a particular focus on implementation and actual enforcement of the Convention, and it also examines country-specific (vertical) issues involving the progress made by Luxembourg in correcting the shortcomings identified since the Phase 2 and Phase 2bis assessments in 2004 and 2008, along with any issues raised by changes in national legislation or Luxembourg's institutional framework.

The Working Group on Bribery welcomes the substantial progress made since Phase 2bis by the Grand Duchy, with the significant amendments to its legislation to achieve compliance with its international obligations under the Convention, and in particular by the introduction, on 3 March 2010, of provisions for the criminal liability of legal persons into its legal system, thus implementing Recommendation 4 (a) of Phase 2bis. The Working Group, though aware that these provisions came into force only recently, notes that their application to date has been limited, and it encourages the Luxembourg authorities to take all appropriate steps to draw the attention of the prosecution service to the importance of also prosecuting legal persons in cases of bribery of foreign public officials. It also recommends Luxembourg to ensure by all means that this regime does not limit such liability to cases in which the natural person or persons who committed the offence are prosecuted and found guilty, and that the level of authority of the person or persons involved and the type of act likely to incur liability be sufficiently broad for effective enforcement.

The Working Group regrets that the recent legislative amendments to strengthen means for combating bribery did not seize the opportunity to clarify that no element of proof other than those stipulated in Article 1 of the Convention should be required to constitute the offence of bribing a foreign public official, and it therefore recommends that Luxembourg state explicitly that it is not necessary to prove the existence of a "corruption pact", and that the notion of "without right" which appears *inter alia* in Article 247 of the Penal Code, should not be interpreted as implying a need for prosecutors to prove that a provision in force in the country of the foreign public official prohibits that official from receiving a bribe.

The report highlights the lack of enforcement of the offence of bribery of foreign public officials, with only one case currently being prosecuted that might involve an offence of bribing a foreign public official. Nevertheless, the magnitude of capital flows in Luxembourg and the associated risks of economic crime cause Luxembourg to receive a large number of requests for mutual legal assistance. The Working Group, while applauding the efforts made by Luxembourg to give priority to responding to those requests, thus enabling other countries to pursue their prosecutions, recommends that Luxembourg re-examines its approach to exercising its own jurisdiction over the prosecution of bribery of foreign public officials on its own territory, in particular on the basis of information obtained and provided through mutual legal assistance.

The Working Group encourages Luxembourg to pursue the efforts undertaken through its 2010 and 2008 legislation with regard to obtaining information that is needed for investigating and prosecuting bribery of foreign public officials from banks, financial institutions and tax authorities, so that such information may be obtained even in the absence of a formal referral to an investigating magistrate, thus ensuring full implementation of Phase 2bis Recommendation 3 (b). It also recommends that Luxembourg continue its reflection on police investigative powers at the preliminary enquiry stage, with a view to extending those powers by tailoring the available means and methods of investigation to the need to gather sufficient evidence so that prosecution can be initiated in cases involving bribery of foreign public officials.

Since Phase 2, the Luxembourg government has taken numerous initiatives to raise awareness in the business sector and among certified accountants and company auditors, but also in the public sector and among agencies that confer public benefits in a context of bolstering the integrity of financial markets and combating money laundering. These actions have contributed indirectly to heightening awareness of the offence of bribing a foreign public official, even if the number of actions focused on the offence *per se* was significantly more limited. The Working Group also welcomes the introduction into Luxembourg law of whistleblower protection measures in the private and public sectors, with the enactment on 13 February 2011 of the Act strengthening means to combat bribery, thus implementing Phase 2bis Recommendation 2 (c). The Working Group recommends that the business and public sectors alike be made more aware of the importance of reporting and preventing transnational bribery, and of the protection now afforded to whistleblowers.

The report and its recommendations reflect the conclusions of Italian and Belgian experts and have been adopted by the Working Group on Bribery. One year after the approval of this report, Luxembourg is invited to present the Working Group with an oral follow-up report on implementation of certain recommendations. It will then submit a written report in two years' time. The Phase 3 evaluation report is based on the laws and regulations and other documents provided by Luxembourg, as well as on the information obtained by the examiners during their three-day on-site visit to Luxembourg on 1 to 3 February 2011, during which the evaluation team met with Luxembourg representatives of government, the private sector and civil society.

A. INTRODUCTION

1. The on-site visit

1. A team from the OECD Working Group on Bribery in International Business Transactions (the "Working Group") visited the Grand Duchy of Luxembourg from 1 to 3 February 2011 as part of the Phase 3 peer evaluation of implementation of the Convention on Combating Bribery of Foreign Public Officials ("the Convention"), the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business (the "2009 Recommendation") and the Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions (the "2009 Recommendation on Tax Measures"). The aim of the visit was to evaluate Luxembourg's implementation of the Convention and the 2009 Recommendations.

2. The Phase 2 evaluation of Luxembourg took place in April 2004. Exceptionally, a Phase 2bis evaluation followed in October 2007 and the corresponding written follow-up report was presented to the Working Group in October 2009. The Phase 3 on-site visit therefore focused mainly on developments in Luxembourg's implementation of the Convention and its related instruments since 2009.

3. The evaluation team comprised lead examiners from Belgium and Italy and members of the OECD Secretariat.¹ During the on-site visit, the examiners met representatives of both the public and the private sectors.² They noted that representatives of the Luxembourg authorities did not take part in meetings with non-governmental representatives.³ The members of the evaluation team were grateful to the Justice Minister for taking the time to answer their questions. The high level of participation of Luxembourg public officials throughout the visit and the goodwill and openness shown by the panellists enabled the evaluation team to focus on the most important issues and helped greatly to optimise the visit. Luxembourg showed an excellent spirit of cooperation not only in the preparation phase but also during and after the on-site visit. In preparing the visit, the Luxembourg authorities provided many documents and answered the Phase 3 questionnaires and supplementary questions. Overall, the answers to the questionnaires provided a sound basis for the meetings during the on-site visit. Following the visit, the Luxembourg authorities answered clarification requests that helped the evaluation team to better understand certain aspects of the Luxembourg system.

1 Belgium was represented by Patrick de Wolf, Avocat Général, Brussels Appeal Court; Alain Luyckx, Federal Criminal Police, Central Office for the Prevention of Bribery; and Peter Hostyn, Federal Budget and Management Control Service. Italy was represented by Anna Pagotto, judge and member of the Criminal Justice Bureau at the Justice Ministry, and Marco Muser, Ministry of Public Administration and Innovation. The OECD Secretariat was represented by Sandrine Hannedouche-Leric, Principal Legal Analyst, Anti-Corruption Division; Inese Gaika, Project Manager, Anti-Corruption Division; and Claudia Pharaon, Anti-Corruption Division.

2 A list of participants is given in Annex 2.

3 See paragraph 26 of the Phase 3 Procedure, which states that the evaluated country may attend, but should not intervene, during the course of non-government panels.

2. Structure of the report

4. Part B of the report looks at Luxembourg's efforts to implement and apply the Convention and the 2009 Recommendations. It considers key issues of interest to the whole Working Group (horizontal), with a particular focus on enforcement efforts and results, specific issues (vertical) arising from the progress made by Luxembourg and the shortcomings identified in Phase 2 and Phase 2bis, and issues raised by changes in national legislation or Luxembourg's institutional framework. Part C contains the recommendations made to Luxembourg by the Working Group and the issues that will be followed up.

3. Economic situation

5. Luxembourg's gross domestic product (GDP) in 2010 amounted to EUR 41 billion,⁴ with financial services accounting for about a quarter of that figure.⁵ That is equivalent to EUR 82,000 per inhabitant in 2010,⁶ the highest GDP per capita in Europe.

6. With 156 banks established in Luxembourg in 2008, the interbank market is central to the vitality of the country's economy, drawing in major capital flows. Financial companies and insurance firms thus play a key role in Luxembourg's economy, due in particular to the existence of specific measures and a favourable legal framework, including banking secrecy and tax incentives.⁷

7. Luxembourg is the world's second largest centre for investment fund business and the largest wealth management centre in the eurozone. Foreign direct investment (FDI) is an important element of business strategies, primarily for finance companies, insurance companies, consulting and engineering firms and international trading companies. Luxembourg's own foreign investment amounted to EUR 112 billion in 2009, the highest level of FDI in Europe. Luxembourg was also the largest beneficiary in Europe of FDI from the rest of the world, with EUR 88 billion invested.⁸

8. The value of exports amounted to EUR 10.6 billion and the value of imports to EUR 15.5 billion in 2010;⁹ trade in goods and services accounts for a substantial share of Luxembourg's GDP.¹⁰ Luxembourg is a hub of international trade, especially in the financial sector. Trade in services is increasing and far outstrips trade in goods,¹¹ mostly machinery, plant and equipment and manufactured goods.¹² Luxembourg's main trading partners are other EU countries, which take approximately 87% of

4 IMF, World Economic Outlook Database, October 2010: <http://www.imf.org/external/ns/cs.aspx?id=28>. According to OECD statistics [source and/or link], Luxembourg had a population of 493,500 in 2009.

5 FATF, Mutual Evaluation of Luxembourg, 19 February 2010, <http://www.fatf-gafi.org/dataoecd/32/13/44847697.pdf>.

6 IMF data, cf. supra.

7 FATF, cf. supra, paragraph 52.

8 Eurostat data, 2009, <http://epp.eurostat.ec.europa.eu/portal/page/portal/statistics/themes>.

9 STATEC data for 2010 (Luxembourg statistics portal): http://www.statistiques.public.lu/stat/TableViewer/tableView.aspx?ReportId=938&IF_Language=fr&MainTheme=5&FldrName=4&RFPath=113.

10 Trade in goods and services represented approx. 156.54% of Luxembourg GDP in 2008. OECD statistics for 2008.

11 Luxembourg's current balance of trade rose from EUR 2,569 million in 2000 to EUR 3,059 million in 2009 for goods and from EUR 7,388 million in 2000 to EUR 17,804 million in 2009 for services. Source: STATEC.

12 STATEC data, Luxembourg statistics portal, External economic relations.

Luxembourg's exports, with its three neighbours Germany, Belgium and France foremost among them. However, Luxembourg is gradually extending the range of its international trade relations, especially in the Americas, Asia and the Middle East, helping to diversify both its export destinations and import sources.¹³

4. Bribery of foreign public officials

(a) Luxembourg's exposure to bribery

9. Luxembourg's exposure to transnational bribery has a number of specific features, though they do not explain the small number of prosecutions in this area. To date, only one case potentially involving bribery of a public official has been prosecuted; no final judgment had been handed down in the case at the time of this report. Three transnational bribery risk factors specific to Luxembourg were identified. First, the country is small and its domestic market correspondingly narrow, with the result that international trade and foreign investment are of vital interest for most of the 30,000 or so companies registered there, thus increasing the risk for those companies of exposure to bribery of a foreign public official. Second, as explained below, the size of Luxembourg's financial market and the scale of capital flows pose a significant risk of infiltration by funds of doubtful origin or, at the very least, of transactions through financial structures designed to mask the sources and recipients of bribes. Third, an attractive tax system has encouraged the growth of trust companies, which give tax advice drawing on legal and accounting expertise and offer company creation and domiciliation services in an environment that was little regulated until 2010.¹⁴ After publication of the Luxembourg evaluation by the FATF in February 2010,¹⁵ a set of laws and regulations were adopted in October 2010 in response to the criticisms made in the report. The report estimated that these trust companies were likely to make it easier for funds to circulate in Luxembourg with extremely limited controls (of some of their activities, and of information about beneficial owners¹⁶), and consequently to perform international commercial transactions that could include the payment of bribes to foreign public officials.

(b) Luxembourg's approach to cases of transnational bribery

10. No investigation or prosecution of a case involving bribery of a foreign public official was pending during Phase 2. In its answers to the Phase 3 questionnaires, Luxembourg stated that one case involving transnational bribery is currently being prosecuted in Luxembourg and that the judicial investigation was under way. Investigations in connection with the case were opened in 2007, 2009 and 2010. However, it is not certain that the case involves bribery of a foreign public official within the meaning of the Convention.¹⁷ During the on-site visit, the Luxembourg authorities mentioned another case of transnational bribery, also at the judicial investigation stage.

13 Luxembourg portal, Foreign trade, information:
www.luxembourg.public.lu/fr/economie/portrait/commerce-exterieur/index.html

14 The legal framework instituted by the Act of 31 May 1999 on company domiciliation and laws to combat money laundering and terrorist financing was strengthened by the anti-money laundering Act of 27 October 2010. The same Act entrusted the Administration de l'Enregistrement et des Domaines with a new task, as supervisory authority and regulator of non-financial professions, especially individuals providing services to companies and trusts as a business in Luxembourg.

15 FATF, cf. supra.

16 FATF, Executive Summary of the third mutual evaluation of Luxembourg, adopted by the FATF plenary on 19 February 2010.

17 The case involves bribes paid by Portuguese nationals established in Luxembourg to a Portuguese public official so that he would issue documents falsely certifying that the conditions for the exercise of certain independent professions in Luxembourg were met. Meeting the conditions was a precondition for obtaining

11. A judgment handed down by the Appeal Court of the Grand Duchy of Luxembourg on 2 February 2011¹⁸ in a domestic bribery case shed new light on certain aspects of the definition and prosecution of the offence of bribery which, according to the Luxembourg authorities, could also apply to cases of bribery of foreign public officials. The judgment is commented on in more detail in the relevant sections of the report.

12. The scale of inflows of capital into Luxembourg poses a high risk of infiltration by funds of doubtful origin which may represent the amount of bribes paid in cases of transnational bribery, justifying the large number of mutual legal assistance requests received by Luxembourg. 28% of cases handled by the Luxembourg police and courts are the result of international rogatory commissions, which are given priority treatment by the Grand Duchy (a legal requirement). The Luxembourg authorities emphasise that the Grand Duchy has thus played an important part in enabling other countries to initiate proceedings on the basis of information provided by the Financial Intelligence Unit (FIU) to their competent authorities. Luxembourg has responded to many mutual legal assistance requests in cases that have been given extensive media coverage, in particular concerning the payment of kickbacks by third country companies to Nigerian, Ghanaian and Pakistani public officials. Luxembourg banks and companies may have played a major role in all these cases by sheltering sums of money that could represent bribes. In contrast, to date Luxembourg has never made use of its own, theoretically very extensive powers (see Phase 1 and 2 reports) to prosecute cases of bribery of public officials, especially on the basis of information obtained and provided under mutual legal assistance procedures.

B. IMPLEMENTATION AND APPLICATION BY LUXEMBOURG OF THE CONVENTION AND THE 2009 RECOMMENDATION

1. The offence of transnational bribery

13. The Act of 13 February 2011 strengthening the fight against bribery introduced the first changes to the sections of the Luxembourg Penal Code (PC) relating to bribery since the Act of 15 January 2001 approving the OECD Anti-Bribery Convention. New article 247 of the Penal Code, which specifically defines the active bribery of public officials, states that:

"The fact of proposing *or giving*, without right, directly or indirectly, offers, promises, gifts, presents or advantages of any kind whatsoever to a person entrusted with, or agent of, public authority or a law enforcement officer or a person charged with a public service mission or holding elected office, for himself or for a third party, *or offering or promising to do so*, [...] shall be punishable by imprisonment from five to ten years and a fine of EUR 500 to EUR 187.500."

the authorisations of establishment sought by a number of Portuguese nationals. The authorisations of establishment were themselves supplied in return for bribes paid through the network of Luxembourg and Portuguese intermediaries to a former Luxembourg civil servant. A number of mutual assistance requests were sent to Portugal as part of the investigation and were all executed.

18 Judgment No. 61/11 X of 2 February 2011, Appeal Court of the Grand Duchy of Luxembourg, Tenth Criminal Division.

14. The word "*octroyer*" (bestow) in the previous version of Article 247 has been replaced by the word "*donner*" (give). Furthermore, whereas formerly the offence consisted in "proposing or bestowing offers, promises, gifts, presents or advantages of any kind whatsoever", it now consists in "proposing or giving offers, promises, gifts, presents or advantages of any kind whatsoever *or offering or promising to do so*". Articles 246, 248, 249, and 250 have also been amended to reflect these changes of wording.

15. The evaluation team became aware of the amendment of the articles of the Penal Code relating to bribery during the Phase 3 on-site visit, although the draft law had been debated before then. It transpired from discussions with the panellists that the changes had no significant impact on the scope of application or the constituent elements of the offence of bribery of a foreign public official. The Luxembourg authorities justified the changes on the grounds of recommendations made in other international forums responsible for monitoring other international conventions.¹⁹ In light of Luxembourg's application of the obligations arising from the OECD Convention, however, the evaluation team was not entirely convinced of their relevance. The verb "*octroyer*" used in Article 1 of the OECD Convention is replaced by "*donner*", which means the same thing. [Translator's note: the issue does not arise in English, since "*octroyer*" is already rendered as "give".] In addition, the phrase "or offering or promising to do so" is redundant in the wording of the articles relating to bribery, since they had already contained the notion of "offer or promise" since 2001.

(a) *Definition of foreign public official*

16. No change has been made to the definition of public official since the Act of 15 January 2001, following which the notion of public official as defined in Luxembourg law was deemed to comply with the requirements of the OECD Convention (see Phase 1 report). The prosecutors interviewed confirmed that the articles of the Penal Code relating to bribery would apply, in their opinion, to employees of a public enterprise, as required by Article 1 and the corresponding Commentary. They emphasised that the most important thing for the Luxembourg judiciary would be to identify the position held by the employee and that thus employees of a public enterprise could be treated as foreign public officials if they exercised a public service mission. Leaving aside the fact that it may be difficult to obtain information from some countries about the functions exercised by an employee, the examiners noted that if there is no case law it is difficult to verify how that aspect of the offence would be interpreted in practice, especially as interpretation in criminal law is restrictive. They recommend that this issue should be monitored.

(b) *Issues identified in Phase 2 as needing specific monitoring by the Working Group*

17. The term "without right" was identified in Phase 2 as needing specific monitoring by the Working Group in order to ensure that it was sufficiently clear to ensure the effective prosecution of bribery of foreign public officials. As in Phases 1 and 2, the members of the Luxembourg prosecuting authorities who spoke on the matter justified the use of the term "without right" by the aim of ensuring that remuneration lawfully owed to public officials, such as their salary, should not be treated as a bribe. The Luxembourg authorities emphasised that this terminology covered the notion of "improper advantage" used in Article 1 of the Convention and could not in their opinion represent an obstacle to the effective prosecution of bribery of foreign public officials. However, that view was not shared by all the panellists, especially the lawyers. Under the circumstances, the Working Group fears that this notion could represent an obstacle to the application of anti-bribery laws in cases relating to active bribery of foreign public officials. The notion of "without right" can be interpreted in different ways and could make application of Article 247 conditional on the existence of current legislation in the country of the foreign public official prohibiting receipt of the sums at issue. After the on-site visit the authorities of Luxembourg have clarified

19 See in particular GRECO, Luxembourg Evaluation Report on "Incriminations", Third Evaluation Round, 2008 (paragraph 8 et seq. of the June 2010 report)

for the first time that the term “without right” rather implies that it should be looked for only if a law into force in the country of foreign public official authorizes the payment of the concerned benefit. Defence lawyers could in all events make play with the apparent imprecision of the notion for the benefit of their clients. Given the persistent lack of judgments that would provide an interpretation of the notion in case law, the lead examiners therefore still fear that it may constitute an obstacle to application of the articles of the Luxembourg Penal Code relating to transnational bribery.

18. Concerning the notion of "corruption pact", the deputy prosecutors and other members of the prosecution service interviewed during Phase 3 confirmed the interpretation given by the Luxembourg authorities in Phases 1 and 2. According to them, since unilateral bribery by merely offering or giving a bribe was introduced into the Luxembourg Penal Code with the Act of 15 January 2001, proof of the existence of a corruption pact is no longer required for an offence to be committed. In Article 247, the aim of replacing the word "*octroyer*" with the word "*donner*" (see above) was to address GRECO concerns about the requirement of a "corruption pact".²⁰ According to the Luxembourg authorities, however, this amendment of the law merely transposed an interpretation that was already perfectly clear.

19. However, although the panellists have consistently asserted the same arguments since Phase 1 (and despite the changes to the law made to comply with GRECO's request), analysis of a recent Appeal Court judgment of 2 February 2011²¹ shows that in practice the Luxembourg courts continue to seek the existence of a corruption pact as necessary proof of a bribery offence under the terms of Articles 246 and 247 of the Penal Code (passive and active bribery). This element is additional to those stipulated in Article 1 of the Convention and is therefore in contradiction with Commentary 3 on the Convention, which states that the Parties to the Convention are not required to use identical terms to Article 1, paragraph 1 "provided that conviction of a person for the offence does not require proof of elements beyond those which would be required to be proved if the offence were defined as in this paragraph". The Luxembourg authorities point out that the law is clear in this regard and that a corruption pact should not be regarded as an additional element of proof but rather demonstrates unsuitable terminology, since the existence of a corruption pact is one proof among others of the element of intent in the offence. However, these arguments are not borne out by the court's reasoning in the judgment at issue. Faced with the impossibility of proving the existence of a corruption pact, the court then examined and confirmed the possibility of categorising the offence as "post hoc bribery" (Article 249 of the Penal Code), an offence committed where the offer or gift of the bribe is made after the official's action or inaction and "on account" of that action or inaction, for which the Luxembourg courts do not seek the existence of a corruption pact. However, it is unlikely that recourse to the notion of "post hoc bribery" could cover all cases of bribery of foreign public officials, with the attendant risk that a wide range of active bribery offences might go unpunished because an element of proof is required that is not contained in Article 1 of the Convention. The Working Group notes that in a recent judgment by a court of first instance the existence of a corruption pact was not required by judges as an element of proof.²² This issue should therefore continue to be monitored as case law develops.

(c) ***Bribery through intermediaries***

20. The term "directly or indirectly" in Articles 246, 247, 248, 249, paragraph 1 and 250, paragraph 1 of the Penal Code implies condemnation of bribery through intermediaries. However, this is not formally

20 GRECO, Luxembourg Evaluation Report on "Incriminations", Third Evaluation Round, 2008, paragraphs 78 and 79.

21 Judgment No. 61/11 X of 2 February 2011, Appeal Court of the Grand Duchy of Luxembourg, Tenth Criminal Division, points III, 1.4.2.2.2 and III.1.4.3.2.

²² Judgment 1679/2011 adopted on 19 Mai 2011 by the Luxembourg district tribunal.

reiterated in Article 249, paragraph 2 relating specifically to the post hoc offer or gift of a bribe, or in Article 250, paragraph 2 relating to the offer or gift of a bribe to a member of the judiciary. The Luxembourg authorities reasserted that this omission did not prevent the condemnation of bribery through intermediaries in all the cases covered by those two articles. In order to clarify the situation, however, the Act of 13 February 2011 amended the abovementioned provisions, which now make explicit reference to the "terms of paragraph 1".

(d) Dual criminality

21. The Act of 13 February 2011 provides an important clarification by explicitly abolishing the dual criminality requirement for offences committed by Luxembourg nationals in other countries. As the 2008 GRECO report emphasises,²³ the dual criminality condition could pose a problem where the Luxembourg courts reclassified the offence. The amendment puts an end to the distinction drawn between felonies (*crimes*) committed by Luxembourg nationals in other countries, which could be prosecuted without a dual criminality requirement, and misdemeanours (*délits*) committed by Luxembourg nationals in other countries, which also had to be an offence in the country where they were committed. Article 5.1 of the Code of Criminal Procedure is thus amended to include Articles 246 to 252 of the Penal Code relating to bribery in the list of offences that can be prosecuted when they are committed by a Luxembourg national, a person habitually residing in the Grand Duchy of Luxembourg or a foreigner found in the Grand Duchy of Luxembourg, even if the offence is not an offence in the country where it was committed.

(e) Exemption from liability in case of coercion

22. Under Article 71.2 of the Penal Code, coercion is admitted as a ground for exemption from liability. In Phase 2, the lead examiners feared that the fact that the immediate perpetrator may have been "coerced" by a foreign public official to pay a bribe in order to obtain or retain a contract could be argued as grounds for exempting the natural person from liability. During the Phase 2 and Phase 3 on-site visits, however, the members of the judiciary argued that the ground of coercion could not be upheld in such circumstances. In the absence of any constant case law in this area, the issue should be monitored by the Working Group.

Commentary

The lead examiners note that the Law of 13 February 2011 strengthening the fight against transnational bribery do not provide any clarification as to the constituent elements of the offence, except for removing the dual criminality condition for misdemeanours (délits) committed by Luxembourg nationals in other countries.

Concerning the term "without right", the examiners consider that Luxembourg should clarify as soon as possible, by all appropriate means, that this notion should not be interpreted more restrictively than the notion of "improper advantage" contained in the OECD Convention.

Concerning the requirement of a corruption pact, the examiners recommend that Luxembourg takes the necessary steps to ensure that the notion of "corruption pact" no longer presents an obstacle to the effective application of Article 247 of the Penal Code.

Concerning the notion of foreign public official, the examiners recommend that the possibility that employees of public enterprises are covered by the law, in the absence of any express provision to that effect, is subject for a follow-up.

23 GRECO, Luxembourg Evaluation Report on "Incriminations", Third Evaluation Round, 2008.

The evaluation team notes the panellists' assertion that exemption from liability in the event of coercion should not include the fact that the immediate perpetrator may have been "coerced" by a foreign public official to pay a bribe in order to obtain or retain a contract. However, in the absence of case law on the subject, the examiners recommend that the issue be monitored.

2. Liability of legal persons

(a) Introduction into Luxembourg law of rules on the liability of legal persons

23. In the Phase 1 evaluation, the Working Group found that Luxembourg had "failed to transpose the requirements of the Convention" relating to the liability of legal persons. Consequently, it recommended that Luxembourg "implement Articles 2 and 3 of the Convention as soon as possible". Finding during the Phase 2 evaluation that no measure had been taken to implement the Phase 1 recommendation, and that consequently "Luxembourg was in persistent contravention of Article 2 of the Convention", the Working Group recommended that Luxembourg establish in law "a clear liability of legal persons for bribery of foreign public officials within a year of the Phase 2 evaluation of Luxembourg, and put in place sanctions that are effective, proportionate and dissuasive [Convention, Articles 2 and 3]" (Recommendation 14).

24. In its Phase 2 written follow-up report in 2006, the Working Group observed that "since work on the bill which would introduce clear liability for legal entities into the legislation of Luxembourg in the event of bribery of foreign public officials is still in progress, the Grand Duchy continues to be in non-compliance with Article 2 of the Convention". In its oral follow-up report in 2007, the Luxembourg delegation informed the Working Group that a draft law, Bill 5718, had been placed before Parliament on 20 April 2007, introducing criminal liability for legal persons in Luxembourg law. The bill would amend the Penal Code, inserting into it a chapter on "penalties applicable to legal persons", and also the Code of Criminal Procedure, to which would be added a section on "proceedings against legal persons". The wording of the draft law drew on prevailing legislation in France, and, to a lesser extent, on Belgian regulations. At the time of the Phase 2bis on-site visit, the timing of the bill's adoption was still very uncertain.

25. Consequently, in October 2009, in accordance with the wish expressed by Luxembourg at the Working Group meeting in June 2009, the Phase 2bis evaluation team (Belgium, France and the OECD Secretariat) issued an opinion concerning Bill 5718 introducing criminal liability for legal persons into Luxembourg's Penal Code and Code of Criminal Procedure.²⁴ The evaluation team had issued reserves concerning a number of elements of the bill introduced by Article 34, paragraph 2. [See Annex]

26. At its meeting on 16-19 March 2010, the Working Group took note of a letter from the Justice Minister, Mr. François Biltgen, in which Luxembourg informed the OECD Secretary-General that the law introducing criminal liability for legal persons had been adopted on 3 March 2010. The Working Group welcomed this progress on Luxembourg's part and deemed it appropriate to evaluate the new law as part of the Phase 3 assessment.

27. The law on legal persons introduces general rules relating to the liability of legal persons and amends the Penal Code, the Code of Criminal Procedure and some other legislative provisions (see Annex 17 of Luxembourg's answers to the Phase 3 questionnaires). Its text broadly corresponds to that of the draft law evaluated in Phase 2bis and in the context of the opinion issued by the evaluation team in October

24 The opinions expressed represented only the viewpoint of the members of the evaluation team. The Working Group's opinion and recommendations on the final law will therefore be formulated for the first time in the context of this Phase 3 evaluation.

2009, except that (as Luxembourg points out in its answers to the Phase 3 questionnaires) Parliament extensively discussed and took account of the evaluation team's opinion and replaced reference to a "corporate officer exercising a senior managerial function and reporting directly to one of its legal bodies" with the notion of "de jure or de facto manager". Thus, Article 34 of the Penal Code states that:

"When a felony (*crime*) or misdemeanour (*délit*) is committed in the name of and in the interest of a legal person by one of its legal bodies or by one or more of its de jure or de facto managers, that legal person may be held criminally liable and may incur the penalties provided for by Articles 35 to 38."

(b) Number of cases

28. In their answers to the Phase 3 questionnaires, the Luxembourg authorities said that they had not yet had any practical experience of applying the Act of 3 March 2010 on the criminal liability of legal persons in the context of bribery of a foreign public official because the new law had only recently come into force. Nor had any legal person incurred criminal liability in connection with a domestic bribery case. However, a case concerning two companies accused of fraud, misappropriation and money-laundering is currently being investigated and appeals were pending in two cases where companies had been convicted in first instance, the first involving assault in a road incident and the second involving infringements of an EU regulation relating to access to the road haulage market.

(c) Scope of the law

29. The scope of application *ratione materiae* of the criminal liability of legal persons, as set forth in the law, is very broad. It makes a general principle of the criminal liability of legal persons and extends it to all crimes and offences covered by the Penal Code and by specific laws. Bribery of a foreign public official is a crime in Luxembourg law, and consequently legal persons are criminally liable for such violations. The scope of application *ratione personae* is just as broad: it covers all legal persons, including those incorporated under public law, with the exception of the State and municipalities.

30. In their answers to the Phase 3 questionnaires, the Luxembourg authorities said that enterprises owned or controlled by the State could incur criminal liability in the same way as any other enterprise. Article 34 of the Penal Code excludes only municipalities from the scope of the law.

(d) Rules and principles relating to the liability of legal persons

31. Where a legal person can incur liability only as a result of the acts of persons at the highest level of management, the Working Group considers that certain conditions should be met in order for the system to work effectively. In accordance with Annex I of the 2009 Regulation, it must be possible for the legal person to be held liable if a person with the highest level managerial authority i) directs or authorises a lower level person to offer, promise or give a bribe to a foreign public official, or ii) fails to prevent a lower level person from bribing a foreign public official, including through a failure to supervise him or her or through a failure to implement adequate internal controls, ethics and compliance programmes or measures.²⁵

32. Despite the amendments made by Parliament following the opinion issued by the evaluation team in October 2009, some elements still appear to remain problematical in that regard.

25 Annex I: Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Section B) Article 2 of the OECD Anti Bribery Convention: Responsibility of Legal Persons.

(i) *Legal bodies*

33. The notion that an enterprise can incur liability through one of its legal bodies corresponds to the theory whereby certain natural persons are identified with the enterprise. The Working Group has consistently held this notion to be too narrow.

(ii) *De jure or de facto managers*

34. However, the new Luxembourg law also states that the enterprise may incur liability through its "de jure or de facto managers". This notion replaces that of "de jure or de facto corporate officer exercising a managerial function" initially contained in the draft law, on the subject of which the evaluation team had found in 2009 that to the best of its knowledge the term "managerial function" was not precisely defined in Luxembourg law. During the Phase 3 on-site visit, the members of the judiciary interviewed said that in their opinion the notion of "de jure or de facto manager" now contained in the law did not pose any problem since it was clearly defined in case law, and French case law in particular, to which the Luxembourg courts habitually refer in their judgments. They said that the notion covered "any person behaving in relation to a third party as a corporate officer, i.e. any person performing acts of management in the name of and in the interest of the enterprise".

35. According to the members of the judiciary interviewed, the notion of "de jure or de facto managers" thus has the advantage of being clear and seems to make it possible for legal persons to incur liability more extensively, insofar as the acts of an employee (such as a salesperson) who pays a bribe may be deemed acts of management in the name of and in the interest of the enterprise. During the on-site visit, the members of the prosecution service interviewed gave differing opinions on the question of whether, for example, the acts of a sales agent who is the sole representative of the enterprise in a foreign country but who is not a manager (de jure or de facto) per se could make the enterprise liable for bribery. Appreciation of the notion of "de jure or de facto manager" on whose account a legal person may be held liable is a question that the courts will have to decide case by case according to the particular circumstances. In the absence of any case law, it is not possible to determine whether the level of authority of the person as a result of whose conduct the legal person incurs liability will be interpreted flexibly enough and will reflect the wide variety of decision-taking systems in effect within legal persons (2009 Recommendation, Annex I, A) a.).

36. Under these conditions, Annex I of the 2009 Recommendation provides that certain cases, corresponding to certain types of acts of persons with the highest level managerial authority, should be covered in order for this system of liability to work. The answers obtained during the on-site visit confirm that only some of the cases provided for in Annex I of the 2009 Recommendation (Section B. b) are clearly covered. Thus, if a manager directs or authorises a lower level person to offer, promise or give a bribe to a foreign public official, it seemed clear to most of the members of the judiciary interviewed that the legal person could be held liable. In contrast, the panellists expressed differing opinions as to the possibility of holding the legal person liable if the manager failed to prevent a lower level person from bribing a foreign public official, especially if this was due to a failure to supervise the person or to implement adequate internal controls, ethics and compliance programmes or measures. Given that Article 34 requires the de jure or de facto manager to have committed a felony or misdemeanour, it seems unlikely that a legal person could be held liable under the terms of the law on the grounds of a failure to supervise, and still less a lack of supervision.

37. Because of the lack of certainty as to the precise scope of the notion of "de jure or de facto managers", at least when applied to certain specific cases, it is to be feared that the law to hold the legal person liable for bribery of foreign public officials in a certain number of circumstances that are nevertheless commonplace in international commercial transactions.

38. In the absence of any case law clarifying these issues, it is not possible to determine that the system fully corresponds to one or other of the approaches that the 2009 Recommendation recommends the Parties to the Convention to adopt, insofar as it does not fulfil the conditions set out in the Recommendation for the system to work effectively. The system for the liability of legal persons instituted in Luxembourg cannot therefore be regarded in the current state of affairs as totally "clear and effective", in accordance with the recommendations made by the Working Group to Luxembourg.

(e) Requirements relating to the liability of the natural person

39. As regards requirements relating to the liability of the legal person, a certain number of points raised during the Phase 2bis evaluation in March 2008, concerning the initial bill tabled in May 2007,²⁶ remain.

(i) Links between the liability of the natural person and of the legal person – Guilt of the natural person

40. The Phase 2bis report pointed out that the preamble of the bill was inconsistent on the question of whether the individual who is the immediate perpetrator must be prosecuted and found guilty in order for the legal person to incur liability.²⁷ One passage in particular posed difficulties of interpretation: "While it is not necessary for the immediate perpetrator of the offence to be actually tried and convicted, his guilt must be established by a court, which must find that the alleged offence was effectively committed in all its material and intellectual elements by the legal body or by one of its members. Consequently, if the immediate perpetrator of the offence is found not guilty by the court, the offence can no longer be held against the legal person". It is difficult to see how the guilt of the immediate perpetrator could be established by a court without a trial.

41. In its answers to the Phase 3 questionnaires, Luxembourg stated that "the liability of legal persons is an autonomous concept that does not depend on the guilt of a representative of the company". During the on-site visit, some members of the judiciary said that in their opinion it would not even be necessary to identify the natural person who was the de jure or de facto manager. They, like the Luxembourg authorities, unanimously referred to French case law in support of their argument.²⁸ In the absence of any case law to clarify this issue in Luxembourg, the Working Group should monitor the issue in order to ensure that the system of liability for legal persons established in Luxembourg complies with the rules set forth in Article 2 of the Convention.

(ii) Perpetrator not criminally liable – Impact of coercion on liability

42. It had also been noted in Phase 2bis that if the immediate perpetrator is not guilty or if his criminal liability is set aside for one of the grounds (objective or subjective) stipulated in Article 70.72 of the Penal Code, the offence cannot be laid to the legal person. In this context, the fact that the immediate perpetrator may have been "coerced" by a foreign public official to pay a bribe in order to obtain or retain a

26 See paragraphs 61 to 80 of the Phase 2bis evaluation report, available at <http://www.oecd.org/dataoecd/5/2/40323564.pdf>.

27 Paragraph 67.

28 C. Cass. Crim. 1 December 2009, no. 09-82.140 and Cass. QPC, 11 June 2010, no. 09-87.884 and annotation by Michel Véron (Pénal – Lexisnexis Jurisclasseur – October 2010) who, comparing the opposite solutions found by the Court of Cassation in this area, points out that the Court of Cassation sometimes considers "this identification to have been made, because it transpires from the findings of the lower courts that the offence could have been committed 'only' by a body or representative of the legal person".

contract could be argued as grounds for exempting the legal person from liability. During the on-site visit, the lawyers interviewed did not deny that they might resort to such arguments in defending their clients. However, the members of the judiciary interviewed insisted that, in principle, the excuse of coercion or duress would not be accepted in such circumstances. During the Phase 3 visit, the members of the judiciary maintained their position, explaining that the coercion in this case should be treated as extortion and would not cover merely seeking a bribe. In their opinion, it could not therefore be used as an argument in a case involving bribery of a foreign public official. In the absence of any case law, however, the Working Group should monitor the issue. (This issue is also dealt with in Section 1, The offence of transnational bribery.)

(iii) *Offence committed "in the interest" of the legal person*

43. The condition posed in Article 34 of the Penal Code of an offence committed "in the interest" of the legal person raises questions about the limits on the liability incurred by a legal person, especially for bribery. The preamble to the draft law only reinforces these questions when it states that "an offence may be considered to have been committed 'in the interest of' the legal person if it was knowingly committed by the manager(s) of a legal person in order to obtain a gain or financial profit for the legal person, or in order to realise economies in its favour, or to save it from losses", even though the Luxembourg authorities emphasise that these are merely non-exhaustive examples.

44. Firstly, this point raises concerns about the need to establish proof of a pecuniary benefit, i.e. a profit, whether expected or actual. This condition might not be met in cases where the foreign public official does not provide the consideration or if the pecuniary benefit (profit) does not appear in the books. Companies may pay a bribe in order to win an unprofitable contract, as when they seek to establish a foothold in a major new market, for example, or pay a bribe not for their own benefit but for that of a subsidiary or their parent. In cases where the consideration is received but the prosecutor is unable to prove that a benefit has been obtained, the offence may be deemed not to have been committed. The members of the judiciary (prosecutors and investigating magistrates) explained that the notion of interest of the legal person would be interpreted very broadly and, in their opinion, would cover all the cases mentioned above.

45. More generally, the notion of an act "in the interest" of the legal person implies that the following are excluded from the scope of liability: offences committed by the legal body or its members acting in their personal interest, even in the performance of their duties; offences committed in the interest of a minority of members of a legal body of the legal person, where the minority group has acted in its personal interest; and offences committed against the interest of the legal person (this could be a line of defence insofar as there is an offence), which will generally find itself the victim of the offence.

46. A year after the law came into force, there has been no case law to clarify this point, considered problematical by the Working Group in a certain number of other evaluations. The Working Group is concerned by the uncertainty that the criterion of the "interest" of the legal person introduces into the scope of liability and fears that the criterion might considerably restrict the possibility of establishing the liability of legal persons in practice.

Commentary

The examiners welcome the entry into force of the law on the liability of legal persons and Luxembourg's intention to comply with its international obligations under the Anti-Bribery Convention. The examiners noted that the reserve issued by the evaluation team in 2009 as to the level of authority of natural persons likely to entail the liability of legal persons had led to the explicit inclusion in the law of "de facto managers" alongside "de jure managers". However, they note that several reserves issued by the evaluation team in 2009 on a certain number of aspects of the draft law had not been taken into account in the final text of the law that came into force in March 2010.

In view of the foregoing, the examiners therefore recommend that Luxembourg ensures by all appropriate means that its system for the liability of legal persons adopts one of the approaches described in Annex 1 B) b. of the 2009 Recommendation concerning the level of managerial authority and the type of act that may cause that liability to be incurred.

The examiners, though aware that the system for the liability of legal persons came into force only recently, note its limited application to date and encourage the Luxembourg authorities to take all appropriate steps to draw the attention of the prosecution service to the importance of also prosecuting legal persons in all cases of bribery of foreign public officials in which they may be involved.

They also consider that Luxembourg should ensure that:

a) the system for the liability of legal persons established by the Act of 3 March 2010 does not limit that responsibility only to cases where the natural person or persons who committed the offence are prosecuted and found guilty;

b) the fact that the immediate perpetrator was "coerced" by a foreign public official to pay a bribe in order to win or keep a contract does not cover cases where a bribe is sought and cannot be considered a ground for the non-liability of the legal person;

c) the criterion of the "interest" of the legal person does not exclude certain cases of bribery of foreign public officials where a bribe is paid to a foreign public official by a de jure or de facto manager of an enterprise only in the partial interest of the enterprise or in the interest of another legal person, possibly linked to the first.

3. Sanctions

47. Article 3 of the OECD Anti-Bribery Convention requires the Parties to apply effective, proportionate and dissuasive sanctions to natural and legal persons convicted of a transnational bribery offence. The Convention also requires the Parties to consider the imposition of additional civil or administrative sanctions. Recommendation III (vii) of the 2009 Recommendation recommends that each Member country "take concrete and meaningful steps [...] to examine or further examine [...] public subsidies, licences, public procurement contracts, contracts funded by official development assistance, officially supported export credits, or other public advantages, so that advantages could be denied as a sanction for bribery in appropriate cases, and in accordance with sections XI and XII of this Recommendation."

(a) Sanctions applicable to natural persons

(i) Description of applicable criminal sanctions / Relevant legislation

48. The level of sanctions applicable to natural persons has not been reviewed since the Phase 2 evaluation in 2004, despite the amendments made to the relevant articles of the PC by the Act of 13 February 2011, adopted a few days after the Phase 3 on-site visit.²⁹ Under Articles 247 and 249 of the Penal Code, a natural person who infringes the anti-bribery provisions of the law is liable to imprisonment for five to ten years and a fine of EUR 500 to EUR 187,500. Where the offence involves a "member of the judiciary or any other person holding judicial office, or any arbitrator or expert appointed either by a court

²⁹ However, new Article 253 of the Penal Code provides that the prohibitions set forth at Article 11 of the Penal Code, reserved in principal for felonies (*crimes*), may nonetheless be ordered if the offence has been ruled a misdemeanour (*délit*).

or by the parties", the prison sentence is raised to ten to fifteen years and the fine to EUR 2,500 to EUR 250,000.

49. The fines for which Luxembourg's legislation provides are relatively low in relation to fines in other countries party to the Convention. During the on-site visit, the representatives of the Luxembourg authorities said that the Justice Ministry was aware that financial penalties for economic crime were generally rather low. However, the matter would form an integral part of a general reform of the Luxembourg PC on which the Justice Minister intended to embark. Overall, none of the members of the judiciary interviewed during the on-site visit disputed the fact that fines for bribery of a foreign public official were low and hence had little deterrent effect, though they pointed out that the level of the penalty should be viewed in conjunction with confiscation. In the absence of any case law, the evaluation team was not able to take this analysis any further.

Commentary

The examiners noted with satisfaction the current debate in Luxembourg on the level of financial penalties for economic crime and recommend that the level of penalties for bribery of foreign public officials are subject to follow-up, with a view to ensuring that they are sufficient to be effective, proportionate and dissuasive.

(ii) Mitigating circumstances

50. In practice, under Luxembourg criminal law, sentences are fixed by the courts on their own authority according to the circumstances of the offence. The principle of mitigating circumstances set forth at Articles 73 to 79 of the Penal Code allows the courts to reduce the applicable prison terms and fines. The Penal Code does not give a list of mitigating circumstances, their application being left to the court's discretion. In Phase 2, one trial judge interviewed during the on-site visit stated that the Luxembourg judiciary was developing its own guidelines (internal and non-public) in the matter on the basis of penalties imposed, in order to maintain consistency in sentencing. No implementing text has been adopted to determine more precisely the mitigating circumstances that may be taken into account in transnational bribery cases. The members of the judiciary interviewed during Phase 3 mentioned the past record of persons on trial, premeditation, the amount and frequency of bribes paid and the extent of the gain obtained as criteria to be taken into account for the application of mitigating circumstances in specific cases of bribery of foreign public officials. As in Phase 2, a bribe paid in the interest of a legal person would be considered less serious than a bribe paid in a natural person's own interest. The examiners considered the latter criterion to be a cause of concern since it would imply that mitigating circumstances would be found in the majority of cases of transnational bribery, given that in the majority of cases bribes are paid in the interest of a legal person, namely the enterprise for which the natural person works.

(iii) Reclassification of offences and the possibility of plea bargaining

51. In Phase 2, the impact of downgrading bribery to a lesser offence (*correctionalisation*) on the deterrent effect of sanctions had raised some concerns. The prosecutors and judges interviewed during the on-site visit had said that bribery, a criminal offence in Luxembourg law, is, like other criminal offences, sometimes reclassified as a lesser offence, on a case-by-case basis, according to the circumstances of the case, for reasons of efficiency. Apart from the effect of this practice on the level of sanctions, another risk was that not all the facts would come to light. The prosecutors interviewed during the Phase 3 on-site visit said that although this possibility is in principle applicable to bribery of foreign public officials, it is unlikely that the considerations of expediency which guide that type of decision would apply to an economic crime like bribery of foreign public officials. There is as yet no case law to confirm or deny that

opinion. The lack of statistical data also means that it is not possible to evaluate policy and practice in the matter.

52. The impact on the sanctions imposed in downgraded bribery cases of the current policy debate on whether to introduce plea bargaining into Luxembourg law had also raised uncertainties (see also the considerations below on the introduction of a "guilty plea"). The current thinking is that plea bargaining would apply only to misdemeanours (*délits*), thus excluding bribery, which is a felony (*crime*). However, such a system could in theory be applied to downgraded bribery cases.

Commentary

The examiners consider that the Working Group should monitor the application of mitigating circumstances and the implementation in practice of reclassification of the offence of bribing a foreign public official as case law develops in order to evaluate its impact on the dissuasive effect of sanctions.

The examiners consider that the Working Group should monitor the progress of current thinking on the introduction of plea bargaining.

(iv) *Level of sanctions applied in practice*

- Bribery cases resulting in sanctions

53. In its answers to the Phase 3 questionnaires, Luxembourg states that there has not yet been a final judgment in any transnational bribery case, nor did it mention any domestic bribery case.

54. In Phase 2, three judgments for bribery of Luxembourg public officials had been brought to the attention of the evaluation team during the on-site visit. On the basis of an examination of these judgments,³⁰ the evaluation team found that, proportionately, the sanctions more often affect the recipients of the bribe than the bribers. In two of the three cases of bribery in which the judgments were provided to the examining team, the bribers were not prosecuted, although it had been established that they had paid bribes to the recipients. The report noted a certain inclination on the part of the prosecuting authorities to prosecute only those who take bribes and not those who pay bribes, for reasons of efficiency: in some cases, where the active briber is the only witness against the public official, the decision not to prosecute the former could, according to the prosecutors interviewed, enable them to secure his cooperation in the proceedings and thus obtain the conviction of the corrupt public official. Although the objective of eradicating passive bribery within Luxembourg is understandable, this approach, if it were applied to bribery of foreign public officials, would seriously undermine implementation of the Convention, the primary aim of which is to prosecute and punish active bribery. The Working Group should monitor developments in case law on this point.

55. This approach could be considered similar to the "guilty plea" procedure available in some countries, even though, as stated in the answers to the Phase 3 questionnaires, there is no provision in Luxembourg law for a guilty plea or other procedure for the deferral of prosecution (see Section 5: Investigations and prosecutions).

56. Nevertheless, during the Phase 3 on-site visit, the prosecutors interviewed said that discussions were taking place on the introduction of a plea bargaining procedure to clear class actions involving offences for which the penalties exceed those that can be settled by summary order (Articles 394 to 403 of

30 See Phase 2 Report, paragraph 111 for more details of these cases, which concerned only small-scale bribery of Luxembourg public officials.

the Code of Criminal Procedure). However, an offence like bribery would be excluded from such a procedure. The discussions also concerned the possible introduction of a "guilty plea" procedure in order to avoid long and costly trials. The offence would be admitted but, as the members of the judiciary interviewed pointed out, the level of sanction could be lower and the judgment would be public and endorsed by the court.

Commentary

The examiners consider that the Working Group should closely monitor the progress of current discussions about the introduction of a plea bargaining procedure to clear court case load for minor offences, especially as regards its impact on the level of sanctions imposed in practice in order to ensure that, if such a policy were applied to cases of active bribery of foreign public officials, the objectives of the Convention would not be compromised.

- Available data on sanctions against natural persons

57. It was found during Phase 2 that, in the absence of adequate statistical tools, it was difficult to identify patterns from which to formulate conclusions on the sentences actually applied to individuals convicted of bribery or related offences, the profile of convicted persons and the nature of the illegal conduct sanctioned, and thus to predict practice in criminal proceedings relating to bribery of foreign public officials.

58. The Phase 2 lead examiners noted that the penalties for bribery seemed low.³¹ Given that no case of bribery of foreign public officials had yet been prosecuted or judged by the courts, they recommended that the Working Group monitor the question of the level of sanctions and use of confiscation in cases involving bribery of foreign public officials. They invited the Luxembourg authorities to compile relevant statistical information concerning sentences pronounced by the courts and convicted persons in order to allow evaluation of criminal policy in the matter. The Working Group has not re-examined the issue since then. In their answers to the Phase 3 questionnaires, the Luxembourg authorities provide no information about any move to undertake such a re-evaluation of criminal policy. They state that they have "neither statistical information nor case law relating to the issue of the level of sanctions", a logical consequence of the absence to date of any judgment relating to bribery of foreign public officials. The Phase 2 Report stated that the criminal records and prosecuting authorities' case files did not allow searches by offence, while the quarterly statistical reports submitted by the Luxembourg and Diekirch prosecutor's offices to the Prosecutor General were very general: accounting offences were not identified at all, the presentation of company law offences was very superficial and offences relating to public procurement, domestic bribery or unlawful interference were not mentioned. The situation does not appear to have changed since Phase 2.

59. The fact that in Luxembourg access to a court decision depends on an "appraisal of the public interest" by the court does not facilitate examination of decisions handed down in cases of economic and financial crime. Moreover, in their answers to the Phase 3 questionnaires, the Luxembourg authorities state that judges, in their judgments, do not give the reasons that determine the severity of the sentence (especially the amount of the fine or the length of the prison term, or the absence of a penalty).

60. This lack of quantitative and qualitative information is particularly prejudicial in Phase 3, when the Working Group's evaluation concentrates on implementation of the Convention and the criminal policy relating to it.

31 The Phase 2 Report noted that "the convictions of persons found guilty of bribery on the basis of the old laws then in force resulted in most cases in token penalties".

Commentary

The examiners recommend that Luxembourg take all necessary steps to introduce statistical tools necessary to monitor the penalties actually applied in cases of bribery of foreign public officials or related offences (especially accounting offences, influence trafficking, forgery and use of forged documents, misuse of corporate assets, money laundering, etc.), the profile of convicted person and the nature of the unlawful conduct sanctioned, and hence to evaluate criminal policy and practice in relation to bribery of foreign public officials.

(b) Sanctions against legal persons

61. The Act of 3 March 2010 on the liability of legal persons (Annex 17 of Luxembourg's answers to the Phase 3 questionnaires) introduced a comprehensive system of criminal liability for legal persons into the Penal Code and Code of Criminal Procedure. According to Luxembourg, this liability is backed up by proportionate and dissuasive criminal penalties under Articles 35 to 38 of the Penal Code.

(i) Principal sanctions

62. The first principal criminal sanction is a fine. Under the law, the maximum fine for a legal person found guilty of a criminal offence is normally EUR 750,000. However, that amount is increased fivefold where the legal person incurs liability for certain specific offences, including active and passive bribery (Article 37) and may therefore reach EUR 3,750,000. For a repeat offence, the maximum fine is four times the amount set at Article 37, i.e. EUR 15,000,000. This is considerably higher than the amount envisaged in the draft law examined during the Phase 2bis evaluation.³² Luxembourg thus followed the opinion of the lead examiners, who at the time of the Phase 2bis evaluation considered that "the maximum amount of the fine stipulated in the draft law on the criminal liability of legal persons, submitted to the Luxembourg Parliament on 20 April 2007, does not give that law the dissuasive force required by the Convention".

63. In principle, the sanction is mandatory for bribery of foreign public officials. Article 39 of the law which, where the legal person incurs a sanction other than a fine, allows that sanction to be imposed alone as the principal sanction, applies only to misdemeanours (*délits*), whereas bribery is a felony (*crime*) under Luxembourg law. However, given the common practice of prosecutors to downgrade the offence of bribery from a felony to a misdemeanour, a practice known as *correctionalisation*, application of Article 39 could call into question the mandatory nature of the fine. In the absence of any judgment relating to bribery of a foreign public official, it was not possible to further evaluate the extent of that risk during the Phase 3 on-site visit.

64. The other principal sanction is dissolution, which may be ordered under the terms of Article 38 of the Penal Code where the legal person was deliberately created to commit the crime in question or where its business purpose has been deliberately diverted into systematic commission of the crime,³³ where the crime is a felony or misdemeanour for which the penalty for a natural person is imprisonment for three years or more.³⁴

32 Under the terms of the draft law, companies and other legal persons convicted of bribing foreign public officials were liable to a fine of up to EUR 375,000; for a repeat offence, the maximum fine would have been EUR 750,000.

33 The penalty of dissolution does not apply to legal persons incorporated under public law.

34 Article 203 of the Act of 10 August 1915 on companies also applies, except as regards the penalty of dissolution per se in order to avoid aggregated penalties for the same offence.

(ii) *Supplementary penalties*

65. Article 35 of the Penal Code lists other penalties applicable to legal persons, namely confiscation and disqualification from public procurement. Exclusion from entitlement to public benefits or aid, which had appeared in the draft law, was not in the end included in the final text (see Section 11 on Public benefits). The preamble describes these as "accessory" penalties. In Phase 2bis, discussion during the on-site visit revealed that such penalties do not necessarily follow upon the principal sanctions, in the sense that they do not have to be imposed in conjunction with those sanctions. The Phase 2bis examiners were pleased to note that supplementary penalties may be imposed but were concerned that the courts had discretion to impose them or not. In the absence of any case law on this point, the examiners were not able to evaluate it further.

(iii) *Setting of penalties*

66. Under the general provisions of Luxembourg criminal law, penalties are fixed by the trial court in light of the circumstances surrounding the offence and the identity of the perpetrator. Under Luxembourg law, the rules on mitigating circumstances in the Penal Code are fully applicable to legal persons.

67. During Phase 2bis, a trial judge was asked if the fact that a company had internal compliance programmes and other preventive measures in place might be admitted as a mitigating circumstance if it were convicted of bribing a foreign public official. The judge did not entirely rule out the possibility that such measures might be taken into account in determining the penalty.

68. On this point, a legal person has the same right as a physical person to apply for reduction or suspension of the sentence, or for a pardon.

(iv) *Other sanctions: civil and administrative sanctions*

69. There is no provision in the Penal Code for additional civil or administrative penalties such as a ban on carrying on one or more professional or corporate activities or placement under judicial supervision. However, other special laws foresee other specific sanctions, for instance, in the area of finance. The law on the liability of legal persons adapted Articles 203 and 203.1 of the law of 10 August 1915, which provide for the dissolution or closure of companies, and excludes their application for cases that involve activities contrary to the criminal law (now covered by the new criminal liability of legal persons), so as to avoid aggregated penalties for the same offence.

Commentary

The examiners congratulate Luxembourg on the proportionate and dissuasive criminal penalties that accompany the system of criminal liability for legal persons (Articles 35 to 38 of the Penal Code). As no sanctions had been imposed at the time of this report, however, the Group cannot give an opinion as to the effectiveness or proportionate and dissuasive nature of the penalties, which will therefore have to be re-evaluated when the system has been in place long enough.

The examiners note that exclusion from entitlement to public benefits or aid, which had appeared in the draft law, was not included as a supplementary penalty in the final text and recommend that Luxembourg reconsider the possibility of including a provision of this type in its law.

The examiners urge Luxembourg to implement its current projects to introduce a criminal record for legal persons as a logical next step following introduction of the new system.

4. Confiscation of the bribe and of the proceeds of bribery

70. Article 3.3 of the Convention requires each Party to "take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to attachment and confiscation or that monetary sanctions of comparable effect are applicable".

(a) *Applicable law*

71. Since the written report on implementation of the Phase 2 Recommendations, in June 2006, there have been several developments in case law and legislation concerning the confiscation measure which should pave the way for more effective prosecution of bribery of foreign public officials. Apart from a reminder from the Appeal Court in December 2005³⁵ of the importance for judges to order confiscation of the bribe in bribery cases, two laws have been passed, one to allow for confiscation of assets of equivalent value, the other to regulate the procedure for preventive attachment of real property in criminal matters.³⁶

72. Confiscation of assets of equivalent value now applies to all offences, including bribery of foreign public officials. The convicted person's property of the same value can be seized without the need to prove that it constitutes the proceeds of the offence, if the proceeds cannot be found, subject to determination of the value of the perpetrator's proceeds from the offence. The Luxembourg authorities state that following the most recent amendment of Article 32.1 of the Penal Code by the Act of 27 October 2010 strengthening the legal framework relating to money laundering and terrorist financing, in combination with Article 31, the scope of application of the confiscation of assets of equivalent value is very broad. Thus, third parties not acting in good faith are systematically prosecuted as co-perpetrators or accomplices in the commission of the offence and their property may be confiscated. In contrast, the Luxembourg authorities said that the legal provisions relating to the attachment of real property in criminal matters are purely formal and procedural, since the principle of attachment and confiscation of real property (as direct or indirect proceeds, substituted property or equivalent property) is admitted under existing provisions, which have never excluded that type of property.

73. The Luxembourg authorities also indicated in their answers that the Appeal Court judgment of 21 December 2005 set aside a judgment in first instance because it had failed to order the confiscation of the items, in this case money not found, delivered by the briber to the bribed (public) officer.³⁷

35 Appeal Court judgment no. 584/05/X of 21 December 2005.

36 A law on confiscation was adopted on 1 August 2007, amending various provisions of the Penal Code and Code of Criminal Procedure and various specific laws. It introduced confiscation of assets of equivalent value for bribery and influence trafficking offences into Luxembourg law. Another law, adopted on 13 December 2007, regulates the procedure for preventive attachment of real property in criminal matters and amends various provisions of the Code of Criminal Procedure and the Act of 25 September 1905 as amended on the transcription of real property rights.

37 The relevant excerpt from the judgment of 21 December 2005 provided by the Luxembourg authorities reads as follows: "[...] Former Article 253 of the Penal Code provides for the specific and mandatory confiscation of the items delivered by the briber. Such confiscation has the characteristics of a penalty designed to strike the guilty where they have transgressed, by depriving them of the objects which the desire to possess caused them to act. (See *Les Nouvelles Verbo Crimes et délits contre l'ordre public commis par des fonctionnaires* No. 4413 to 4416). The judgment should be set aside because it failed to order confiscation of the items delivered by the briber to the bribed officer N. M. In connection with the litigation relating to that failure, an order should be made against the accused for the confiscation of the sums deriving from the bribery, i.e. the sums of 247,000 francs and 50,000 francs, giving a total of 297,000 francs, equivalent to 7,362.44 euros." The Court therefore applied former Article 253 of the Penal Code,

(b) Examples of confiscations ordered

(i) Data on confiscation

74. During Phase 2, the lead examiners noted that the level of sanctions for bribery offences seemed modest. Given that no case of bribery of foreign public officials had yet been prosecuted, and hence judged by the courts, they recommended that the Working Group monitor the issue of the level of sanctions and the use of confiscation in cases of bribery of foreign public officials. In this regard, they invited the Luxembourg authorities to compile relevant statistical information concerning sentences pronounced by the courts and convicted persons in order to enable evaluation of the criminal policy in question. As the Working Group has not re-examined the issue since, Luxembourg was asked in the Phase 3 supplementary questionnaire to provide such statistical information and to state how case law and practice had developed in this area. As indicated above in connection with sanctions, Luxembourg answered that it had neither statistical information nor case law relating to the level of sanctions and that the sanctions imposed always depended on the circumstances of the case.

(ii) Natural persons

75. In answer to the Phase 3 questionnaires, Luxembourg said that no final judgment had been issued to date in a case of transnational bribery likely to give rise to confiscation. The Phase 3 evaluation team was therefore not given any new information that would enable it to evaluate implementation of the new legislation. According to the members of the judiciary interviewed during the Phase 3 on-site visit, confiscation was frequently used, and such measures involved confiscation of the subject-matter of the offence and sometimes the proceeds. With the entry into force of the Act of 1 August 2007, the judges underlined the growing number of preventive attachments ordered with a view to confiscation of assets of equivalent value. As in Phase 2, in the absence of any case law presented to the evaluation team or sufficiently detailed statistics indicating the categories of sentence delivered by the courts, it is difficult to draw any conclusions as to the use of confiscation measures in economic and financial criminal cases.

(iii) Legal persons

76. With respect to confiscation of assets belonging to legal persons, in Phase 2 the Luxembourg authorities indicated, citing a case heard by the Appeal Court on 11 March 2003, that there would be no real difficulty in confiscating such assets. In the absence of case law, doubts remained as to the possibility of confiscating the assets of a legal person. Since then, the law on the liability of legal persons has clarified the situation. Under Article 35 of the Act, specific confiscation (Article 31 of the Penal Code) is included among the criminal penalties incurred by legal persons. Specific confiscation has included confiscation of assets of equivalent value since the 2007 law on confiscation came into force.³⁸

(iv) Difficulties linked to locating assets derived from the commission of a transnational bribery offence

77. In its answers to the Phase 3 questionnaires, Luxembourg said that in the case mentioned earlier, involving a former Luxembourg civil servant and Portuguese nationals wishing to establish themselves in Luxembourg, the mutual legal assistance requests sent to Portugal directly concerned the personal accounts of the foreign public official. There appeared to be no problem locating the proceeds of the transnational

which provided for the mandatory confiscation of the item delivered by the briber and received by the bribe-taker.

38 An Appeal Court judgment of 15 July 2008 relating to confiscation of assets belonging to a legal person has since enforced this provision.

bribery offence but no request for attachment of the proceeds was made. However, Luxembourg said that funds had been seized and the State Prosecutor had issued an additional request in the first case so that a subsequent confiscation could take place. In contrast, Luxembourg said that assets belonging to the Luxembourg briber had been seized by application of the confiscation of assets of equivalent value. The authorities had not encountered any difficulties in this regard.

78. In the same answers, the Luxembourg authorities said that it was generally very difficult to quantify the proceeds of a bribery offence, at both national and transnational level. It was necessary to compare statements made by the different persons for whom the main perpetrators had worked and that in all events the issue had to be decided by the courts.

Commentary

The examiners congratulate Luxembourg on recent progress in legislation enabling confiscation of assets of equivalent value, including assets belonging to legal persons, and the attachment of real property in criminal matters.

In the absence of implementation, the examiners suggest that, as had already been decided in Phase 2, the Working Group should monitor the issue of the level of sanctions and the use of confiscation in cases of bribery of foreign public officials. They suggest that the Luxembourg authorities should again be invited to compile relevant statistical information concerning sentences pronounced by the courts and convicted persons in order to allow evaluation of criminal policy in the matter.

5. Investigation and prosecution of transnational bribery offences

(a) Means of investigation and prosecution

79. The organisation of investigations and prosecutions in Luxembourg is based on a threefold division of power between the State Prosecutor, investigating magistrates and the criminal police.

(i) Preliminary enquiries and preparatory investigation

80. Until a preparatory investigation headed by an investigating magistrate has been opened, the criminal policy may undertake preliminary enquiries (police enquiries) either under the direction of a State Prosecutor or on their own initiative, in accordance with Article 46 of the Code of Criminal Procedure. On an order of the State Prosecutor, the police may, in the context of a preliminary enquiry, conduct searches, make on-site visits with consent (i.e. with the express agreement of the persons concerned – Article 47.1 of the Code of Criminal Procedure) and seize evidence. Under Article 48.1(1) of the Code of Criminal Procedure, the criminal police may also hear witnesses during a preliminary enquiry.

81. The State Prosecutor may then ask an investigating magistrate to conduct a preparatory investigation. The investigating magistrate may carry out acts of investigation himself or ask the police to perform them. State Prosecutors and investigating magistrates are attached to the Luxembourg and Diekirch district courts. The criminal police are part of the Grand Ducal police. Financial and economic crime units exist in the two courts and the criminal police; they deal with bribery cases, including bribery of foreign public officials. During the preparatory investigation, the investigating magistrate or, under his orders, the criminal police may perform the acts of investigation provided for by the Code of Criminal Procedure. These include conducting searches, hearing witnesses, questioning suspects, arranging confrontations, bringing in experts and using special measures to monitor telecommunications and other forms of communication.

(ii) *Limits of investigative powers in preliminary enquiries*

82. In Phase 2, the Working Group considered that investigative powers at the preliminary enquiry stage were limited. Consequently, it recommended that Luxembourg consider extending such powers in order to ensure effective prosecution of offences of active bribery of foreign public officials (Phase 2, Recommendation 12, first part).

83. The Phase 2 written follow-up report subsequently noted a draft law (no. 5986) extending the investigative powers of police and investigating magistrates, approved by the government in March 2006, and, on that basis, considered Recommendation 12 to have been partially implemented. In the meantime, the draft law became the Act of 5 June 2009 giving magistrates and police officers simplified and computerised access to a certain number of databases managed by ministries and other public administrations, including the VAT database managed by the Administration de l'Enregistrement et des Domaines.

84. The Phase 2 report noted that "the investigative tools available to the investigating magistrates and the police should be reinforced shortly with the introduction of witness protection provisions into Luxembourg's criminal law".³⁹ The Luxembourg authorities said that the project is still on the agenda of the Chamber of Deputies, though no timetable for adoption could be given.

85. The police representatives interviewed during the Phase 3 visit acknowledged that progress had been made in various areas (see below) but nevertheless reiterated some of the difficulties identified during Phase 2. In particular, they emphasised that it was not always possible to gather sufficient evidence during the preliminary enquiry. This aspect could prove particularly important in transnational bribery cases, given the complexity of the transactions often involved and the resources needed to gather all the evidence. The police officials interviewed also emphasised that Luxembourg was often used as a hub in financial cases but that the police lacked resources to analyse and retrieve information at the preliminary enquiry stage (this issue is considered in greater detail below). They said that more resources would enable the police to step up the analysis and retrieval of information, including by making use of databases, carrying out enquiries into the origin of assets, and seeking and identifying collaterals and relations by the bank accounts through which funds of illegal origin are liable to pass.

(iii) *Strengthening means of investigation*

86. In their answers to the Phase 3 questionnaires, the Luxembourg authorities said that in July 2008 the Government Council had approved an inter-ministerial anti-bribery action plan, drawn up in particular in light of the recommendations issued by the OECD Working Group. In this context, a working group had been set up in the Justice Ministry to examine police investigative powers at the preliminary enquiry stage with a view to reforming criminal procedure in that area.⁴⁰ During the on-site visit, the Luxembourg authorities also mentioned a pending reform of the status of the criminal police, though it is still at an early stage (on this point, see also Section V(b) below – Information about personal data).

- Information on personal data

87. In the Phase 2 report, the Working Group noted that the police had only limited access to personal information about suspects even though such information was necessary for their enquiries. In their answers to the Phase 3 questionnaires,⁴¹ the Luxembourg authorities stated that on 5 June 2009

39 Phase 2 report, p. 31.

40 Luxembourg's answers to the Phase 3 questionnaires, p. 8.

41 Questionnaire, Parts I.A, 1.1, 2 and 3.

Luxembourg had passed a law giving the judicial authorities, the police and the general inspectorate of police access to certain personal information held by public law legal entities. The Code of Criminal Procedure (Article 47.2 concerning access to information by the State Prosecutor, the State Prosecutor General and members of the prosecution service and Article 51.1 concerning access to the same information by investigating magistrates) and the Police Act were amended to give State Prosecutors General, members of the prosecution service and criminal police officers access, through a computer system, to personal information held by other administrations, in particular information in the general register of natural and legal persons and databases on employee affiliations, work permits, visa applications, vehicles and VAT payers.⁴² This progress was unanimously welcomed by the members of the judiciary and police officials interviewed.

- Infiltration and observation

88. Chapter VIII of the Code of Criminal Procedure, entitled "Infiltration" (Article 48.17(1)) was adopted on 3 December 2009, establishing in Luxembourg law a specific legal basis for the use of undercover agents from the preliminary enquiry stage, on an order from the State Prosecutor. The Code of Criminal Procedure specifies that infiltration may be used in connection with bribery offences.

89. Chapter VII, entitled "Observation" (Article 48.13(1)) was introduced into the Code of Criminal Procedure at the same time. It allows for the systematic observation (surveillance) of a person or place using technical means, also from the preliminary enquiry stage, on an order from the State Prosecutor. According to the panellists interviewed, infiltration and observation were already used in practice, with the prosecutor's approval, before the texts were adopted, though they set them on a legal footing.

- Lifting of banking secrecy

90. In the Phase 2bis report, the Working Group recommended that Luxembourg "take all steps that could facilitate the work of the judicial authorities in seeking information from Luxembourg financial and banking institutions, including in cases where there has been no formal referral to an investigating judge" (Phase 2bis, Recommendation 3(b)). In the Phase 2bis written follow-up report, the Working Group did not find any significant progress in this area and considered that the recommendation had still not been implemented.

91. With the Act of 27 October 2010 introducing Articles 66.2 and 66.3 into the Code of Criminal Procedure, Luxembourg implemented new measures relating to the retrieval of information and banking documents. In particular, it established a legal basis on which investigating magistrates may exceptionally order credit institutions to provide banking information concerning accused persons, including for national and transnational bribery and money laundering offences. Article 66.2 of the Code of Criminal Procedure thus provides that, in the context of a preparatory investigation, an investigating magistrate may order credit institutions to inform him if the accused – who may be a natural or legal person – owns, controls or has power of attorney for one or more accounts. In addition, Article 66.3 introduces real-time surveillance of bank accounts, whereby an investigating magistrate may order a credit institution to inform him during a specified period of operations performed or scheduled through those accounts. Under Article 66.4, an investigating magistrate may, using a streamlined procedure, ask to be provided with information or documents concerning accounts or operations. During the on-site visit, the police officers and members of the judiciary interviewed said that the term "exceptionally" was generally interpreted extensively. They

42 Act of 5 June 2009 on access of the judicial authorities, the police and the general inspectorate of police to certain processings of personal information undertaken by public law legal entities and amending the Code of Criminal Procedure, and the Act of 31 May 1999 as amended on the police and the inspectorate general of police.

said that in practice the main advance made by the law was that they could now obtain banking information on a written request (whereas a search used to be necessary) from all banks (previously the request had to be made to each bank individually). The term "exceptionally" nevertheless remains open to interpretation and steps should be taken to verify the scope given to the notion in practice, especially as one investigating magistrate interviewed during the on-site visit seemed to give a more restrictive interpretation of it.

92. Except in money laundering cases, with the FIU, these new measures do not give the criminal police access to banking information in the context of a preliminary investigation and hence require a formal referral to an investigating magistrate. They therefore only very partially implement Phase 2bis Recommendation 3(b) to "take all steps that could facilitate the work of the judicial authorities in seeking information from Luxembourg financial and banking institutions, including in cases where there has been no formal referral to an investigating judge", since the involvement of an investigating magistrate is still systematically required.

- Inter-agency cooperation and exceptions to tax secrecy

93. Another obstacle to the detection of transnational bribery identified during Phase 2 and Phase 2bis was the lack of cooperation between administrative, financial and judicial authorities. Following the Working Group's recommendations (Phase 2 Recommendation 9 and Phase 2bis Recommendation 3(a)), a law on inter-agency and judicial cooperation was adopted on 19 December 2008. Article 16.1 of the law states that the Luxembourg tax authorities must transmit useful information in connection with pending criminal proceedings to the judicial authorities⁴³ on request. Article 16.2 states that the tax authorities are also required to inform the prosecutor when "a felony (*crime*) or misdemeanour (*délit*) comes to their attention" (spontaneous reporting). Article 16 of the Act of 19 December 2008 constitutes an exception to Section 22 of the General Tax Law on tax secrecy, since it expressly authorises the disclosure to the judicial authorities of information covered as a rule by tax secrecy.⁴⁴ Two members of the judiciary have been appointed as contact points responsible for tax offences and contacts between agencies are more frequent, including through meetings and joint training sessions. Representatives of the prosecution service interviewed during the visit emphasised that inter-agency cooperation has improved significantly since the new law came into force. However, the new provisions still do not allow the police to obtain such information during a preliminary enquiry.

- Claims for damages

94. The Phase 2 report stated that a claim for damages in criminal proceedings (*constitution de partie civile*) could be a potential source of reports relating to transnational bribery. The Act of 6 October 2009 strengthened the rights of victims of criminal offences, adding paragraphs 4 and 5 to Article 23 of the Code of Criminal Procedure, whereby the State Prosecutor must now advise a victim who has brought proceedings of the further action he has decided to take in the case, including discontinuance. The law states that the discontinuation decision must include information on the terms under which the victim may initiate proceedings, including through a claim for damages, and that the victim, in cases where criminal sanctions have been ordered, may apply to the State Prosecutor General, who may order a prosecution. However, only a small number of complaints with a claim for damages have so far given rise to prosecutions in cases involving economic and financial crime.

43 According to information provided during the on-site visit, the judicial authorities include the prosecution service but not the police.

44 Circular of the director of contributions L.G. no. 14 of 3 December 2009 "Cooperation with the judicial authorities", p. 1.

Commentary

The examiners are pleased to note that Luxembourg has increased the means of investigation since Phase 2. In particular, they welcome the introduction into the Code of Criminal Procedure of provisions:

(a) giving the State Prosecutor General, State Prosecutors, members of the prosecution service and criminal police officers access to personal information held by public administrations (Act of 5 June 2009 on access to personal information); and

(b) establishing a specific legal basis in Luxembourg law for the use of undercover agents and the use of observation techniques from the preliminary enquiry stage, on an order from the State Prosecutor, including for bribery offences (Articles 48.17(1) and 48.13(1) of the Code of Criminal Procedure).

They also welcome the progress made in obtaining information from banks and financial institutions (Act of 27 October 2010) and from the tax authorities (Act of 19 December 2008) in the context of pending criminal proceedings but recommend that these efforts should be continued so that such information can be obtained in the absence of a formal referral to an investigating magistrate (thus ensuring in particular full implementation of Phase 2bis Recommendation 3(b) to "take all steps that could facilitate the work of the judicial authorities in seeking information from Luxembourg financial and banking institutions, including in cases where there has been no formal referral to an investigating judge".

In order to guarantee effective prosecution of the offence of active bribery of foreign public officials, the examiners:

(a) Recommend that Luxembourg take the necessary steps to ensure that the means made available to it by the new legislative provisions are implemented in order to guarantee effective prosecution of the offence of active bribery of foreign public officials;

(b) Encourage Luxembourg to continue its reflection on police investigative powers at the preliminary enquiry stage with a view to continuing to envisage extending such investigative powers, as the Working Group recommended in Phase 2 (Recommendation 12). In its opinion, such reflection should include the availability and suitability of means and methods of retrieval in order to ensure the gathering of sufficient evidence in cases involving bribery of foreign public officials (see also below);

(c) Consider that the Working Group should be attentive to implementation of the new provisions contained in Articles 66.2 to 66.5 of the Code of Criminal Procedure, and in particular to the scope of the term "exceptionally" contained in the law in connection with obtaining information from banks and financial institutions.

(b) Discretion as to prosecution, independence of prosecutors, factors prohibited by Article 5

95. Criminal proceedings in Luxembourg are governed by the principle of discretionary prosecution (*opportunité des poursuites*) set forth at Article 23.1 of the Code of Criminal Procedure. According to this principle, the prosecuting authorities may decide on their own discretion whether or not to prosecute cases having the characteristics of a criminal offence, without prejudice to a claim for damages (*constitution de partie civile*) from parties that have suffered harm.

96. Article 19 of the Code of Criminal Procedure prohibits the Justice Minister from ordering the prosecuting authorities not to pursue a case. However, the Justice Minister may order the State Prosecutor

General to bring a prosecution. Under Article 20.2 of the Code, the State Prosecutor General has the same prerogatives as the Justice Minister with regard to members of the judiciary. In practice, the State Prosecutor General and the Justice Minister exercise this power only in exceptional circumstances. The Phase 2 report stated that the power is exercised only exceptionally: the last occurrence dated back over 20 years and it had not been used since Phase 2. Only prosecutors may drop or suspend a case. They must substantiate their decision to drop a case and may reverse that decision if new evidence is provided to them. According to Luxembourg's answers to the Phase 3 questionnaires, a decision to discontinue is made subject to the right for the head of the prosecution service to decide to continue proceedings and to the power of the State Prosecutor General and the Justice Minister to order a prosecution.

97. As in Phase 2, the prosecutors and judges interviewed during the Phase 3 on-site visit emphasised the extensive constitutional and legal guarantees they enjoy in order to ensure the independence of the judiciary from any desire to interfere with or pressurise them. In its answers to the Phase 3 questionnaires, Luxembourg emphasised that the factors prohibited by Article 5 of the Convention are not admitted in Luxembourg. In the absence of any cases of transnational bribery by Luxembourg enterprises, it is still difficult to evaluate whether law enforcement authorities could experience undue influence in this type of investigation.

(c) Importance of prosecuting transnational bribery cases

(i) Appreciation of the level of proof

98. In Phase 2, the Working Group recommended that Luxembourg ensure that, at the stage where an investigation is initiated, the threshold taken into account by the prosecuting authorities is not too high, concerning the level of proof gathered in the course of the enquiry (Phase 2 Recommendation 12, second part). Citing the fact that, in deciding whether or not to forward a case to the investigating magistrate, the prosecuting authorities require a sufficient level of evidence to offer "reasonable prospects of success" in any prosecution, police representatives complained that their powers of investigation at this stage do not allow them to compile sufficient evidence to satisfy the prosecutors' needs, and that as a result some cases may become stalled (see discussion below on the initiation of public prosecution). At the time of the Phase 2 written follow-up report, the Working Group considered that Luxembourg had not envisaged any measure to implement this aspect of the Recommendation, nor had any measure been taken by the time of the Phase 3 visit. The police officers interviewed by the evaluation team during the Phase 3 visit again emphasised this difficulty. In contrast, the prosecutors said that they did not share the Working Group's viewpoint, since no specific level of proof is required to initiate a criminal investigation and all serious allegations of bribery are, they claim, investigated and, if necessary, prosecuted, including when they originate in the press. Nevertheless, it is a fact that information brought to the attention of the Luxembourg authorities during international rogatory commissions has not so far been used in order to open a police enquiry or investigation. Given the limited number of investigations and the absence of any prosecution of cases of bribery of foreign public officials, the Working Group should continue to monitor the importance of the appreciation of the level of proof required.

(ii) Importance of prosecuting active bribery

99. The Phase 2 report also noted a tendency, in cases involving the bribery of Luxembourg public officials, for the prosecution service not to prosecute bribers but only bribe-takers and found that the objectives of the Convention could be compromised if this approach was applied in cases of transnational bribery. In Phase 2, Luxembourg was recommended to "formally remind prosecuting authorities of the importance of prosecuting bribers, as an essential condition for the effective application of the foreign bribery offence, and, similarly, draw their attention to the importance of prosecuting money laundering offences related to bribery" (Phase 2, Recommendation 13).

100. Following this recommendation, Luxembourg stepped up the participation of members of the Luxembourg judiciary in meetings of the OECD Working Group and GRECO. The Working Group considered that the recommendation was partially implemented but that a formal reminder should nonetheless be given. In its answers to the Phase 3 questionnaires, Luxembourg said that on 6 October 2009 the State Prosecutor General had sent a memorandum to State Prosecutors concerning criminal cases involving bribery, influence trafficking, unlawful acquisition of interests and misappropriation of public funds. The memorandum repeats the OECD and GRECO recommendations and Point 20 of Luxembourg's anti-bribery action plan on raising awareness among the prosecuting authorities of the need for effective prosecution of bribery offences. The memorandum was sent to all members of the prosecution service. The State Prosecutor General stated that State Prosecutors should inform the First Deputy Prosecutor of the General Prosecution Service every six months of the state of domestic cases of bribery, money laundering linked to bribery, influence trafficking, illegal acquisition of interests and misappropriation of public funds but he did not refer to bribery of foreign public officials.

101. The members of the judiciary interviewed during the Phase 3 on-site visit told the examiners that the Luxembourg judiciary were not perfectly aware of the importance of prosecuting bribers. According to those interviewed, awareness of the importance of prosecuting active bribery with equal severity arose from regular exchanges of information between prosecutors and with the State Prosecutor General, facilitated by the relatively small size of Luxembourg prosecutors' offices. All the panellists interviewed emphasised that formal circulars are not part of Luxembourg's legal tradition and that, given the country's size, the authors and recipients of such circulars would in practice be the same. In the absence of any case law, the Working Group cannot evaluate this development any further.

(iii) Units responsible for investigating and prosecuting transnational bribery offences

102. As in Phase 2, the economic and financial crime units of the police and prosecution service are responsible for investigating and prosecuting transnational bribery offences. There is no specific unit assigned solely to investigating and prosecuting transnational bribery offences.

103. In a letter to the Justice Minister in March 2010, the General Prosecution Service of the Grand Duchy of Luxembourg suggested that "criminal policy should be directed more towards major crime [and] bribery", since "few cases in this area are currently brought before the courts", and such a policy calls for "specialist staff in all fields and at all levels. [...] Specialist members of the judiciary are required in all increasingly complex matters".⁴⁵ The Justice Minister, interviewed during the Phase 3 on-site visit, said that consideration was being given to the need to develop criminal policy in Luxembourg that focuses more on major economic crime, including transnational bribery and related offences.

Commentary

In the absence of prosecutions of transnational bribery offences, the lead examiners are not in a position to judge whether the factors prohibited by Article 5 of the Convention are liable to have an influence on investigations and prosecutions. Given the importance of these aspects for this phase of the evaluation, the lead examiners recommend that the Working Group monitor the issue.

The examiners recommend that Luxembourg take the necessary steps to ensure that Luxembourg's criminal policy:

45 Letter of 8 March 2010 from the General Prosecution Service of the Grand Duchy of Luxembourg to the Justice Minister of Luxembourg transmitting the annual reports of judicial bodies for 2008-2009, <http://www.justice.public.lu/fr/organisation-justice/ministere-public/index.html>

a) clearly identifies the investigation and prosecution of bribery of foreign public officials as a priority;

b) emphasises the need to ensure that the appreciation of the level of proof necessary for initiating criminal investigations is not so stringent that it constitutes an obstacle to the investigations.

(d) Resources and training

(i) Human resources

104. In Phase 2, the Working Group noted the lack of human resources in the police and judicial bodies for prosecuting offences involving bribery of foreign public officials. In its answers to the Phase 3 questionnaires, Luxembourg stated that there had been a significant increase in numbers in the police and judicial authorities since Phase 2: 17% in the police and 13% in the judiciary (judges and prosecutors) between 2006 and 2010.

105. However, a closer look at the number of staff assigned to economic and financial crime shows that this overall increase is not as significant as it would appear. At the time of the Phase 2 report, in 2004, the Luxembourg prosecution service had 8 to 10 members specialising in economic and financial cases out of a total of 25. At the time of the Phase 3 on-site visit, there had been no increase in the number of members specialising in economic and financial cases even though the total number had been increased to 31. Likewise, there had been no change in the number of investigating magistrates specialising in economic crime (6 out of a total of 13). The Diekirch prosecution service had one specialist out of a total of four members in 2004 and, at the time of the Phase 3 visit, still had one specialist prosecutor and one specialist investigating magistrate out of a total of five. The increase seems more significant in the economic and financial crime unit of the criminal police. About 30 investigators were assigned to the unit at the time of Phase 2, whereas at the time of Phase 3 the number had risen to 44, an increase of almost 50%.⁴⁶

(ii) Use of specialists in economic and financial cases

106. Another need identified in Phase 2 was greater use of economists and other specialists in economic and financial matters. The prosecutors interviewed said that two new specialists in financial analysis had been assigned to the FIU in 2010. A further request for two more specialists in financial analysis and one administrative assistant had been submitted to the Finance Ministry.

107. During the on-site visit, the Luxembourg authorities also mentioned a pending reform of the status of the criminal police, emphasising that it should allow for an increase in numbers with the recruitment of new specialists – economists and lawyers – from outside. The reform was also due to consider the question of careers within the criminal police in order to forestall the current brain drain.

(iii) Training

108. At the time of Phase 2, none of the prosecutors or investigating magistrates interviewed said they had received specific training in bribery offences. The Working Group recommended that Luxembourg provide specific training to law enforcement professionals (police, prosecutors, investigating magistrates and judges) to guarantee effective prosecution of foreign bribery offences (Phase 2, Recommendation 10) and to raise awareness among government employees in a position to detect bribery of the offence of

46 Mutual assistance (10 officers), domestic cases (27), money laundering and terrorist financing (7).

bribery of foreign public officials (Phase 2bis, Recommendation 2(a)). The Working Group considered that these two recommendations had been implemented.

109. According to the answers to the Phase 3 questionnaires, Luxembourg police officials have taken part in international anti-bribery seminars organised by the International Police Association at Gimborn, the Academy of European Law in Trier, the Police Academy at Freiburg in Germany, the International Anti-Corruption Summer School, the Federal Criminal Police Office in Germany, the Federal Anti-Corruption Bureau in Austria and the National Institute of Public Administration. In 2007, an in-service training course for criminal police officers was organised in Luxembourg, consisting of two-day sessions for criminal police officers and regional criminal investigation staff. The course included a section on national and transnational bribery. 168 police officers and investigators received training over 14 two-day sessions. In 2010, the Criminal Police Department organised specialist training in economic and financial investigation techniques. The 24-day training course mainly targeted new recruits into the criminal police economic and financial crime unit. About 30 police officers plus six prosecutors and investigating magistrates attended the course, which covered the Anti-Bribery Convention along with other subjects such as tax, bank accounts, credit, stock market transactions, investment, auditing, accounting, competition, public procurement, property, parallel payments, money laundering, etc. The course was organised around two main themes: police ethics and initial and continuous training in economic and financial crime, including national and transnational bribery.

110. In the Phase 2bis written follow-up report, the Working Group noted that Luxembourg's anti-bribery action plan, adopted in 2008, provided for specific and compulsory training for public officials, including police officers and members of the judiciary, in bribery offences, including transnational bribery. The examiners emphasise that this action plan should be updated to take account of the recent entry into force of the Act of 13 February 2011 strengthening the fight against bribery.

(e) Statistics

111. The Phase 2 report noted the lack of relevant statistical information about the number and treatment of bribery offences and related offences. The Phase 2 written follow-up report in 2006 indicated that the criminal police now centralised information about the prosecution of bribery and that the centralisation of detailed information would improve the preparation of statistics on bribery, since the criminal police were required to provide the information to its supervising ministry and to the judicial authorities.⁴⁷ Following a GRECO recommendation, the Justice Minister had also asked the General Prosecution Service to prepare annual statistics on the detection, prosecution and punishment of bribery offences. In practice, however, relevant statistics on detection, investigation, prosecution and the sanctions imposed by the courts in cases involving offences covered by the Council of Europe and OECD Conventions are not systematically prepared or analysed by either the police or the prosecution service. Nor is there any systematic analysis of statistics on mutual legal assistance (offences, amounts seized, etc.). However, the members of the judiciary interviewed during the on-site visit told the lead examiners of a project for a new software tool that should enable them to retrieve data on criminal offences in general, including bribery offences, and to prepare statistics.

(f) Limitation period

112. The limitation period for transnational bribery offences has not changed since Phase 2: it is ten years, as stipulated in the Act of 15 January 2001 approving the OECD Convention. The limitation period remains the same in case of reclassification (“*correctionnalisation*”) of the offence (Article 640-1 of the CPC). In the absence of any specific provisions relating to limitation in transnational bribery cases, the

47 Phase 2 written follow-up report, p. 28

rules of ordinary law apply: the limitation period begins when the acts that are the constituent elements of the offence are committed; it is suspended when there is a legal or de facto obstacle; it is interrupted whenever an act of investigation or prosecution is performed; and the offence can no longer be prosecuted when the limitation period expires. During the Phase 3 on-site visit, the members of the judiciary interviewed said that mutual legal assistance requests constituted acts of investigation, which therefore interrupted the limitation period. Luxembourg indicated that it had not encountered any problems during transnational bribery cases linked to limitation before or during an investigation or prosecution.

Commentary

The lead examiners are concerned that there has been no prosecution or judgment in a case of bribery of foreign public officials in the ten years since Luxembourg ratified the Convention. Under the circumstances, they recommend that Luxembourg:

- a) Ensure the necessary level of resources, training and specialisation within the police, in order to be able to seriously investigate credible allegations. Luxembourg should provide adequate resources to law enforcement authorities so as to permit effective investigation and prosecution;***
- b) Prepare relevant statistics on detection, investigation, prosecution and sanctions imposed by the courts in connection with bribery offences and other economic offences and ensure that the statistics are systematically analysed by the police and the prosecution service;***
- c) Prepare and analyse statistics on mutual legal assistance (offences, amounts seized, etc.).***

6. Money laundering

113. The offence of money laundering is covered by Article 506.1 of the Penal Code introduced by the Act of 12 August 2003 suppressing terrorism and terrorist financing. As already noted in the Phase 2 report, in accordance with Article 7 of the OECD Convention, Article 506.1, paragraph 1 defines bribery as a predicate offence to money laundering. Since Phase 2, a Financial Intelligence Unit has been created as part of the economic and financial crime unit of the Luxembourg prosecution service. The FIU has extensive guarantees of independence. Made up of members of the judiciary and financial analysts, it is tasked, under the direction of the State Prosecutor and the Deputy State Prosecutor who heads the unit, with investigating money laundering and terrorist financing.⁴⁸

114. The Act of 12 November 2004 on the fight against money laundering and terrorist financing has been passed since Phase 2. Under Article 5 of the law, professionals are required to inform the prosecution service (following amendment of the law in 2010, they are now required to inform the Financial Intelligence Unit) as soon as they know, suspect or have good reason to suspect that money laundering is taking place, has taken place or is being attempted, in particular on account of the person concerned, his behaviour, the origin of his assets and the nature, purpose or terms of the transaction, and to promptly provide information to the FIU on request. The Act of 12 November 2004 also amended the Code of Criminal Procedure, introducing in Article 23.3 a specific obligation on all public officials to inform the State Prosecutor of Luxembourg district court of any fact that might constitute evidence of money laundering.

48 As the FATF points out, the members of the judiciary in the FIU do not receive instructions from and are not influenced either by the State Prosecutor or in operational terms. FATF report, 19 February 2010, para. 350, p. 83.

115. A new law strengthening the legal framework for the fight against money laundering and terrorist financing was adopted on 27 October 2010. The law amends twenty existing laws relating to the fight against money laundering and terrorist financing, especially the Act of 12 November 2004. It increases the administrative sanctions for non-compliance by professionals and introduces a new sanction: the possibility of ordering temporary suspension of activities or withdrawal of approval. Since the amendments of 27 October 2010, the law on the fight against money laundering and terrorist financing also confirms that professional secrecy may not be asserted against the FIU. According to the Luxembourg authorities and the business representatives interviewed, the FIU has enough powers to react quickly and effectively. The Act of 27 October 2010 considerably improved the means of action available to the Commission de Surveillance du Secteur Financier (Financial Sector Supervisory Commission, CSSF) in its capacity as supervisory authority. In particular, the law has extended the range of sanctions available to the CSSF, made them applicable to both natural and legal persons and allowed for sanctions to be made public. The same applies to the Commissariat aux Assurances (Insurance Commission) and the Administration de l'Enregistrement et des Domaines (AED), which now also have wider powers in relation to the institutions they supervise.

116. The Phase 2 report had already noted that Luxembourg's anti-money laundering legislation was satisfactory. The recent FATF evaluation report on Luxembourg confirms that the crime of money laundering in Luxembourg "is defined technically in a manner largely consistent with international standards".⁴⁹ Since the FATF report, the Act of 27 October 2010 has further extended the offence of money laundering, adding to the material elements and introducing the principle of a stand-alone offence.

117. However, the FATF report notes that "practical implementation of the offence [money laundering] is very ineffective, so that sanctions (the level of which is generally low) have been imposed in only eight cases since 2003".⁵⁰ The number of cases that reach the judicial phase in relation to the total number of suspicious transaction reports (STRs) is extremely low. The number of STRs relating to money laundering and its predicate offences has risen slightly in the past few years, especially in 2009: 486 in 2006, 552 in 2007, 752 in 2008 and 1,332 in 2009. Nevertheless, according to the FATF report, the number of preliminary enquiries and judicial investigations relating to money laundering is small: proceedings were initiated in 15 cases in 2005/2006, 13 in 2007, 16 in 2008 and 56 in 2009.⁵¹ According to those interviewed during the Phase 3 on-site visit, the statistics for 2009 and 2010 show an increase in the number of prosecutions, judgments and convictions in money laundering cases, due to a range of factors including a tougher prosecution policy and the substantial extension of the list of predicate offences operated by the Act of 17 July 2008. Proceedings were initiated in 107 money laundering cases and 32 judgments were handed down in 2010.

118. The Phase 2 report noted the small number of bribery offences referred to in STRs. Since Phase 2, there has been a slight increase in the number of bribery offences notified to the FIU in STRs. Bribery as a predicate offence was noted in 45 STRs analysed by the FIU in 2004, 17 in 2005, 24 in 2006, 13 in 2008 and 16 in 2009.⁵² According to the information provided by Luxembourg, the FIU received about 40 STRs relating to bribery in 2010. It was not possible to say how many of these suspicions of bribery related more specifically to bribery of foreign public officials.

49 FATF, Mutual Evaluation of Luxembourg, 19 February 2010, p. 6.

50 FATF, Mutual Evaluation of Luxembourg, 19 February 2010, p. 6.

51 FATF, Mutual Evaluation of Luxembourg, 19 February 2010, para. 78, p. 35; FIU, Annual Report 2009, p. 19 (data for 2008 and 2009).

52 FATF, Mutual Evaluation of Luxembourg, 19 February 2010, Table 2, Predicate offences noted by the FIU in STRs, p. 23.

119. During the Phase 3 visit, representatives of the Luxembourg authorities interviewed mentioned a number of enquiries in progress in money laundering cases linked to bribery of foreign public officials. Only information concerning one judicial investigation initiated in Luxembourg was confirmed by Luxembourg after the visit. The investigation concerns a Luxembourg national suspected of paying a bribe in a foreign country in connection with a contract and implies a suspicion of money laundering in connection with transnational bribery.

120. The information provided by the Luxembourg authorities in their answers to the Phase 3 questionnaires show that since the new money laundering law of 27 October 2010 and the Act of 3 March 2010 on the liability of legal persons, more has been done in Luxembourg to raise awareness of money laundering. It transpired from discussions with the various panellists interviewed during the on-site visit that this action has also significantly helped to raise awareness of bribery, including bribery of foreign public officials, among law enforcement and supervisory authorities, financial institutions and non-financial enterprises and professions covered by the requirement to report suspicions of money laundering.

121. Thus, numerous information and awareness-raising initiatives and training courses relating to money laundering, dealing with the predicate offence of bribery, have taken place since Phase 2 and a large number of enterprises have introduced anti-money laundering policies, often through their parent companies in other countries or following the creation of a compliance function in 2004. Business representatives interviewed during the on-site visit said that, in their opinion, CSSF circulars and FIU money laundering typologies had drawn attention to the predicate offence of transnational bribery. The Association of Luxembourg Banks and Bankers (ABBL) recently issued a handbook for banks setting out professional obligations relating to money laundering and terrorist financing, while in 2007 the Luxembourg Association of Investment Funds issued anti-money laundering guidelines for investment funds. The Luxembourg Bank Training Institute has organised training courses and the Institute of Company Auditors is organising a specific anti-bribery training course as part of its training programme in 2011. The Association of Certified Accountants has devoted several issues of its newsletter to money laundering, recalling the importance of the predicate offence of bribery and the OECD Anti-Bribery Convention.⁵³

Commentary

The lead examiners welcome the strengthening of the legal and institutional framework for the fight against money laundering, the increase in the number of received suspicious transaction reports relating to money laundering and the slight increase since 2008 in the number of bribery offences noted in these reports. The lead examiners note that they have not received sufficient information to measure the extent to which there are investigations, prosecutions and judgments in money laundering cases where bribery of foreign public officials is the predicate offence.

The lead examiners recommend that Luxembourg continue its efforts to detect and prosecute money laundering linked to foreign bribery. They also recommend establishing relevant statistics to enable monitoring of the number of suspicious transaction reports and cases of money laundering linked to bribery revealed, the number of investigations, prosecutions and judgments and the amount of assets frozen and seized for money laundering where corruption of a foreign public official is the predicate offence.

53 Ordre des Experts Comptables Newsletter 13/2010, Special issue on money laundering and terrorist financing, December 2010.

7. Accounting standards, external audit and corporate compliance and ethics programmes

122. Company auditors and certified accountants are supervised by self-regulating bodies, respectively the Institute of Company Auditors (Institut des Réviseurs d'Entreprises, IRE) and the Association of Certified Accountants (Ordre des Experts-Comptables, OEC). Since 2009, approved company auditors have been supervised by the CSSF. The OEC and IRE take part in the work of the consultative committee to the Justice and Finance Ministries, which acts as a forum for discussion of anti-money laundering legislation.

123. As already noted in the Phase 2 report, certified accountants and company auditors are required to report suspicions of money laundering to the FIU, including money laundering related to bribery. Nevertheless, as the Phase 2 report says, "the number of cases reported to the prosecuting authorities by the accounting profession has been low [...] and not one of them concerned indications of money laundering related to bribery."⁵⁴ No statistics have been provided concerning the number of reports of suspicions of money laundering, especially money laundering linked to bribery, received by the prosecuting authorities from certified accountants and company auditors, either in the answers to the Phase 3 questionnaires or during the Phase 3 on-site visit. One person interviewed during the Phase 3 on-site visit mentioned a single case in 2007 where a certified accountant had reported a forgery case with a possible bribery element, but this information was not confirmed by the Luxembourg authorities.

124. During Phase 2, the Working Group recommended that Luxembourg ensure compliance with the reporting requirement, including by raising awareness of these professions to the provisions of anti-bribery legislation (Phase 2, Recommendation 8). Awareness-raising initiatives have been taken and work on transposing the 8th Company Law Directive (Directive 2006/43/EC) has begun (see below). On this basis, the recommendation was deemed to have been implemented at the time of the Phase 2bis report in 2008.

(a) Accounting standards

125. Under Article 8 of the OECD Convention and 2009 Recommendation X (A), the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents for the purpose of bribing foreign public officials or of hiding such bribery must be prohibited and sanctions must be introduced. According to the written analysis provided to the evaluation team by the OEC, accounting standards in Luxembourg and international accounting standards are sufficiently clear for professionals to validly and effectively refer to them.

126. As indicated in the Phase 2 report, Luxembourg law provides for accounting offences but convictions for accounting offences "are in practice if not almost non-existent, at least very few"⁵⁵ and the Working Group recommended that Luxembourg should "guarantee vigorous prosecution of accounting offences".⁵⁶ In the answers to the Phase 3 questionnaires, Luxembourg noted that the offences of forgery and use of forged documents had become predicate offences to money laundering in 2008 and that anti-money laundering measures now also applied to accounting offences. Luxembourg did not provide any relevant information to show vigorous prosecution of accounting offences either in its answers to the Phase 3 questionnaires or during the Phase 3 visit.

54 Phase 2 Report, p. 10.

55 Phase 2 Report, p. 41.

56 Phase 2 Report, p. 42.

127. The Grand Ducal regulation of 10 June 2009 defining the contents and presentation of a standardised chart of accounts imposes an accounting code for all sectors except the financial and insurance sectors. According to the OECD, this initiative is part of a move to standardise accounting information and encourages greater transparency. According to the IRE, the regulation is important in the context of the fight against bribery and money laundering because it makes falsification technically more difficult.

128. As already indicated above, certified accountants are required to report suspicions of money laundering to the FIU, including if the money laundering is linked to bribery, though they do not have to prove the predicate offence, in accordance with the FATF recommendations and methodology incorporated into Luxembourg law.

129. According to the OECD, the public authorities (ministries, prosecution service, FIU) and the self-regulating authorities of the accounting and audit professions are making joint efforts to raise awareness among, train and inform professionals involved in the fight against money laundering, including the fight against foreign bribery. The OEC itself takes regular steps to inform its members about money laundering and terrorist financing issues, treating bribery as a predicate offence to money laundering, through an OEC in-house newsletter and an intranet site accessible to all certified accountants. The OEC devoted the December 2010 issue of its newsletter to money laundering and terrorist financing, mentioning the OECD Convention and related anti-bribery instruments. During the evaluation team's on-site visit, the representatives of the accounting profession said that regular training sessions took place on relations between certified accountants and the prosecuting authorities. During one of these sessions, a prosecutor had given a presentation on the requirement to report bribery offences and the liability of legal persons. In contrast, it transpired from what the panellists had to say during the visit that the conditions under which and the time when certified accountants should report their suspicions in practice were not known with sufficient clarity.

(b) External audit

(i) Auditing standards

130. External audits are conducted according to international standards and regulated by the CSSF. Under Article 27 ("Auditing Standards") of the Act of 18 December 2009 on the audit profession, statutory audits are performed in accordance with international auditing standards as adopted by the European Commission. The CSSF may also issue standards relating to statutory audits. CSSF Regulation No. 10-01 of 28 April 2010 relating to the adoption of professional standards created a regulatory framework, ensuring that the same ISA standards previously used by the IRE continue to be used.

131. According to the written information provided by the Institute of Company Auditors (Institut de Réviseurs d'Entreprises, IRE) before the Phase 3 visit, in performing their mission auditors consult and take account of the terms of circulars and information provided by the Financial Intelligence Unit, the CSSF, the Insurance Commission and other public authorities.

132. One important development in this area is the Act of 18 December 2009 on the audit profession, which transposes the 8th Company Law Directive (Directive 2006/43/EC of the European Parliament and of the Council on statutory audits of company accounts and consolidated accounts) and provides a new basis for organisation of the audit profession.

133. According to the written information provided by the IRE before the Phase 3 visit, major advances in the new law include the creation of a register of auditors accessible to the public, greater transparency for audit firms, recognition of international auditing standards and the existence of a public

regulator of the audit profession. The law also provides for the rotation of auditors and quality controls. Licensed company auditors are now supervised by the CSSF instead of the Justice Ministry, as was previously the case. During the Phase 3 on-site visit, representatives of the audit profession mentioned as an example that money laundering could constitute a risk for a bank. Under Article 73 ("Transparency Report") of the Act of 18 December 2009 on the audit profession, licensed company auditors and audit firms that audit public interest bodies are required to submit a transparency report at the end of each accounting period and publish it on the internet.

(ii) *Independence*

134. Under Article 75 of the Act of 18 December 2009 on the independence of company auditors, licensed company auditors and audit firms licensed in Luxembourg must give the audit committee written confirmation each year of their independence from the audited entity and state any additional services provided to the entity concerned, and undertake that they will examine with the audit committee any risks to their independence and safeguard measures taken to mitigate such risks. The article also provides for rotation. Licensed auditors and audit firms asked to perform a statutory audit of the accounts of public interest entities are replaced in their audit assignment at the latest seven years after the date of their appointment and may not participate again in the audit of the entity concerned until a period of at least two years has elapsed.

(iii) *Detection*

135. The Act of 18 December 2009 on the audit profession, in compliance with Directive 2006/43/EC, enables the statutory auditor of a group's consolidated accounts to access the audit files of the statutory auditors of the accounts of other group entities located in the European Union. However, the professional secrecy laws of a third country (outside the European Union) may limit the exchange of information between the statutory auditors of the accounts of group subsidiaries located in a third country and the statutory auditor of the accounts of the parent company located in the European Union.

136. The requirement for professionals, including company auditors, to promptly report any suspicion of money laundering and predicate offences, including bribery, is set forth at Article 5 of the law on the fight against money laundering and terrorist financing. That requirement is recalled in Article 24 of the law on the audit profession.

137. Under the law on the fight against money laundering and terrorist financing, company auditors must promptly report suspicions of money laundering to the Financial Intelligence Unit without having to prove any predicate offence. Not having to assess whether the legal criteria for a predicate offence are met but reporting a suspicious transaction directly is an FATF requirement taken up in Luxembourg law. It was apparent from interviews during the Phase 3 visit that awareness-raising and training initiatives to date have focused on money laundering and all predicate offences. The effect has also been to significantly raise awareness of transnational bribery as a predicate offence, as shown by discussions with those interviewed during the on-site visit. However, this approach should not be an obstacle to reporting facts that might constitute an offence of bribery of a foreign public official.

138. Although the IRE emphasised in the written information provided before the Phase 3 visit that company auditors, applying all the legal rules and following joint efforts to raise awareness among the various players involved, have stepped up their "professional scepticism" and thus contribute to the detection of bribery in particular, no case of transnational bribery reported by company auditors was mentioned during the Phase 3 visit.

(iv) *Training and awareness-raising*

139. According to the written information provided by the IRE before the Phase 3 visit, the public authorities (ministries, prosecution service, FIU) and the self-regulatory authorities are carrying out joint initiatives to raise awareness, train and inform the professionals concerned of the fight against money laundering, including statutory auditors, whose attention has been drawn to the provisions of the Act of 12 December 2004 on the fight against money laundering.

140. The Grand Ducal regulation of 15 February 2010 on the training of auditors requires licensed company auditors to receive at least 12 hours training over a three-year reference period in the laws relating to money laundering and terrorist financing, including the predicate offence of transnational bribery. The training programme was sent to the examiners after the visit and may be consulted on the IRE website.⁵⁷

(c) *Corporate compliance and ethics programmes*

141. The lead examiners note that the Luxembourg authorities have not taken steps to promote the good practice guidance on internal controls, ethics and compliance contained in Annex 2 of the 2009 Recommendation for further combating bribery to Luxembourg companies. However, as several of those interviewed during the Phase 3 visit said, and as documents provided by the Luxembourg authorities show, a certain number of companies in Luxembourg have implemented internal control, ethics and compliance measures in the context of increasing the transparency of financial markets and corporate governance and the fight against money laundering.

(i) *Financial sector*

142. In 2007, the Act of 5 April 1993 on the financial sector was amended to impose new requirements on credit institutions and investment firms. Under Article 37.1(4), credit institutions and investment firms had to prove that their administrative and accounting functions were well organised and implement appropriate internal control and risk assessment procedures. Under the terms of CSSF circular 04/155 adopted on 27 September 2004, credit institutions and investment firms must have a compliance function. Institutions that do not wish to appoint a full-time compliance officer must obtain express authorisation from the CSSF. Under the terms of circular 11/508, circular 04/155 now also applies to UCITS fund management companies.

143. The financial sector has taken many steps to combat money laundering. In 2007, the Association of Luxembourg Banks and Bankers (ABBL) began work on "Vade-mecum" setting out professional obligations relating to money laundering and terrorist financing, circulated to all its members in 2009. Obligations cited in the handbook include introducing written internal control and communication procedures, raising awareness of money laundering among staff, cooperating with and responding to requests from the prosecuting authorities and reporting suspicions of elements that may constitute evidence of money laundering to them. An annex to the Vade-mecum contains a list of predicate offences to money laundering. On the subject of bribery, the handbook gives a definition of the offence of bribery, identifies the persons to whom the offence of bribery applies under Luxembourg law, lists elements that could constitute offence and gives guidelines for identifying them. The handbook also sets out the specific obligations on professionals when a customer is a "politically exposed person". In 2008, the ABBL also drew up a document on the specific aspects of data surveillance and protection in the workplace. Whistleblowers are another of the subjects covered by the document. The ABBL has issued

57 www.ire.lu

recommendations on the subject, drawing on the national guidelines established by the National Data Protection Commission.

144. Likewise the Luxembourg Association of Investment Funds, the ABLF and the Luxembourg Association of Financial Sector Compliance Officers published guidelines in 2006/07 on "Practices and recommendations with a view to reducing the risks of money laundering and terrorist financing for the Luxembourg Fund Industry". According to the panellists interviewed during the Phase 3 on-site visit, the guidelines will be updated in 2011. However, there are no plans to mention bribery other than as a country-based investment risk factor.

145. The new by-laws of the Association of Insurance Companies of the Grand Duchy of Luxembourg (ACA) adopted in 2010 state that the ACA's General Assembly may adopt rules of conduct and ethics that all members are committed to following.⁵⁸ A Disciplinary Board has also been established. Its role will be to ascertain and sanction breaches of rules of conduct approved by the ACA's General Assembly on 15 June 2010 in the form of a Code of Governance.

(ii) *Enterprises*

146. In its answers to the Phase 3 questionnaire, Luxembourg said that there had been a considerable increase in the number of codes of conduct in place in firms. However, the only examples given are exporting firms whose shares are listed on the New York Stock Exchange and which are consequently bound by the internal control, ethics and compliance requirements imposed in the United States by the Foreign Corrupt Practices Act and the 2002 Sarbanes-Oxley Act on reform of the accounting system of listed companies and investor protection.

147. These firms have indeed implemented a set of internal control, ethics and compliance measures which include a code of business conduct, a whistleblower protection policy, a ban on the payment of bribes to public officials and training in the code of conduct. At the time of the on-site visit, no case of transnational bribery had been detected within the firms interviewed.

148. During the on-site visit, business representatives said that the introduction of compliance rules and ethical standards was general practice, partly at the instigation of parent companies based in other countries partly because it is important for many firms in Luxembourg to comply with the internal control provisions of the Foreign Corrupt Practices Act (FCPA), the Sarbanes-Oxley Act and the UK Anti-Bribery Act, which comes into effect on 1 July 2011. One interviewee from the public sector emphasised the increase in the number of companies that have introduced whistleblower protection arrangements.

149. The evaluation team found that panellists from the world of business, especially those from the financial sector, were aware of the need to introduce internal control and ethics measures that would prevent and detect bribery. Although the government has not circulated the good practice guidance on internal controls, ethics and compliance contained in Annex 2 of the 2009 Recommendation to companies, the business representatives interviewed during the on-site visit said that the Luxembourg authorities had made firms aware of the importance of introducing internal control, ethics and compliance rules that would prevent bribery, including by creating a compliance function. That awareness has recently been increased with the passing of Act 6104 on whistleblower protection, the tightening of anti-money laundering legislation and the FIU's actions and circulars.

Commentary

58 By-laws of the Association of Insurance Companies of the Grand Duchy of Luxembourg, Article 5 "Rights and Obligations".

The lead examiners note with satisfaction that since Phase 2 accounting offences have become predicate offences to money laundering and that the measures taken to prevent money laundering now also apply to accounting offences.

However, they note the persistent absence of detection and prosecution of accounting offences linked to bribery. They recommend that the Luxembourg authorities take measures, jointly with the Association of Certified Accountants and the Institute of Company Auditors, to ensure that the provisions in Luxembourg legislation implementing Article 8 of the Convention are fully used to prevent and detect accounting offences linked to the bribery of foreign public officials.

The lead examiners welcome the adoption of the new law on the audit profession which transposes the 8th Company Law Directive into Luxembourg law. They note that initiatives to raise awareness among certified accountants and external auditors have been stepped up since 2004 in a context of combating money laundering, including the predicate offence of bribery.

However, they recommend that the authorities, in liaison with the regulatory bodies of the accounting and audit professions:

- a) Step up measures to raise awareness in these professions of the importance i) of detecting transactions liable to constitute bribery of foreign public officials and/or related offences such as accounting offences; and ii) of not limiting detection to suspicions of money laundering;*
- b) Clarify the obligations of external auditors who discover evidence of bribery of foreign public officials so that they inform the company's managers and, where relevant, supervisory bodies;*
- c) Consider requiring external auditors to report their suspicions to the law enforcement authorities (2009 Recommendation X.A).*

The lead examiners note that internal control, ethics and compliance measures are becoming widespread in firms in Luxembourg, especially in the financial sector, in a context of increasing the integrity of financial markets and combating money laundering. However, they note that all the efforts in this area are concentrated on money laundering and note that much less attention is paid to bribery. Consequently, they recommend that Luxembourg promote Annex 2 of the 2009 Recommendation and raise awareness in business circles of the offence of bribery of foreign public officials and the need to report suspicions of actions linked to that offence.

8. Tax measures to combat bribery

(a) Non-deductibility of bribes

150. As stated in the Phase 2 report, the principle of the non-deductibility of bribes was established in Luxembourg by the Act of 15 January 2001 approving the OECD Anti-Bribery Convention. The law added a paragraph 5 to Article 12 of the Act of December 1967 on income tax, under which "advantages of any nature and the expenses incurred in obtaining a pecuniary or other advantage from any person in a position of public authority or enforcement or responsible for a public service, either in the Grand Duchy of Luxembourg or in another State, Community officials and members of the Commission of the European Communities, the European Parliament, the Court of Justice and the Court of Auditors of the European Communities [...] and officials or agents of any other public international organisation" are not tax-deductible. The definition of public official, identical to that in Article 247 of the Penal Code defining the offence of transnational bribery, is broad enough to cover all aspects of the notion of foreign public official defined in the OECD Convention (see Section 1 on the offence of transnational bribery). New Article 12.5 therefore introduced an explicit refusal of the tax deductibility of bribes to foreign public officials into the

1967 Income Tax Act as required by Recommendation I(i) of the 2009 Recommendation on Tax Measures relating to tax deductibility. The representatives of the tax authorities interviewed during the on-site visit were all aware of the existence of this provision.

(b) *Detection and reporting of suspicions of transnational bribery*

(i) Existing framework for effective controls

151. In Phase 2, the examiners considered the detection and reporting of suspicions of transnational bribery to be insufficient. Consequently, the Working Group recommended that Luxembourg "develop clear instructions for the Tax Administration prescribing verifications to be carried out in order to detect possible offences of bribery of foreign public officials" and to "ensure that sufficient human and financial resources are made available to the tax authorities for effective controls" (Phase 2, Recommendation 5). The efforts made by Luxembourg to raise awareness at the time of the written follow-up report, supplemented at the time of Phase 2bis by the tabling in Parliament in summer 2007 of a bill on inter-agency and judicial cooperation, led the Working Group to consider that this recommendation had been partially implemented at the time of the Phase 2bis evaluation. The law, by allowing tax administrations to communicate with each other and by creating an obligation for tax officials to provide information about facts liable to constitute a felony or misdemeanour to the judicial authorities, greatly increased the means available to the tax authorities for ensuring effective controls. In order to fully comply with Phase 2 Recommendation 5, it only remained for the Luxembourg authorities to adopt the draft law (Phase 2bis, Recommendation 2(b)). The draft law was subsequently enacted on 19 December 2008 (the "2008 Act").

(ii) Possibility of lifting tax secrecy

152. Phase 2 Recommendation 5 was supplemented by Phase 2 Recommendation 9, intended to improve cooperation between administrative, financial and judicial authorities and interdisciplinary coordination, deemed partially implemented during the Phase 2bis on-site visit. Consequently, the examiners framed a new Recommendation 3(a) encouraging Luxembourg to "adopt promptly the provisions of the bill on inter-agency and judicial cooperation that will allow the tax administration, as an exception to fiscal secrecy, to transmit to the judicial authorities any evidence useful for the prosecution and punishment of foreign bribery and related offences", fully implemented at the time of the Phase 2bis written follow-up. Since the Phase 2bis on-site visit, the possibility of lifting the tax secrecy provided for at Article 22 of the General Tax Act is one of the greatest steps forward in the detection and reporting of transnational bribery by the Luxembourg tax authorities.

153. The 2008 Act firstly authorises the lifting of tax secrecy between tax administrations and Luxembourg public administrations in possession of information that enables tax to be collected, by creating a legal framework for the exchange of information between agencies. Thus, it will be possible for the Administration des Contributions Directes (ACD) and the Administration de l'Enregistrement et des Domaines (AED)⁵⁹ to exchange with each other "information such as to enable them to correctly assess and collect the taxes, duties, excise and licence fees they are responsible for collecting" (Article 1 of the 2008 Act). In particular, the ACD and AED may carry out simultaneous or joint on-site inspections of taxpayers (Articles 2 and 5 of the Act). The law also institutes cooperation between the tax administrations and other public administrations in possession of information that enables tax to be collected. Thus, under Chapter III of the Act, the ACD and the AED are allowed access to certain data held by STATEC (Service Central de

59 The ACD's main task is to set and collect direct taxes. The AED's main task is to collect indirect taxes (VAT, registration duty, succession duty, stamp duty), issue revenue stamps and keep the mortgage register.

la Statistique et des Études Économiques), the Social Security General Inspectorate, the Social Security Common Centre, the Labour and Mines Inspectorate and other public establishments.

154. Under the 2008 Act, tax secrecy may also be lifted between the tax administration and the judicial authorities. Under Article 16, paragraph 1, the ACD and AED are required to transmit information that may be helpful in the context of judicial criminal proceedings to the judicial authorities on request. Under Article 16, paragraph 2, where one of those administrations "becomes aware of a felony or misdemeanour in the exercise of its powers and duties", it is required to spontaneously inform the State Prosecutor and to "transmit to [him] all information, reports, records and documents relating thereto". The Act does not expressly mention transnational bribery, though the offence is included in the notion of felony or misdemeanour. During the Phase 3 on-site visit, however, the tax authorities showed that they were very much aware of the possibilities and obligations contained in the 2008 Act, especially their obligation to spontaneously provide relevant information to the judicial authorities in the event of suspicion of a transnational bribery offence.

(iii) *Limits posed by banking secrecy*

155. As regards cooperation between the tax administration and financial institutions, there is no general legal provision that authorises the tax authorities to demand information from domestic financial institutions. However, the tax authorities may gain access to information held by banks under the terms of bilateral tax treaties, especially those approved by the Act of 31 March 2010 (see below), and indirect access to such information through the limited obligation on the judicial authorities to inform the tax administration of tax fraud brought to their attention by the financial authorities (Article 189 of the General Tax Act). On the contrary, under Article 1 of the Grand Ducal regulation of 24 March 1989 stipulating bank secrecy in tax matters and defining the right of investigation of tax administrations, tax officials are not authorised to "demand individual information about their customers from financial institutions, except in the cases provided for by the Act of 28 January 1948 intended to ensure the fair collection of registration and succession duties".⁶⁰ Only the AED, in the cases of registration and succession provided by the law, may therefore obtain information from financial institutions. Banking secrecy therefore limits the Luxembourg tax authorities' right of investigation and communication with regard to financial institutions mainly at the level of the administration responsible for direct taxes.

(iv) *Increase in the number of inspections*

156. Despite the existence of banking secrecy, the representatives of the tax authorities interviewed said that Luxembourg's efforts, through tax reform and awareness-raising among the tax authorities, had led to an increase in the number of on-site inspections by ACD officials since the Phase 2 and Phase 2bis visits. Inspections of businesses with more than 50 employees which, under the terms of Article 162.10 of the General Tax Act, should be carried out every three years, rose from 89 to 197 a year between 2007 and 2010, compared with only 43 in 2002. Progress on in-depth inspections of companies by the ACD has been more limited: about 50 inspections were carried out in 2004, compared with about 60 in 2009 and 2010. Overall, although the number of inspections by the ACD has increased, it is still relatively low. For the AED, in addition to the improvements made by the 2008 law on inter-agency and judicial cooperation, the

60 Article 30 of the Act of 28 January 1948, relating solely to the AED, states that "any department or public service of the national or a municipal government, public or parapublic establishments, State-owned agencies and services, associations, companies or corporations with their principal establishment, a branch or an operations office in the country, banks, exchange agents, business agents, entrepreneurs, public or ministerial officials, and all persons subject to inspection pursuant to the taxation laws are required, when so requested by officials designated by the Director of Registration and Properties, to provide all information in their possession [...] which those officials deem necessary for assessing or receiving registration, succession, mortgage and stamp duties payable on their own or another party's account."

agency's offices are due to be reorganised under a ministerial regulation of 4 November 2010. Each office is responsible for one or more groups of taxpayers, which enables officials to specialise and hence to better detect attempted fraud and related practices. The reorganisation should help to increase the number of on-site inspections carried out by the AED (410 a year on average by VAT offices and 75 a year on average by anti-fraud units).

(v) *Reporting suspicions of fraud or other offences*

157. As regards the reporting of tax offences, the ACD officials interviewed in Phase 3 mentioned that 10 to 15 reports of tax fraud or evasion had been made to the prosecution service in 2010, an average of one or two a month. Although the tax administration has not so far detected or reported any case of transnational bribery, the ACD officials interviewed thought that the new law on inter-agency and judicial cooperation had had a real impact on the detection and reporting of tax offences in general and that the new system introduced after the 2008 Act should make it easier to detect and report transnational bribery offences in the future. The Working Group considers that the tax authorities should contribute more to the detection and reporting of transnational bribery.

(c) *Guidance to taxpayers and tax authorities*

158. Recommendation I (ii) of the 2009 Recommendation on Tax Measures urges the Parties to the Convention to "assess whether adequate guidance is provided to taxpayers and tax authorities as to the types of expenses that are deemed to constitute bribes to foreign public officials". During the Phase 3 on-site visit, ACD officials mentioned that the OECD Bribery Awareness Handbook for Tax Examiners, which describes how to identify evidence of fraud and the payment of bribes, was published on the ACD website. The ACD officials interviewed during the visit all seemed well aware of the contents of the Handbook, which is also accessible to taxpayers on the website.

(d) *Bilateral treaties and information sharing by the tax authorities*

159. As regards sharing information with foreign authorities, Luxembourg pointed out during the Phase 3 evaluation that the Act of 31 March 2010 approving certain tax conventions approved the integration into 20 bilateral conventions concluded by Luxembourg of Article 26.5 of the OECD Model Tax Convention on Income and on Capital.⁶¹ Under the terms of this article, the Luxembourg tax authorities may directly access information held by Luxembourg banks and financial institutions in order to answer requests for information from States that have adopted the same bilateral conventions. However, Luxembourg has not included the option provided for in paragraph 12.3⁶² of the Commentary on Article 26 of the OECD Model Tax Convention in the bilateral conventions, as recommended by Recommendation 2009 on Tax Measures. In the lead examiners' view, non-inclusion of this option poses a practical problem: exchanges of information inevitably take longer, since the Luxembourg tax authorities have to seek

61 Article 26 of the OECD Model Tax Convention covers the exchange of tax information between the competent authorities of the Contracting States. Article 26.5 states that "In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person".

62 Paragraph 12.3 authorises "the sharing of tax information by tax authorities with other law enforcement agencies and judicial authorities on certain high priority matters (e.g. to combat money laundering, corruption, terrorism financing)" and the option reads as follows: "Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use."

permission from the government before they can exchange tax information with other law enforcement agencies and judicial authorities.

160. Lastly, because the Luxembourg tax authorities hardly ever apply administrative sanctions, in Phase 2 the Working Group recommended "[raising] awareness among tax authorities regarding the importance of making rigorous use of all sanctions available under the Luxembourg tax legislation in order to deter any attempt on the part of taxpayers to pass bribes paid abroad as deductible charges" (Recommendation 16). This recommendation, considered to have been partially implemented in the Phase 2 follow-up report, was not examined in Phase 2bis, but only in an oral report to the Working Group at its meeting on 19-21 June 2007. At the time of the Phase 3 visit, the Luxembourg authorities had still not take any steps to raise awareness of administrative sanctions among tax administration staff. Although the ACD and AED officials interviewed during the visit were aware of the existence of sanctions in theory, they admitted that they almost never applied them in practice.

Commentary

The lead examiners congratulate Luxembourg on the notable improvements made concerning tax measures to combat bribery in Luxembourg, especially in the 2008 law on inter-agency and judicial cooperation, which enables tax secrecy to be lifted both between the tax administrations and other competent administrative authorities, and between the tax administrations and the judicial authorities.

However, the lead examiners are concerned by the total lack of detection and reporting by tax officials of transactions that could constitute bribes paid in other countries. The lead examiners have identified the lack of resources and the relatively small number of on-site inspections (though it has increased since Phase 2 and Phase 2bis), the only partial use made by tax officials of the options available under Luxembourg tax law and the shortcomings that still remain in the exchange of information as obstacles to effective detection by the tax authorities of international transactions that could constitute bribery offences. The lead examiners therefore recommend that the Luxembourg authorities:

a) take appropriate steps to increase the intensity and frequency of on-site inspections by the tax authorities;

b) envisage including the option provided for in paragraph 12.3 of the Commentary on Article 26 of the OECD Model Tax Convention in their bilateral tax conventions in order to facilitate international exchanges of information in accordance with the 2009 Recommendation on Tax Measures;

c) do more to raise awareness among the tax authorities of the need to make full use of the new measures made available to them in the 2008 law on inter-agency and judicial cooperation in order to detect illegal transactions linked to bribery of foreign public officials and to encourage the reporting of such transactions;

d) raise awareness among the tax authorities of the importance of making more stringent use of the administrative sanctions available to them, thus reiterating Phase 2 Recommendation 16.

9. International cooperation

161. With a new law on mutual legal assistance in criminal matters, adopted on 27 October 2010, Luxembourg ratified the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and the Protocol of 16 October 2001 to the Convention. The new law amends a certain number of provisions of the Act of 8 August 2000 on international mutual legal assistance in criminal matters. Inter alia, it introduces new Article 7 prohibiting banks from disclosing information

provided in execution of a mutual legal assistance request to the clients concerned and to third parties. Articles 66.2 to 66.5 were added to the Code of Criminal Procedure, whereby investigating magistrates may order a credit institution to provide information about bank accounts and transactions, including in connection with bribery, influence trafficking and money laundering.

162. Under Articles 9 and 10 of the OECD Convention, banking secrecy may not be asserted as grounds for refusing mutual legal assistance or an extradition request. The Phase 2 report looked at the restrictions imposed by banking secrecy on authorities seeking to obtain information from banks. During the Phase 3 visit, those interviewed during the panel on money laundering said that the problem of banking secrecy did not arise for money laundering; the members of the judiciary interviewed said that cooperation between the banks and the judicial authorities was satisfactory and that the banks generally provided the information requested.

163. In view of the role of its financial markets in international transactions, Luxembourg, through mutual legal assistance procedures, plays an important part in the prosecution of bribery cases in other countries, especially other Parties to the Convention. In the vast majority of cases such assistance concerns the provision of banking information and the attachment of bank accounts. The members of the judiciary interviewed during the on-site visit confirmed, as had already been noted in Phase 2, that responding to mutual legal assistance requests was both a priority and a major burden for investigating magistrates in Luxembourg.⁶³ The processing of international rogatory commissions represented 28% of cases handled by the Luxembourg police and judicial authorities in 2008.

164. According to the figures provided by Luxembourg after the Phase 3 on-site visit, the number of international rogatory commissions received by Luxembourg gradually increased between 2005 and 2010.⁶⁴ Of the mutual legal assistance requests received between 1 January 2005 and 31 December 2010, 82 related to investigations of bribery in the requesting country (active or passive bribery, bribery of public officials, bribery of foreign public officials, private-private bribery) and 26 related to money laundering in connection with a bribery offence. Luxembourg said that all these requests had been answered or were being processed. Between 2005 and the moment of drafting this report two mutual legal assistance requests relating to bribery of a foreign public official have been received one in 2008 and one in 2011.

165. The members of the judiciary interviewed during the Phase 3 visit explained that Luxembourg regularly granted mutual legal assistance in major bribery cases investigated by other countries, including other countries party to the OECD Convention (France, Italy and Switzerland, for example), even if the offence cited by the country issuing the mutual legal assistance request is not generally bribery of foreign public officials.

166. Luxembourg has issued several mutual legal assistance requests in connection with the single case of transnational bribery currently under investigation in Luxembourg and the members of the judiciary interviewed during the visit said that answers had been received without difficulty (see Part A).

167. As indicated earlier, mutual legal assistance requests in Luxembourg often result in the attachment of bank accounts and, as indicated by the members of the judiciary during the Phase 3 on-site visit, handling them may take years. According to information provided by Luxembourg after the visit, the bank accounts attached in Luxembourg on the basis of mutual legal assistance requests between 1 January 2005 and 31 December 2010 were worth USD 352 million and EUR 77 million. Because of the limited

63 Article 8 of the Act of 27 October 2010, taking up and replacing former Article 7 of the Act of 8 August 2000, states that "mutual assistance matters shall be treated as urgent and priority matters. The requested authority shall inform the requesting authority of the state of the procedure and of any delay".

64 296 in 2005-2006, 342 in 2006-2007, 334 in 2007-2008, 427 in 2009-2010.

resources available to the prosecuting authorities and the police for these tasks, the persons interviewed thought that it would be useful to set up a central attachment and confiscation body in Luxembourg.

168. The Working Group congratulates Luxembourg on the priority given in practice to the treatment of the large number of mutual legal assistance requests that the Grand Duchy receives. According to the members of the judiciary interviewed, however, few mutual legal assistance requests have resulted in the opening of an investigation into transnational bribery in Luxembourg. On the other hand, they mentioned one investigation begun in Luxembourg following execution of a mutual legal assistance request, albeit in a money laundering case in which the court of first instance has already issued a verdict. At the time of this report, the case had just been heard on appeal and was under consideration, with the judgment due to be delivered on 28 June 2011.

169. The prosecutors and other members of the judiciary interviewed during the visit confirmed the analysis in Phase 2 that the existence of pending judicial proceedings in another country would encourage the prosecuting authorities not to prosecute.⁶⁵ All the panellists interviewed said that Luxembourg preferred to let the countries issuing mutual legal assistance requests take up prosecutions themselves. After the visit, the Luxembourg authorities specified that, in bribery as in other cases, Luxembourg does not prosecute cases that come to its attention through a mutual legal assistance request and that are already the subject of a criminal prosecution in the requesting country, especially on the grounds of the *non bis in idem* principle. The Working Group notes that as a matter of principle the Grand Duchy thus limits its role in the fight against bribery to merely granting mutual legal assistance to the other Parties to the Convention. Article 4, paragraph 3 of the Convention states that when two parties have jurisdiction, they should consult with a view to determining the most appropriate jurisdiction for prosecution, in particular so as to avoid conviction for the same offence in two Parties to the Convention. It considers that the very extensive jurisdiction available to Luxembourg could enable the authorities (in particular on the basis of information obtained in the context of mutual legal assistance requests and rogatory commissions) to initiate their own domestic investigations or even themselves prosecute cases of transnational bribery which involve financial flows passing through Luxembourg. A proactive rather than a reactive approach, while still respecting the *non bis in idem* principle, could thus help to reveal a wider spectrum of facts involved in the often complex operations of transnational bribery. Given that where transnational bribery is concerned the mechanisms revealed on execution of an international rogatory commission are not generally one-off arrangements limited to a single transaction, the Working Group notes that the Luxembourg police and judicial authorities do not use the information received from foreign authorities to open a case and verify, as part of a proactive investigation, if the revealed mechanisms are not used for other offences and persons.

Commentary

The lead examiners congratulate Luxembourg on the efforts made and resources implemented to answer the mutual legal assistance requests it receives, since, according to the data provided, the country has executed a large number of such requests from countries party to the OECD Convention relating to cases of bribery and money laundering. However, the examiners are not in a position to evaluate in any more detail Luxembourg's practice with regard to granting international mutual legal assistance, in the absence of any mechanism whereby the evaluation team could obtain information from other Parties to the Convention on their experience of cooperation with Luxembourg in response to mutual legal assistance requests. This is a cross-cutting issue that will require closer examination by the Working Group.

The examiners recommend that Luxembourg establish more detailed statistics on mutual legal assistance requests received and sent so as to be able to precisely identify the proportion of such requests

65 Phase 2 Report, p. 25.

that involve bribery of foreign public officials, money laundering in connection with bribery of foreign public officials and bank accounts attached and confiscated in the context of international rogatory commissions.

The examiners encourage Luxembourg to reconsider its approach regarding the possibility of the prosecution in Luxembourg of transnational bribery offences brought to the attention of the Luxembourg authorities through mutual legal assistance requests, where Luxembourg also has jurisdiction over the offence.

10. Raising public awareness and the reporting of transnational bribery

(a) *The Corruption Prevention Committee (COPRECO)*

170. Raising awareness of transnational bribery in the public and private sectors is made easier in Luxembourg by the existence of a Corruption Prevention Committee (COPRECO), created by the Act of 1 August 1997 approving the United Nations Convention against Corruption specifically to raise awareness of bribery. An inter-ministerial committee, it has met 13 times since it was created. Its action includes preventive initiatives such as the production of brochures for companies and public officials and inviting the government to take measures against bribery. The panellists interviewed during the on-site visit emphasised that COPRECO had helped to draft the Act of 13 February 2011 strengthening the fight against bribery, which introduced whistleblower protection. Preventive and awareness-raising measures also include inviting public officials and employees of public and private sector firms to attend certain meetings of the committee and seminars relating to bribery (see below).

(b) *Awareness of the Convention and of transnational bribery in the public and private sectors*

(i) *Raising awareness in the public sector*

171. At the time of Phase 2, the Working Group, considering the steps taken by the Luxembourg authorities to raise awareness in the public sector to be insufficient, recommend that Luxembourg "take necessary measures to raise awareness of the offence among the administration, notably among those officials that may play a role in detecting and reporting acts of bribery and those in contact with Luxembourg enterprises exporting or investing abroad (in particular diplomatic missions of Luxembourg abroad)" (Recommendation 2). Luxembourg took many initiatives in reaction to the Phase 2 report, as a result of which the recommendation was considered in the Phase 2bis report to have been implemented.

172. During the Phase 3 on-site visit, the lead examiners found that Luxembourg public officials were generally well aware of the offence of transnational bribery. Luxembourg has continued the efforts begun after Phases 2 and 2bis, mainly through training courses on bribery organised by the National Institute of Public Administration (INAP) for public officials.⁶⁶ The Luxembourg authorities have taken further initiatives since Phase 2bis to raise awareness of transnational bribery in the public sector.

173. For agencies in contact with Luxembourg firms, especially those that export or invest abroad, training courses in bribery, including bribery of foreign public officials, have been organised for the staff of the CSSF and the Office du Ducroire. However, the Luxembourg authorities did not make any mention during the Phase 3 visit of any training intended specifically for development cooperation agencies, especially Lux-Development.

⁶⁶ The Luxembourg authorities cite the course given by Diekirch State Prosecutor Jean Bour on the "Phenomenon of bribery in Luxembourg", which includes explanations of international anti-bribery instruments.

174. Several measures have been taken to raise awareness of bribery of foreign public officials in the tax administration. In addition to being familiar with the contents of the code of conduct drawn up by the director of the AED and of the OECD Bribery Awareness Handbook, published on the ACD website, the tax authorities were aware of recent changes to the law designed to improve the detection of bribery. During the on-site visit, AED and ACD officials spontaneously and regularly referred to the new law on inter-agency and judicial cooperation, which improves communication between the tax administrations and the judicial authorities and institutes a requirement to report any suspicion of a felony or misdemeanour to the judicial authorities. However, ACD and AED officials do not always seem to be aware of the need to make use of administrative sanctions as recommended in Phase 2 Recommendation 16 (on this point, see Section 8 on tax measures against bribery).

175. The Luxembourg authorities also told the examiners that a financial, economic and judicial training course organised by the criminal police included a module on international bribery conventions, including the OECD Convention (on this point, see Section 5 on investigations and prosecutions).

(ii) *Raising awareness in the private sector*

176. The lead examiners found during the Phase 3 on-site visit that firms, especially banks, investment and management companies, industrial companies and financial and industrial sector associations were generally aware of the offence of bribing a foreign public official, especially as a predicate offence to money laundering. The awareness-raising activities mentioned by the panellists included the most recent legislative developments relating to the liability of legal persons and money laundering, CSSF circulars on money laundering and bribery as a predicate offence, the FIU's money laundering typologies containing information about predicate offences, and the requirement to report predicate offences.

177. On initiative of COPRECO, a seminar on business ethics, including the fight against bribery, was organised on 14 September 2009 by the Luxembourg Chamber of Commerce with the support of the Ministry of Justice, in the context of German-Luxembourg conferences on ethics and business. The Luxembourg authorities said that the CEOs and senior executives of Luxembourg's largest firms had taken part in the seminar. The government representatives interviewed during Phase 3 also mentioned the awareness-raising efforts made by the Luxembourg Chamber of Commerce and the Federation of Luxembourg Industrialists (FEDIL) through articles published respectively in the magazines *Merkur* and *Écho de l'Industrie*.

178. During the Phase 2bis on-site visit, the major industrial and commercial groups seemed to be generally aware of the offence of bribing foreign public officials. However, the lead examiners noted the lack of awareness of the offence of bribing foreign public officials in other firms that could have international operations, especially small and medium-sized enterprises. This finding was at the origin of Recommendation 1(a) to "conduct activities, in association with business circles concerned, to raise awareness of the anti-bribery provisions of Luxembourg law among small and medium-sized enterprises that may engage in international trade, and monitor the awareness-raising activities conducted by banking and financial institutions". Seminars were subsequently organised with partners from the business world (the Chamber of Commerce and Chamber of Trades, FEDIL, the Association of Luxembourg Banks and Bankers) and the recommendation was considered to have been implemented at the time of the Phase 2bis written follow-up report.

179. Despite these efforts, the examiners found during the Phase 3 visit that awareness remained limited among SMEs. The Luxembourg authorities interviewed pointed out that it was difficult for the government to raise awareness among SMEs, especially as they engaged in little or no international trade or transactions with foreign countries and that hence the risk of transnational bribery was limited. However, given the country's small size, the narrowness of the domestic market and the number of firms,

including SMEs, that have chosen to set up in Luxembourg,⁶⁷ a large number of those SMEs are potentially liable to be concerned by transnational bribery. This is especially true of SMEs in the financial sector, which should be made more aware of the offence of bribing foreign public officials. The Justice Ministry listed some government initiatives for contacting SMEs, including inviting them to meetings and events organised by COPRECO⁶⁸ and the Ministry of the Economy and the Middle Classes. However, the Luxembourg authorities have not made any particular effort to target a large number of SMEs, or to transmit guidelines on the prevention of bribery. This could have been done, for example, by circulating the Good practice guidance on internal controls, ethics, and compliance found in Annex 2 of the 2009 Recommendation for further combating bribery.

180. Generally speaking, the examiners found that raising awareness of money laundering tended to take priority over raising awareness of transnational bribery. The panel on the fight against money laundering showed that confusion could still exist and that the distinction between money laundering and transnational bribery was not clear to all the panellists, even if there were links between the two offences.

(c) Reporting of transnational bribery

181. Since Phase 2, the circle of persons required to report criminal offences to the prosecution service has been extended to include all public officers, civil servants and employees charged with a public service mission, whether engaged or appointed under provisions of public or private law (Act of 13 February 2011 strengthening the fight against bribery, which amended Article 23.2 of the Code of Criminal Procedure). The amendment extended the requirement to report bribery of foreign public officials to public employees who do not have civil servant status, such as staff of the Luxembourg development cooperation agency, Lux-Development.

182. The Phase 2 report showed that the level of reporting of suspicions to the law enforcement authorities by public officials and private-sector representatives was generally low. One of the reasons given was the lack of effective protection for whistleblowers. Consequently, the Phase 2 and Phase 2bis reports contained recommendations designed to i) raise awareness of the requirement to report transnational bribery among public officials and in business circles, and ii) to introduce whistleblowing and whistleblower protection mechanisms.

183. Phase 2 Recommendation 3 recommended that Luxembourg, inter alia, "issue regular reminders to public officials of their obligation [...] to inform prosecuting authorities of any offence of bribery of a foreign public official that they may become aware of [...] and of disciplinary sanctions applicable in the event of non-compliance with this obligation, and ensure effective application of such sanctions". In light of Luxembourg's awareness-raising efforts, this recommendation was deemed to have been partially implemented in the Phase 2 written follow-up report. Likewise, Phase 2bis Recommendation 2(a) urging Luxembourg to continue its awareness-raising efforts was deemed to have been implemented in the Phase 2bis written follow-up report. No information about the application of sanctions for non-compliance with the reporting obligation was provided by Luxembourg in Phase 2bis or in the answers to the Phase 3 questionnaires or during the Phase 3 on-site visit.

184. Phase 2 Recommendation 2 recommended that Luxembourg raise awareness among public officials, especially those that may play a role in detecting and reporting acts of bribery and those in contact with Luxembourg enterprises exporting or investing abroad, especially the Office du Ducroire, responsible for export credits, Lux-Development and Luxembourg's diplomatic missions abroad. The

67 According to the Luxembourg authorities, there were about 30,000 companies registered in the country in 2008.

68 SMEs were invited to take part in the business ethics seminar organised on the initiative of COPRECO.

Recommendation was deemed to have been implemented in Phase 2bis. Phase 2 Recommendation 4 recommended encouraging the implementation of a similar reporting procedure to the prosecuting authorities for staff of the Ducroire and Lux-Development who are not public officials. This recommendation was also deemed to have been implemented in the Phase 2bis report. Phase 2 Recommendation 5, which inter alia recommended reminding tax administration officials of their obligation to alert the prosecuting authorities of any offence that they may become aware of, was deemed to have been partially implemented in the Phase 2bis report. Phase 2bis Recommendation 2(b) on this matter was deemed to have been implemented in the Phase 2bis written follow-up report.

185. The code of conduct of the Administration de l'Enregistrement et des Domaines (AED), adopted in October 2004, reminds its officials of their reporting obligation. The procedure to be followed in the event of requests relating to criminal tax offences and for reporting breaches of ordinary law to the State Prosecutor are described in a directorial instruction of 10 December 2010. In March 2005, the Administration des Contributions Directes (ACD) issued a handbook, based on the OECD Bribery Awareness Handbook for Tax Examiners, to raise awareness among tax officials of the detection of bribes paid to public officials. A circular for Foreign Ministry staff on assignment abroad, recalling their obligation to report any suspicion to the prosecuting authorities, was adopted in November 2007.

186. However, a reminder of this reporting requirement was not included in the Integrity Code adopted by Lux-Development in 2007, even though with the Act of 13 February 2011⁶⁹ the requirement under the Code of Criminal Procedure to report any felony or misdemeanour, including transnational bribery, to the State Prosecutor now applies to all Lux-Development staff, including those who are not public officials. The Integrity Code merely makes a general reference to corruption, without specifically mentioning bribery of a foreign public official. If they have a doubt, Lux-Development officials may contact their line manager or the Executive Committee or send an e-mail. The Integrity Code therefore needs to be updated. Following the 2006 OECD Recommendation on Bribery and Officially Supported Export Credits, the Office du Ducroire introduced a code of ethics, the anti-bribery section of which makes explicit reference to the OECD Anti-Bribery Convention and to the 2006 Recommendation. Nevertheless, the obligation under Article 23.2 of the Code of Criminal Procedure to report offences or suspicions to the State Prosecutor is not recalled in the code of ethics.⁷⁰

187. During the Phase 3 on-site visit, Lux-Development also told the examiners about a fraud prevention procedure described in the agency's Quality handbook, adopted in June 2010. The procedure gives a clear reminder of the importance of reporting fraud and states that members of the agency's staff (including those working on projects) must report any suspicion of fraud to their line manager or via the same e-mail address. The procedure also institutes a risk manager responsible for handling cases of fraud.

188. No information was provided during the Phase 3 on-site visit about the number of transnational bribery reports made to the prosecution service by public officials, employees, enterprises or other groups subject to the requirement, or about sanctions applied for failure to comply with the requirement. Consequently, the evaluation team was not able to evaluate the current level of transnational bribery reports submitted to the authorities, or to evaluate whether it was higher than in Phase 2, or whether any steps to investigate are actually taken on the basis of these reports.

(d) Whistleblower protection

189. In the Phase 2 evaluation, the Working Group recommended that Luxembourg "adopt measures to ensure effective protection of any person collaborating with the law enforcement authorities, notably

69 Act 6104 strengthening the fight against bribery.

70 Office du Ducroire, Annual Report 2009, Annex "Code of Business Ethics".

employees who report in good faith suspected cases of bribery" (Recommendation 6). As no measures had been taken to this end, a new Recommendation 2(c) was issued in Phase 2bis, recommending that Luxembourg "adopt measures promptly for protecting whistleblowers, in order to encourage private sector employees to report acts of transnational bribery without fear of reprisals or dismissal". This recommendation was deemed to have been partially implemented at the time of the Phase 2bis written follow-up report in 2009 because draft legislation to protect whistleblowers was being prepared.

190. Act 6104 of 13 February 2011 strengthening the fight against bribery introduced whistleblower protection measures into Luxembourg law.

191. The Act of 13 February 2011 introduces provisions into the Labour Code which state that reprisals may not be taken against employees who protest against or refuse acts they consider to constitute the acquisition of an illegal interest, bribery or influence trafficking within the meaning of Articles 245 to 252, 310 and 310-1 of the Penal Code (Article L. 271.1(1) of the Labour Code). Likewise, reprisals may not be taken against them for reporting such an act to a line manager or to the relevant prosecuting authorities (Article L. 271.1(2) of the Labour Code). Protective measures come into effect when the alert is raised within the enterprise and/or reported to the law enforcement authorities. Employees have two means of redress. The first is a special action to set aside, using the expedited procedure set forth at Article L. 271.1(4) of the Labour Code whereby, on an application from the employee, the president of the employment tribunal must take an urgent decision within 15 days. He may find that termination of the employment contract is void and order the employee to be kept on or, where relevant, reinstated pursuant to the provisions of Article L. 124-12 of the Labour Code. The employee may also seek damages for wrongful dismissal through the courts.

192. Although employees who report a suspected offence in good faith are afforded protection, they must prove a significant element on the basis of which they may be presumed to have been unlawfully sanctioned. It is then up to the employer to prove that the sanctions were justified by other objective elements and prove that no prohibited reprisals have been taken. If the employee takes legal action to seek damages for wrongful dismissal, the Labour Code provides for a complete reversal of the burden of proof in the employee's favour.⁷¹

193. Likewise, the Act introduces protection for central and local government officials. Their service regulations now state that no reprisals may be taken against any civil servant for having witnessed or reported the actions provided for at Articles 245 to 252, 310 and 310-1 of the Penal Code.

194. Article 3.1 of the Code of Criminal Procedure was also amended. It now states that any association on a national scale that has legal personality and has been approved by the Justice Ministry may exercise the rights granted to the civil party with regard to acts that constitute an offence within the meaning of a certain number of articles of the Penal Code, including Articles 245 to 252, and cause direct or indirect harm to the collective interests it is their purpose to defend.

195. In their answers to the questionnaires and during the Phase 3 on-site visit, the Luxembourg authorities told the examiners about an innovative initiative designed to encourage whistleblowers, especially where bribery is concerned. The aim is to enable the Association pour la Promotion de la Transparence, the Luxembourg chapter of Transparency International, to set up a "whistleblower bureau" that would serve as an interface between whistleblowers and the judicial authorities. The Corruption Prevention Committee (COPRECO) is currently examining how such a bureau might work with the Association pour la Promotion de la Transparence.

71 See Commentary on the Articles, p.9, Draft law strengthening the fight against bribery and amending the Act of 4 February 2010.

196. The Luxembourg authorities say that the general public is sometimes reluctant to contact the law enforcement authorities (prosecuting authorities and police) directly and that this initiative could improve the flow of information between the general public and the law enforcement authorities. During the on-site visit, the lead examiners heard representatives of civil society confirm that informers are historically regarded unfavourably in Luxembourg and that awareness of bribery is still insufficient. The "whistleblower bureau" would be based on the model of Transparency International's Advocacy and Legal Advice Centres. Whistleblowers could contact the Association in person, by telephone or by e-mail. Consideration is also being given to the possibility of taking anonymous reports, at least initially. Such a bureau should not of course replace the prosecuting authorities but, by providing information and acting as an interface, merely make it easier to report bribery.

Commentary

The lead examiners congratulate Luxembourg on implementing whistleblower protection in the private and public sectors through the entry into force, on 21 February 2011, of the law strengthening the fight against bribery. The lead examiners consequently propose to consider that Phase 2bis Recommendation 2(c) has been implemented.

However, they recommend that Luxembourg, in implementing the new law, take the necessary steps to encourage whistleblowers to directly alert law enforcement agencies of bribery offences without fear of reprisals.

The examiners recommend that Luxembourg take steps necessary to raise awareness of employees in public and private sector on the importance to report suspicions of bribery of foreign public officials and of the new whistleblower protection provisions .

The examiners also recommend that Luxembourg's anti-bribery action plan adopted in 2008 be updated in order to reflect the recent entry into force of the Act of 13 February 2011 increasing the fight against bribery.

In this regard, they note with interest the reflection initiated jointly with representatives of civil society to accompany them in the establishment of a "whistleblower bureau" intended to make it easier to report bribery to the law enforcement authorities.

In the ongoing absence of prosecutions of transnational bribery offences, the examiners encourage Luxembourg to promptly undertake an analysis of reports of transnational bribery transmitted to the law enforcement authorities since Phase 2.

While acknowledging Luxembourg's efforts to raise awareness of bribery in the private sector, the lead examiners nevertheless note that the extent of awareness and knowledge of the offence could be improved in the business sector, and in particular among SMEs, especially those that may operate on foreign markets or be involved in international transactions, and recall that raising awareness of money laundering should not occur to the detriment of raising awareness of bribery of foreign public officials.

11. Public benefits

(a) Official development aid

197. Almost all the resources allocated by the Luxembourg government to official development are managed by the Luxembourg development cooperation agency Lux-Development SA, a private company.

198. In accordance with the 2006 Recommendation of the Development Assistance Committee on Anti-corruption Proposals for Bilateral Aid Procurement, Lux-Development's general procurement regulations contain an anti-bribery clause under which financing of contracts may be suspended or cancelled if corrupt practices are discovered at any stage of the award process and appropriate steps to remedy the situation are not taken. In addition, the regulations provide that all tender dossiers and contracts must include a clause stipulating that tenders will be rejected or contracts terminated if unusual commercial expenses are found to have been paid.

199. The Integrity Code for Lux-Development staff was adopted in October 2007. The code defines bribery and its sources, how to behave in the event of a conflict of interest, and improper advantages such as travel, discounts, invitations, etc. The chapter of the code entitled "What to do if in doubt" recommends that Lux-Development employees finding themselves in a work-related situation that calls their integrity into question should contact their line manager or the Executive Committee or send an e-mail to a dedicated address, integrity@lux-development.lu. According to those interviewed during the Phase 3 visit, no such e-mail has yet been received.

200. Lux-Development's Quality handbook, adopted in June 2010, describes a procedure to prevent fraud, including a reporting procedure (described in the previous section).

(b) Export credits

201. Luxembourg-based firms may benefit from government support for their exports and foreign investment through export credit and financial help with promoting their products abroad. The authority responsible for supporting and promoting Luxembourg's exports is the Office du Ducroire. Insurance is granted mostly for operations in central and eastern Europe (52%), Russia, China and Germany. 80% of medium- and long-term commitments at 31 December 2009 concerned India, Azerbaijan and South Korea.

202. In compliance with the 2006 Recommendation on Bribery and Officially Supported Export Credits, and as indicated in the Phase 2bis report, since 2007 the Office du Ducroire has required exporters applying for credit insurance or financial support for a promotional campaign abroad to sign a declaration of non-involvement in bribery as defined by the OECD Convention. Policyholders are required to declare that they are aware of the 2001 law transposing the provisions of the Convention into Luxembourg law; that they will not engage in corrupt practices in connection with the transaction; that they are not included in debarment lists; and that they or persons acting on their behalf have not been prosecuted for bribery of a foreign public official in the five years preceding the application.⁷²

203. Article 12.5 of the General Terms of the Overall Agreement of the Office du Ducroire states that financing will be withdrawn in the following cases: "The insured may forfeit his rights and be obliged to reimburse any indemnity paid to him if he is condemned under a definitive court sentence, pronounced on the basis of penal provisions made to enforce the OECD agreement to fight corruption of foreign civil servants in international transactions, signed in Paris on 17 December 1999 [sic]."

204. In accordance with point 1(f) of the 2006 Recommendation on Bribery and Officially Supported Export Credits, the Ducroire's Code of Business Ethics states that the Office du Ducroire will carry out detailed checks of bribery of foreign public officials in the following cases: where the policyholder is included on exclusion lists; where the policyholder or any person acting on his behalf has been prosecuted or convicted of bribing a public official; where there is credible evidence of corruption in the award or execution of the contract. The Office du Ducroire will suspend approval of the application pending in-depth investigations and refuse any form of official support if, as a result of this procedure, it is concluded

72 Office du Ducroire, Annual Report 2009, Annex "Code of Business Ethics".

that the transaction is corrupt. During the Phase 3 on-site visit, those interviewed said that the Office du Ducroire had not detected any corrupt transaction to date.

205. Despite the reporting requirement incumbent upon it under Article 23.2 of the Code of Criminal Procedure, the Office du Ducroire has not taken any steps to raise awareness or implemented any procedure for its employees to disclose or report credible evidence of corruption to the law enforcement authorities as stipulated at point 1(h) of the 2006 OECD Recommendation. The Luxembourg authorities point out that they have been bound by a statutory reporting requirement only since the recent adoption of the Act of 13 February 2011 extending the obligation from civil servants as such to all employees charged with a public service mission, following amendment of Article 23.2 of the Code of Criminal Procedure.

206. During the Phase 3 on-site visit, the Office du Ducroire confirmed that it systematically checks the World Bank exclusion list. The Office du Ducroire does not have the resources to check convictions, court judgments or the existence of judicial proceedings for bribery. In addition, the Office du Ducroire does not ask for information about the existence of appropriate management control systems that combat bribery (2006 Recommendation, Article 1(a)).

207. According to the panellists interviewed during the on-site visit, the Office du Ducroire has never detected suspicions of bribery of foreign public officials. More generally, it has never found any infringement and hence has never had to make any checks or reject an application or cancel a contract. The representatives of the Office du Ducroire interviewed during the visit said that this was because the number of firms seeking financial support for exports was limited and that the Office du Ducroire was familiar with their situation.

(c) Public procurement

208. Since 2010 the Article 35 of the CC provides for exclusion from participation in public procurement as a sanction that can be applied to legal persons. Besides, in accordance with EU Directives 2004/17/EC and 2004/18/EU,⁷³ Luxembourg does not allow candidates who have been convicted of bribery to participate in public procurement procedures.

209. In transposing the EU rules, Article 222 of the Grand Ducal Regulation of 3 August 2009 implementing the Act of 25 June 2009 on public procurement introduces an obligation not to consider tenders from economic operators who have been convicted for involvement in bribery and money laundering. There are no statistics on the number of economic operators excluded on the basis of this provision. The corresponding provisions of Directive 2004/17/EC were also transposed into Luxembourg law by the above-mentioned regulation.

210. In addition, Article 13.1 of the Act of 25 June 2009 on public procurement provides for the sanction of exclusion from participation in public procurement procedures, inter alia for lack of commercial integrity. The sanction is ordered by the contracting authority on an opinion from the Tendering Commission, and may not exceed two years. However, no economic operator has been excluded from participation in public procurement procedures since the law came into effect at the beginning of August 2009.

73 Article 45.1 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts states that: "Any candidate or tenderer who has been the subject of a conviction by final judgment [...] for [...] corruption shall be excluded from participation in a public contract (active bribery of a public official or in the private sector in EU Member States)."

211. The authorities interviewed during the on-site visit had not come across any cases where firms submitting tenders for public procurement contracts had been convicted of bribery of foreign public officials or included in development banks' exclusion lists. The existence of internal control, ethics and compliance measures in firms tendering for public procurement contracts is not a criterion for award of the contract.

Commentary

The lead examiners consider that Luxembourg is generally in compliance with the 2006 Recommendation of the Development Assistance Committee on Anti-Bribery Clauses and with the 2006 OECD Recommendation on Bribery and Officially Supported Export Credits. The Grand Ducal Regulation of 3 August 2009 implementing the Act of 25 June 2009 on public procurement includes an obligation not to consider tenders from economic operators who have been convicted of participating in bribery or money laundering offences.

The Luxembourg development cooperation agency (Lux-Development) and the Office du Ducroire have stepped up internal measures to better prevent corruption in the provision of public funds. Generally, they seemed aware of the problem of transnational bribery and of the importance of implementing the necessary measures. The lead examiners note that a limited number of actions have been taken to prevent bribery in public procurement.

The lead examiners regret that no case of bribery of foreign public officials has been reported by staff of the Office du Ducroire and Lux-Development. No enterprise has been excluded for bribery in connection with the provision of public advantages.

The lead examiners recommend that Luxembourg take steps to raise awareness in these two agencies of the new law on whistleblowers and the new reporting requirements for their staff under Article 23.1 of the Code of Criminal Procedure. They also recommend that the relevant agencies use the existence of internal control, ethics and compliance measures as a criterion in their decisions to grant public benefits. Finally, the lead examiners recommend that foreign bribery and the requirement to report it to the prosecuting authorities are specifically mentioned in the Integrity Code and Quality manual of Lux-Development, as well as in the internal procedures of the Office du Ducroire.

C. RECOMMENDATIONS AND ASPECTS TO BE MONITORED

The Working Group on Bribery congratulates Luxembourg on the significant efforts it has made since Phase 2bis by amending its legislation and altering its practices significantly to achieve compliance with its obligations under the Convention, in particular by introducing criminal liability for legal persons into its system of laws. Nevertheless, the Working Group is still concerned about the lack of sanctions for cases of bribing foreign public officials, and by the fact that only one case likely to constitute a case of bribing a foreign public official is currently being prosecuted, and that this is the first such case since the Convention entered into force in 2001. The Working Group is especially concerned insofar as Luxembourg sees substantial financial flows pass through its businesses and financial institutions, and in this respect receives a large number of requests for mutual legal assistance on the basis of which its broad authority should enable it to trigger investigations and prosecutions to enforce its transnational bribery legislation.

Luxembourg's Phase 2 and Phase 2bis evaluation reports, which were adopted in 2004 and 2008 respectively, included recommendations and questions requiring follow-up (as indicated in Annexes 1 and 2 of this report). Of these recommendations deemed only partially or not implemented at the time of the written follow-up to Luxembourg's Phase 2bis in 2009, Recommendations 13 of Phase 2 and 2c) of Phase 2bis have been implemented, Recommendations 3 (b) and 4 (a) of Phase 2 have been implemented partially and Recommendations 12 et 16 of Phase 2 remain partially implemented.

Consequently, based on this report's conclusions with regard to Luxembourg's implementation of the Convention and 2009 Recommendation, the Working Group: (1) makes the following recommendations to Luxembourg in Part I; and (2) will follow up on the issues identified in Part II. The Working Group invites Luxembourg to present it with an oral report on implementation of Recommendations 1, 2(a) and 4 in one year (*i.e.* in June 2012). It furthermore invites Luxembourg to submit a written follow-up report on all recommendations and follow-up issues in two years' time (*i.e.* in June 2013).

1. Recommendations of the Working Group

Recommendations to ensure the effectiveness of investigations, prosecutions and sanctions with regard to offences involving the bribery of foreign public officials

1. With regard to the transnational bribery offence, the Working Group recommends that Luxembourg use any appropriate means to clarify that no element of proof, beyond those stipulated in Article 1 of the Convention, is required to enforce Articles 247ff of the Penal Code, and in particular that (i) the notion of "without right" that is found, *inter alia*, in Article 247 of the Penal Code, should not be interpreted more restrictively than the notion of "improper advantage" contained in the Convention, and therefore that there is no need to prove that any provision in force in the bribe recipient's country prohibits that recipient from receiving a bribe; and that (ii) the notion of "corruption pact" that was deleted from Article 247 in 2001 does not, in practice, constitute an additional element of proof which prosecuting authorities must seek out in order to prove the offence [Convention, Article 1; 2009 Recommendation, III. ii) and V.].

2. Regarding the liability of legal persons, the Working Group recommends that Luxembourg:

- a. Ensure by all means that the liability system instituted by the Act of 3 March 2010 adopts one of the two approaches described in Annex 1 B) of the 2009 Recommendation concerning the level of managerial authority and the type of act that may cause that liability to be incurred [Convention, Article 2; 2009 Recommendation, Annex 1 B)];
- b. Take all necessary steps to ensure that (i) the system for the liability of legal persons does not limit that liability to cases in which the natural person or persons who committed the offence are prosecuted and found guilty; (ii) the fact that the immediate perpetrator was "coerced" by a foreign public official to pay a bribe in order to win or keep a contract does not cover cases where a bribe is sought and cannot be considered a ground for the non-liability of the legal person; and (iii) the criterion of the "interest" of the legal person does not exclude certain cases of bribery of foreign public officials where a bribe is paid to a foreign public official by a *de jure* or *de facto* manager of an enterprise only in the partial interest of the enterprise or in the interest of another legal person, possibly linked to the first [Convention, Articles 1 and 2; 2009 Recommendation, Annex 1 B)].

3. Regarding sanctions in cases of transnational bribery, the Working Group recommends that Luxembourg re-assesses whether to take the opportunity to (i) amend the law on the liability of legal persons to include exclusion from entitlement to public benefits or aid as a supplementary penalty; and

(ii) introduce criminal records for legal persons [Convention, Articles 2 and 3; 2009 Recommendation, III. vii) and XI. i)].

4. Regarding investigations and prosecutions in cases of transnational bribery, the Working Group recommends that Luxembourg:

- a. Pursue the efforts made in obtaining information from banks and financial institutions (Act of 27 October 2010) and from tax authorities (Act of 19 December 2008) so that such information can be obtained even in the absence of a formal referral to an investigating magistrate, thus ensuring in particular full implementation of Phase 2bis Recommendation 3 (b) [2009 Recommendation, III. ii), iii) and iv); VIII. and Annex 1, D];
- b. Further evaluate police investigative powers at the preliminary enquiry stage with a view to extending such powers, as the Working Group had recommended in Phase 2 (Recommendation 12), tailoring the available means and methods of investigation to the need to gather sufficient evidence so that prosecution can be initiated in cases involving bribery of foreign public officials [2009 Recommendation, III. ii), V. and Annex 1, D];
- c. Ensures that the level of resources, training and specialisation provided to the police ensures the effective investigation and prosecution of bribery of foreign public officials [2009 Recommendation, Annex 1, D];
- d. Take the necessary steps to ensure that Luxembourg's criminal policy (i) clearly identifies the investigation and prosecution of bribery of foreign public officials as a priority; and (ii) emphasises the need to ensure that the appreciation of the level of proof necessary for initiating criminal investigations is not so stringent that it constitutes an obstacle to the investigation of bribery of foreign public officials [Convention, Article V; 2009 Recommendation, Annex 1, D].

Recommendations to ensure effective prevention and detection of transnational bribery

5. Regarding raising public awareness and reporting transnational bribery, the Working Group recommends that Luxembourg:

- a. Take the necessary steps to raise employee awareness, in the private and public sectors alike, of the importance of reporting suspicions of bribery of foreign public officials, as well as of new provisions for the protection of whistleblowers [2009 Recommendation, IX. and III. i)];
- b. Intensify efforts to enhance awareness in the accounting and auditing professions of the importance of detecting and reporting transactions likely to constitute bribery of foreign public officials and related offences, such as accounting offences [2009 Recommendation, III. i), X. A. and X. B.];
- c. Further heighten the awareness of professionals required to report money-laundering suspicions of the predicate offence of bribing foreign public officials [Convention, Article 7; 2009 Recommendation, IX. and III. i)];
- d. Raise awareness of employees of the Luxembourg development co-operation agency and the Office du Ducroire of the new law on the protection of whistleblowers and, as regards the development co-operation agency, the new reporting requirements to which its staff are subject under Article 23 (1) of the Code of Criminal Procedure [2009 Recommendation IX. iii)].

6. Regarding accounting standards, external audit and corporate compliance and ethics programmes, the Working Group recommends that Luxembourg:

- a. Take measures, jointly with the Association of Certified Accountants and the Institute of Company Auditors, to ensure that full use be made of the provisions of Luxembourg legislation implementing Article 8 of the Convention so as to prevent and detect accounting offences relating to the bribery of foreign public officials [Convention, Article 8; 2009 Recommendation, IX., X. and X. A];
- b. Clarify the obligations of external auditors who discover evidence of bribery of foreign public officials so that they inform the company's managers and, where relevant, supervisory bodies [2009 Recommendation, III. i); X. B iii)];
- c. Consider requiring external auditors to report their suspicions of bribery of foreign public officials to the law enforcement authorities and ensure that auditors making such reports reasonably and in good faith are protected from legal action [2009 Recommendation X. B. (v)];
- d. Promote, jointly with the relevant professional associations, internal control, ethics and compliance programmes or measures in the financial sector and businesses involved in commercial transactions abroad, including distribution of Annex 2 of the 2009 Recommendation, Good practice guidance on internal controls, ethics, and compliance [2009 Recommendation, X. C. i); Annex II].

7. Regarding tax measures to combat bribery, the Working Group recommends that Luxembourg:

- a. Take appropriate steps to increase the intensity and frequency of on-site inspections by the tax authorities [2009 Recommendation, III. iii); 2009 Recommendation on Tax Measures, I. ii) and II.];
- b. Facilitate international exchanges of information in accordance with the 2009 Recommendation of the Council on Tax Measures notably by considering including the option provided for in paragraph 12.3 of the Commentary on Article 26 of the OECD Model Tax Convention in their bilateral tax conventions [2009 Recommendation on Tax Measures, I. iii)];
- c. Do more to raise awareness among its tax authorities of the need to make full use of the new measures made available to them in the 2008 law on inter-agency and judicial co-operation in order to detect illegal transactions linked to bribery of foreign public officials, and to encourage the reporting of such transactions [2009 Recommendation on Tax Measures, I. iii)];
- d. Raise awareness among the tax authorities of the importance of making more stringent use of the administrative sanctions available to them to discourage tax deductibility of expenses likely to constitute bribes [2009 Recommendation on Tax Measures, I. ii); Phase 2 Recommendation 16].

8. Regarding international judicial co-operation, the Working Group recommends that Luxembourg reconsider its approach to the possibility of initiating prosecution in Luxembourg of transnational bribery offences brought to the attention of the Luxembourg authorities through mutual legal assistance requests, where Luxembourg also has jurisdiction over the offences committed [Convention, Articles 5 and 7; 2009 Recommendation, XIII. i)].

9. Regarding public benefits, the Working Group recommends that Luxembourg:

- a. Make sure that the integrity code of the Luxembourg development co-operation agency be updated to include an explicit reference to the bribery of foreign public officials, and to the requirement that its staff report any suspicions of such bribery to the prosecuting authorities under Article 23.1 of the Code of Criminal Procedure and the protection of whistleblowers instituted by the new law [2009 Recommendation, IX.];
- b. Take the steps necessary to ensure that public procurement authorities impose stricter enforcement of existing provisions to bolster the integrity of public procurement, and especially of those excluding bids (i) submitted by economic operators that have been convicted of bribery or (ii) appearing on the development banks' exclusion lists [2009 Recommendation, IX. and XI.];
- c. Explore the feasibility of taking measures so that, when deciding to grant contracts and other public benefits, the relevant agencies would use the existence of internal control, ethics and compliance measures as a criterion for those decisions [2009 Recommendation, X. C, vi) and XI. i)].

2. Monitoring by the Working Group

The Working Group will monitor the following aspects, depending on developments in case law and practice, in order to check:

- a. The scope of the exemption from liability in the event of “constraint”, so as to ensure that the exemption does not include the fact that in the event of coercion the immediate perpetrator may have been “coerced” by a foreign public official to pay a bribe in order to obtain or retain a contract;
- b. Employees of public enterprises are covered by Article 247 of the Penal Code;
- c. The level of penalties applicable to natural persons, with a view to ensuring that they are sufficient to be effective, proportionate and dissuasive;
- d. The impact on the dissuasive effect of sanctions of the application of mitigating circumstances, notably in cases of reclassification of the offence of bribing a foreign public official;
- e. The progress of current discussions about the introduction of a plea bargaining procedure, especially as regards its impact on the level of sanctions imposed in practice in this context;
- f. The level of sanctions and the use of confiscation in cases of bribery of foreign public officials, and especially the criminal penalties imposed on legal persons to ensure that they are effective, proportionate and dissuasive;
- g. Implementation of the new provisions contained in Articles 66.2 to 66.5 of the Code of Criminal Procedure, and in particular to the scope of the term “exceptionally” contained in the law in connection with obtaining information from banks and financial institutions;
- h. Efforts to detect and prosecute facts of transnational bribery related to money laundering;
- i. Establishment of statistics on (i) the number of investigations, prosecutions and sentences imposed by jurisdictions in respect of the bribery of foreign public officials and related offences; and (ii) mutual legal assistance requests related to transnational bribery, including the number of requests received and executed.

ANNEX 1: TABLE OF PHASE 2 RECOMMENDATIONS

	RECOMMENDATIONS	FOLLOW UP (WRITTEN/ NEW EVALUATION/ORAL)
	<p><i>Recommendations for ensuring effective measures for preventing and detecting bribery of foreign public officials</i></p> <p>The Working Group recommends that Luxembourg :</p>	
1.	<p>Take necessary measures, in cooperation with the professional organisations and the business circles concerned, to raise awareness among the private sector regarding the offence of bribery of foreign public officials, and promote the implementation within enterprises of preventive organisational measures – internal control mechanisms, ethics committees, and warning systems for employees –, as well as the adoption of codes of conduct specifically addressing the issue of foreign bribery.</p>	<p>WRITTEN PHASE 2 FOLLOW UP REPORT: <i>Partially implemented</i></p> <p>PHASE 2 BIS REPORT: <i>Partially implemented</i></p>
2.	<p>Take necessary measures to raise awareness of the offence among the administration, notably among those officials that may play a role in detecting and reporting acts of bribery and those in contact with Luxembourg enterprises exporting or investing abroad (in particular diplomatic missions of Luxembourg abroad), the Luxembourg public and professional bodies.</p>	<p>WRITTEN PHASE 2 FOLLOW UP REPORT: <i>Partially implemented</i></p> <p>PHASE 2 BIS REPORT: <i>Implemented</i></p>
3.	<p>Issue regular reminders to public officials of their obligation under article 23 (2) of the Code of Criminal Procedure to inform prosecuting authorities of any offence of bribery of a foreign public official that they may become aware of in the exercise of their duties, and of disciplinary sanctions applicable in the event of non-compliance with this obligation, and ensure effective application of such sanctions.</p>	<p>WRITTEN PHASE 2 FOLLOW UP REPORT: <i>Partially implemented</i></p> <p>PHASE 2 BIS REPORT: <i>Partially implemented</i></p>

4.	Encourage the implementation of a similar reporting procedure to the prosecuting authorities for officials not subject to the provisions of article 23 (2) of the Code of Criminal Procedure working for bodies vested with supervisory powers with regard to corruption in the attribution of public subsidies (notably certain officials of the Ducroire and Lux Développement).	WRITTEN PHASE 2 FOLLOW UP REPORT: <i>Not implemented</i> PHASE 2 BIS REPORT: <i>Implemented</i>
5.	Develop clear instructions for the Tax Administration prescribing verifications to be carried out in order to detect possible offences of bribery of foreign public officials, and remind these officials of their obligation to alert the prosecuting authorities of any offence that they may become aware of in this regard, and ensure that sufficient human and financial resources are made available to the tax authorities for effective controls.	WRITTEN PHASE 2 FOLLOW UP REPORT: <i>Partially implemented</i> PHASE 2 BIS REPORT: <i>Partially implemented</i>
6.	Adopt measures to ensure effective protection of any person collaborating with the law enforcement authorities, notably employees who report in good faith suspected cases of bribery.	WRITTEN PHASE 2 FOLLOW UP REPORT : <i>Partially implemented</i> PHASE 2 BIS REPORT: <i>Partially implemented</i>
7.	<i>Given the particular importance of the Luxembourg financial centre, continue ongoing efforts in the context of the Action Plan against Money Laundering in order to ensure rigorous implementation by the entire banking and financial sector of legislative and regulatory measures aimed at preventing and detecting money laundering of funds that may be related to the bribery of foreign public officials on international markets, and ensure that non-compliance with the legal obligation to report be sanctioned in a dissuasive manner.</i>	WRITTEN PHASE 2 FOLLOW UP REPORT: <i>Implemented</i>
8.	<i>Bearing in mind the important role of accounts auditing in the detection of suspicious operations related to bribery of foreign public officials, and in the context of ongoing efforts by Luxembourg aimed at ensuring greater transparency in corporate accounting, ensure compliance by accountants and external and internal auditors with their obligation to inform prosecuting authorities of any suspected money laundering related to corruption. In this regard, Luxembourg authorities are invited to further raise awareness of such professionals to the provisions of the anti-bribery legislation, notably by introducing stricter auditing procedures, and to ensure that non-compliance with the reporting obligation be effectively sanctioned</i>	WRITTEN PHASE 2 FOLLOW UP REPORT: <i>Partially implemented</i> PHASE 2 BIS REPORT: <i>Implemented</i>

9.	Establish effective interdisciplinary cooperation and coordination among the bodies concerned (administrative, financial and law enforcement) with regard to supervisory, detection and sanctioning powers, and, in this regard, ensure that professional secrecy does not constitute an impediment.	WRITTEN PHASE 2 FOLLOW UP REPORT: <i>Partially implemented</i> PHASE 2 BIS REPORT: <i>Partially implemented</i>
	<i>Recommendations for ensuring adequate mechanisms for the effective prosecution of offences of bribery of foreign public officials and related offences</i> The Working Group recommends that Luxembourg :	
10.	Grant determined financial support with a view to ensuring sufficient human and financial resources as well as specific training to law enforcement professionals (police, prosecution, investigating magistrates and judges) to guarantee effective prosecution of the foreign bribery offence and related offences, notably those related to accounting, without prejudice to the execution of request for mutual legal assistance	WRITTEN PHASE 2 FOLLOW UP REPORT: <i>Implemented</i>
11.	Compile relevant statistical information regarding the number, source and treatment of bribery offences (prosecution, judgment and sanction) in order to facilitate evaluation, and, if necessary, develop criminal policy in this regard.	WRITTEN PHASE 2 FOLLOW UP REPORT: <i>Implemented</i>
12.	<i>afin de garantir une poursuite effective de l'infraction de corruption active d'agents publics étrangers et compte tenu des pouvoirs d'investigation actuellement limités en matière d'enquête préliminaire, d'une part, d'envisager d'étendre ceux-ci et, d'autre part, de faire en sorte que le parquet n'ait pas, au stade de l'engagement des poursuites, une appréciation trop exigeante du niveau des indices recueillis au cours de l'enquête.</i>	WRITTEN PHASE 2 FOLLOW UP REPORT: <i>Partially implemented</i>
13.	Formally remind prosecuting authorities (via circulars or directives, or any other official channel) of the importance of prosecuting bribers, as an essential condition for the effective application of the foreign bribery offence, and, similarly, draw their attention to the importance of prosecuting money laundering	WRITTEN PHASE 2 FOLLOW UP REPORT: <i>Partially implemented</i>

	offences related to bribery on foreign markets, without referring to the place of occurrence of the predicate offence or to the place of residence of the alleged offender.	
14.	<i>Taking note of Luxembourg's continued non-compliance with Article 2 of the Convention</i> , establish in Luxembourg law a clear liability of legal persons for bribery of foreign public officials within a year of the Phase 2 evaluation of Luxembourg, and put in place sanctions that are effective, proportionate and dissuasive.	WRITTEN PHASE 2 FOLLOW UP REPORT: <i>Not implemented</i> PHASE 2 BIS REPORT: <i>Not implemented</i>
15.	Raise awareness among prosecuting authorities on the importance of rigorously applying the range of sanctions provided for in criminal law which may be effective and dissuasive with respect to corruption, including confiscation measures, and encourage prosecuting authorities to lodge the range of appeals provided for under the law, should the decisions handed down be too lenient.	WRITTEN PHASE 2 FOLLOW UP REPORT: <i>Implemented</i>
16.	Raise awareness among tax authorities regarding the importance of making rigorous use of all sanctions available under the Luxembourg tax legislation in order to deter any attempt on the part of taxpayers to pass bribes paid abroad as deductible charges.	WRITTEN PHASE 2 FOLLOW UP REPORT: <i>Partially implemented</i>

ANNEX 2: TABLE OF PHASE 2BIS RECOMMENDATIONS

	RECOMMENDATION	WRITTEN FOLLOW UP
1.	<p><i>With respect to raising awareness of transnational bribery among the economic circles and professional organizations concerned:</i></p> <p>The Working Group recommends that Luxembourg :</p>	
1 (a)	<p>conduct activities, in association with business circles concerned, to raise awareness of the anti-bribery provisions of Luxembourg law among small and medium-sized enterprises that may engage in international trade, and monitor the awareness-raising activities conducted by banking and financial institutions.</p>	<i>Implemented</i>
2.	<p><i>With respect to the detection and reporting of the offence of bribing foreign public officials and related offences:</i></p> <p>The Working Group recommends that Luxembourg :</p>	
2(a)	<p>continue its awareness-raising efforts, using brochures, circulars, in-service training for public employees, or any other means, to ensure that government employees who are in a position to detect bribery, or who are in contact with Luxembourg enterprises exporting or investing abroad, will not only maintain but increase their vigilance against the bribery of foreign public officials</p>	<i>Implemented</i>
2(b)	<p>adopt as soon as possible the present version of the draft law on interagency and judicial cooperation that was laid before the Luxembourg Parliament in the summer of 2007, in order to enhance the means available to the Luxembourg tax authorities for detecting irregularities relating to the payment of bribes to foreign public officials</p>	<i>Implemented</i>

2 (c)	adopt measures promptly for protecting whistleblowers, in order to encourage private sector employees to report acts of transnational bribery without fear of reprisals or dismissal.	<i>Partially implemented</i>
3.	<i>Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery and related offences</i> The Working Group recommends that Luxembourg :	
3 (a)	adopt promptly the provisions of the bill on interagency and judicial cooperation that will allow the tax administration, as an exception to fiscal secrecy, to transmit to the judicial authorities any evidence useful for the prosecution and punishment of foreign bribery and related offences	<i>Implemented</i>
3 (b)	take all steps that could facilitate the work of the judicial authorities in seeking information from Luxembourg financial and banking institutions, including in cases where there has been no formal referral to an investigating judge.	<i>Not implemented</i>
4.	<i>With respect to the responsibility of legal persons</i> The Working Group recommends that Luxembourg :	
4 (a)	establish promptly a clear and operational system for making legal persons liable for the bribery of foreign public officials, together with effective, proportionate and dissuasive penalties, recognizing that legislation consistent with the requirements of articles 2 and 3 of the Convention is still lacking	<i>Not implemented</i>
4 (b)	expand the scope of application of Article 5 of the Code of Criminal Procedure to give the Luxembourg courts jurisdiction over offences committed outside the territory of the Grand Duchy by legal persons of Luxembourg nationality.	<i>No longer relevant</i>

ANNEX 3 LIST OF PARTICIPANTS

Ministries and government agencies

Ministries

- **Ministry of Justice**

Claudine KONSBRUCK, Conseiller de Gouvernement 1^{ère} classe, Director of Criminal and Judicial Affairs

Luc REDING, Conseiller de Direction

Laurent THYES, Attaché de Gouvernement

Katia KREMER, Conseiller de Direction 1^{ère} classe

Daniel RUPPERT, Conseiller de Direction 1^{ère} classe

- **Ministry of Foreign Affairs**

Pierre FRANCK, Secrétaire de Légation 1^{er} en rang

- **Ministry of the Economy**

Pierre RAUCHS, Conseiller de Direction 1^{ère} classe

- **Ministry of Finance**

Jean-Luc KAMPHAUS, Conseiller de Direction 1^{ère} classe

- **Ministry of the Middle Classes**

Emmanuel BAUMANN, Premier Conseiller de Gouvernement

- **Ministry of Sustainable Development and Infrastructure – Public Works**

Claude PAULY, Conseiller de Direction, Secretary of the Tendering Commission

- **Ministry of the Interior**

Andrée COLAS, Premier Conseiller de Gouvernement

- **Ministry of the Civil Service**

Bob GENGLER, Conseiller de Direction adjoint

Annette ELDEWEYS, Attaché d'Administration

Prosecutors

- **Luxembourg General Prosecution Service**

Doris WOLTZ, Procureur d'Etat adjoint, Luxembourg

Martine SOLOVIEFF, 1^{er} Avocat général

Jeannot NIES, 1^{er} Avocat général

Jean-Paul FRISING, Procureur d'Etat, Luxembourg

Jean BOUR, Procureur d'Etat, Diekirch

- **Economic and Financial Department – Financial Intelligence Unit**

Jean-François BOULOT, Substitut principal, FIU

- **Mutual Assistance Unit**

Martine SOLOVIEFF, 1^{er} Avocat général

Jeannot NIES, 1^{er} Avocat général

Judges

- **Investigation Office**

Doris WOLTZ, juge d'instruction directeur until 2010

Ernest NILLES, juge d'instruction directeur

Police

- **Grand Ducal Police / Criminal Police**

Patrice SOLAGNA, Director of Criminal Police

Lucien SCHILTZ, head of the Economic and Financial Division, Criminal Police

Claude SCHO, head of the Anti-Money Laundering Unit, Criminal Police

Eric LUDWIG, Economic and Financial Division, Criminal Police

Other public bodies or bodies under the aegis of a public body

- **Office du Ducroire**

Simone JOACHIM, Secretary General of the Office du Ducroire

- **National Data Protection Commission**

Gérard LOMMEL, Director

- **Corruption Prevention Commission (interministerial body)**

- **Chamber of Commerce of the Grand Duchy of Luxembourg**

Paul EMERING, member of the Executive Committee

- **Luxembourg Chamber of Commerce Continuous Training Institute (LSC)**

Paul EMERING, Director

- **Chamber of Trades**

Tom WIRION, Deputy Director

- **Association of certified accountants**

Marc MEYERS, President

Eric COLLARD, Board member

Isabelle FILIATRE, technical expert

- **Administration des Contributions Directes**

Monique ADAMS, Director, Legal Affairs Division

Sandro LARUCCIA, Director, Legal Affairs Division

Fernand MULLER, Audit Unit

- **Administration de l'Enregistrement et des Domaines**

Irène THILL, Inspecteur de direction principal 1^{er} en rang

Maryline GROSSKLOS, Attaché d'Administration

- **Financial Sector Supervisory Commission**

Jean-François HEIN, Legal Affairs Department

- **Insurance Commission**

Michèle OSWEILER, Legal Affairs Department

- **National Institute of Public Administration**

Romain KIEFFER, chargé de direction

- **Luxembourg Development Cooperation Agency**

Robert DE WAHA, Deputy Director General, Executive Committee member

- **Institute of Company Auditors**

Pierre KRIER, President

Michel GUAY

Private sector

Private companies

- **Banque ING Direct**

Patrick CHILLET, head of ING Luxembourg, Vice-Chair of the Professional Obligations Commission

- **Shroders Investment Management**

Marco ZWICK, Compliance and Risk Director, Schroders Investment Management (Luxembourg),

- **Arcelor-Mittal**

Christophe JUNG, Compliance Officer and General Counsel, Arcelor-Mittal

- **Luxembourg Bank Training Institute**

Werner ECKES, Director

- **Lux-Development**

Business associations

- **Federation of Luxembourg Industry**

Magalie LYSIAK, advisor

- **Association of Luxembourg Banks and Bankers**

Rüdiger JUNG, Executive Committee member

Catherine BOURIN, Legal Affairs Department

Patrick CHILLET, head of ING Luxembourg, Vice-Chair of the Professional Obligations Commission

- **Luxembourg Association of Insurance Companies**

Paul HAMMELMANN, Administrateur délégué

Paul DE COOMAN, President

- **Luxembourg Association of Investment Funds**

Marco ZWICK, Compliance and Risk Director, Schrodgers Investment Management (Luxembourg),

- **Luxembourg Association of Financial Sector Compliance Officers**

Vincent SALZINGER, Vice-Chairman, Compliance Officer KBL

Patrick SCHOTT, Board member

Academics and legal profession

- **Bar Association**

Guy HARLES, Vice-Chair

- **Luxembourg Bar**

Rosario GRASSO, attorney at law

- **Luxembourg University**

Stefan BRAUM, Professor of Law

Accounting and audit professions

- **CA ICE S.A.**

- **PWC Luxembourg**

Pierre KRIER, audit partner, PWC Luxembourg
Roxane HAAS, PWC

- **Audit & Compliance**

Cyril LAMORLETTE, partner

Civil society

NGOs

- **Association pour la Promotion de la Transparence (*Transparency International*)**

Yann BADEN, attorney at law
Serge MARX, attorney at law

- **The Institute for Global Financial Intergity (TIGFI)**

Michel MAQUIL, CEO of the Luxembourg Stock Exchange

- **Ecology movement**

Blanche WEBER, President

Media

- **Letzebuerger Land newspaper**

Anne HENNIQUI

ANNEX 4: ABBREVIATIONS, TERMS AND ACRONYMS

ABBL	Association des Banques et Banquiers du Luxembourg <i>Association of Luxembourg Banks and Bankers</i>
ACA	Association des Compagnies d'Assurance <i>Association of Insurance Companies</i>
ACD	Administration des Contributions Directes <i>Income Tax Administration</i>
ADA	Administration des Douanes et Accises <i>Customs and Excise Administration</i>
AED	Administration de l'Enregistrement et des Domaines <i>Registration and Property Administration</i>
ALCO	Association Luxembourgeoise des « Compliance-Officers » <i>Luxembourg Association of Compliance Officers</i>
APPT	Association pour la Promotion de la Transparence <i>Association for the Promotion of Transparency</i>
CAA	Commissariat aux Assurances <i>Insurance Commission</i>
CCSS	Centre Commun de la Sécurité Sociale <i>Common Social Security Centre</i>
CIC	Code d'Instruction Criminelle <i>Code of Criminal Procedure</i>
COPILAB	Comité de pilotage anti-blanchiment <i>Anti-Money Laundering Steering Committee</i>
COPRECO	Comité de Prévention de la corruption <i>Corruption Prevention Committee</i>
CNPD	Commission Nationale pour la Protection des Données <i>National Data Protection Commission</i>

CNPF	Caisse Nationale des Prestations Familiales <i>National Family Benefits Fund</i>
CP	Code Pénal <i>Penal Code</i>
CRI	Commissions Rogatoires Internationales <i>International Rogatory Commissions</i>
CRF	Cellule de Renseignements Financiers <i>Financial Intelligence Unit (FIU)</i>
CSSF	Commission de Surveillance du Secteur Financier <i>Financial Sector Supervisory Commission</i>
DOS	Déclaration d'Opérations Suspectes <i>Suspicious Transaction Report (SRT)</i>
ECOFIN	Section Économique et Financière du Service de police Judiciaire <i>Economic and Financial Division, Criminal Police</i>
FCPA	Foreign Corrupt Practices Act
FEDIL	Fédération des Industriels du Luxembourg <i>Federation of Luxembourg Industry</i>
FMI	Fonds Monétaire International <i>International Monetary Fund (IMF)</i>
GAFI	Groupe d'Action Financière <i>Financial Action Task Force (FATF)</i>
GRECO	Groupe d'États contre la corruption <i>Group of States against Corruption</i>
IACI	Institut des Auditeurs-Conseils Internes <i>Institute of Internal Auditors</i>
IDE	Investissement Direct Étranger <i>Foreign Direct Investment (FDI)</i>
IFAC	International Federation of Accountants
IFBL	Institut de formation bancaire du Luxembourg <i>Luxembourg Bank Training Institute</i>
IGSS	Inspection Générale de la Sécurité Sociale <i>Social Security General Inspectorate</i>
INAP	Institut National de l'Administration Publique <i>National Institute of Public Administration</i>

INDR	Institut National pour le Développement durable et la Responsabilité sociale des entreprises <i>National Institute for Sustainable Development and Corporate Social Responsibility</i>
IRE	Institut des Réviseurs d'Entreprise <i>Institute of Company Auditors</i>
ISA	International Standards of Auditing
LCB/FT	Lutte contre le Blanchiment d'Argent et le Financement du Terrorisme <i>Fight against money laundering and terrorist financing</i>
MCM	Ministère des Classes Moyennes <i>Ministry of the Middle Classes</i>
OEC	Ordre des Experts Comptables <i>Association of certified accountants</i>
PNB	Produit National Brut <i>Gross national product (GNP)</i>
RSE	Responsabilité Sociale des Entreprises <i>Corporate Social Responsibility (CSR)</i>
SPJ	Service de Police Judiciaire <i>Criminal Police</i>
STATEC	Service Central de la Statistique et des Études Économiques <i>Central Department of Statistics and Economic Research</i>

ANNEX 5: LEGAL TEXTS

Sections 1 to 5 of the report

Penal Code

BOOK I

Chapter II. – Penalties applicable to natural persons

Article 31. (Act of 1 August 2007) Specific confiscation applies:

- 1) to property including property of all kinds, tangible or intangible, movable or real, and legal deeds or documents attesting to title or a right to property, property forming the object or the proceeds, direct or indirect, of an offence or constituting a property-related benefit from the offence, including the income from such property;
- 2) property used or intended to be used to commit the offence, when the convicted person has title to it;
- 3) it substituted for that referred to at 1) of this paragraph, including the income from substituted property;
- 4) property to which the convicted person has title and whose monetary value corresponds to that of the property referred to at 1) of this paragraph, if it cannot be found for the purposes of confiscation.

[...]

Chapter II-1. – Penalties applicable to legal persons (Act of 3 March 2010)

Article 34. (Act of 3 March 2010) When a felony (*crime*) or misdemeanour (*délit*) is committed in the name of and in the interest of a legal person by one of its legal bodies or by one or more of its de jure or de facto managers, that legal person may be held criminally liable and may incur the penalties provided for by Articles 35 to 38.

The criminal liability of legal persons does not exclude that of natural persons who are perpetrators or accomplices of the same offence.

The foregoing provisions do not apply to the State or to municipalities.

Article 35. (Act of 3 March 2010) The penalties for felonies or misdemeanours committed by legal persons are:

- 1) a fine, under the terms and conditions set forth at Article 36;
- 2) specific confiscation;
- 3) disqualification from public procurement procedures;
- 4) dissolution, under the terms and conditions set forth at Article 38.

Article 36. (Act of 3 March 2010) The fine for a felony or misdemeanour applicable to legal persons shall be at least 500 euros.

For a felony, the maximum amount of the fine applicable to legal persons shall be 750,000 euros.

For a misdemeanour, the maximum amount of the fine applicable to legal persons shall be equal to double the amount applicable to natural persons under the law punishing the offence.

Where the law punishing the offence makes no provision for a fine on natural persons, the maximum amount of the fine applicable to legal persons may not be more than double the amount obtained by multiplying the maximum prison sentence provided for, expressed in days, by the amount taken into consideration for imprisonment for default.

Article 37. (Act of 3 March 2010) The maximum amount of the fine incurred pursuant to the provisions of Article 36 shall be quintupled when the legal person incurs criminal liability for one of the following offences:

– felonies and misdemeanours against the security of the State,

- acts of terrorism and terrorist financing,
- infringements of the laws relating to prohibited weapons in connection with a criminal conspiracy or organised crime,
- people trafficking and procuring,
- drug trafficking in connection with a criminal conspiracy or organised crime,
- money laundering and handling the proceeds of money laundering,
- extortion, illegal acquisition of interests, active and passive bribery, private bribery,
- aiding illegal entry and residence in connection with a criminal conspiracy or organised crime.

Article 38. (Act of 3 March 2010) Dissolution may be ordered where the legal entity has been deliberately created or, where the offence is a felony or misdemeanour for which the penalty for a natural person is deprivation of liberty for three years or more, diverted from its business purpose in order to commit the offence.

Chapter VIII. – Grounds for justification, non-liability, mitigation of liability and excuse.

Article 71-2. (Act of 8 August 2000) A person who has acted under duress or coercion which he was not able to resist shall not incur criminal liability.

(Act of 13 March 2009) A victim of the offences defined at Articles 382.1 and 382.2 who takes part in unlawful activities under duress shall not incur criminal liability.

BOOK II

TITLE IV. – Felonies and misdemeanours against public order committed by public officials in the performance of their duties or by ministers of religion in the exercise of their ministry.

Chapter 1 – Conspiracy of public officials

Bribery and trading in influence

Article 247. (Act of 13 February 2011) The fact of proposing or giving, without right, directly or indirectly, offers, promises, gifts, presents or advantages of any kind whatsoever to a person entrusted with, or agent of, public authority or a law enforcement officer or a person charged with a public service mission or holding elected office, for himself or for a third party, or offering or promising to do so, in order that such person:

1. performs or refrains from performing an act in accordance with his function, mission or office or facilitated by his function, mission or office, or
2. abuses his actual or presumed influence in order to obtain distinctions, employment, business or any other favourable decision from an authority or public administration,

shall be an offence punishable by imprisonment for five to ten years and a fine of 500 euros to 187.500 euros.

Article 248. (Act of 13 February 2011) Any person who solicits or receives, without right, directly or indirectly, offers, promises, gifts, presents or advantages of any kind, or who accepts the offer or promise thereof, for himself or for a third party, in order that such person abuses his actual or presumed influence to obtain distinctions, employment, business or any other favourable decision from an authority or public administration shall be liable to imprisonment from six months to five years and a fine of 500 euros to 125,000 euros.

Any person who proposes to or gives a person, without right, directly or indirectly, offers, promises, gifts, presents or advantages of any kind whatsoever, for himself or for a third party, or offers or proposes to do so, so that that person abuses his actual or presumed influence to obtain distinctions, employment, business or any other favourable decision from an authority or public administration shall be liable to the same penalties.

Article 249. (Act of 13 February 2011) Any law enforcement officer or any person charged with a public service mission or holding elected office who solicits or accepts offers, promises, gifts, presents or advantages of any kind, or who accepts the offer or promise thereof, without right, directly or indirectly, for himself or for a third party, for performing or refraining from performing an act in accordance with his function, mission or office or facilitated by his function, mission or office from any person who has benefited from performance or non-performance of such act shall be liable to imprisonment for five to ten years and a fine of 500 euros to 187,500 euros.

Any person who, under the conditions set forth in paragraph 1, proposes or gives offers, promises, gifts, presents or advantages of any kind to a law enforcement officer or any person charged with a public service mission or holding elected office, for himself or for a third party, or offers or proposes to do so, shall be liable to the same penalties.

Bribery of members of the judiciary

Article 250. (Act of 13 February 2011) Any member of the judiciary or any other person holding judicial office, or any arbitrator or expert appointed either by a court or by the parties, who solicits or accepts, without right, directly or indirectly, offers, promises, gifts, presents or advantages of any kind, for himself or for a third party, or who accepts the offer or promise thereof, for the performance or non-performance of an act in accordance with his function shall be liable to imprisonment for ten to fifteen years and a fine of 2,500 euros to 250,000 euros.

Any person who, under the conditions set forth in paragraph 1, proposes or gives offers, promises, gifts, presents or advantages of any kind to a member of the judiciary or any other person holding judicial office, or to an arbitrator or expert appointed either by a court or by the parties, for himself or for a third party, or who offers or promises to do so, shall be liable to the same penalties.

TITLE V- Felonies and misdemeanours committed against public order by private individuals

Chapter VIII- Offences relating to industry, trade and public auctions

Article 310. (Act of 13 February 2011) Any person who is a director or manager of a legal person or the agent or proxy of a legal or natural person and who solicits or agrees to accept, directly or through others, an offer, promise or advantage of any kind, for himself or for a third party, or accepts the offer or promise thereof, in order to perform or not perform an act in accordance with his function or facilitated by his function, without the knowledge and authorisation, as appropriate, of the board of directors or general meeting of the principal or employer shall be liable to imprisonment for one month to five years and a fine of 251 euros to 30,000 euros.

Article 310-1. (Act of 13 February 2011) Any person who proposes or gives, directly or through others, an offer, promise or advantage of any kind to a person who is a director or manager of a legal person or the agent or proxy of a legal or natural person, for himself or for a third party, or offers or promises to do so, in order that such person perform or not perform an act of his function or facilitated by his function, without the knowledge and authorisation, as appropriate, of the board of directors or general meeting of the principal or employer shall be liable to the same penalties.

Code of Criminal Procedure

Preliminary provisions

Article 5-1. (Act of 13 February 2011) Any Luxembourg citizen, any person who has his habitual residence in the Grand Duchy of Luxembourg and any foreigner found in the Grand Duchy of Luxembourg who has committed one of the offences provided for at Articles 112.1, 135.1 to 135.6, 135.9, 163, 169, 170, 177, 178, 185, 187.1, 192.1, 192.2, 198, 199, 199bis, 245 to 252, 310, 310.1, and 368 to 384 of the Penal Code in another country may be prosecuted and tried in the Grand Duchy even if the offence is not punished by the laws of the country where it was committed and the Luxembourg authority has not received a complaint from the offended party or the authority of the country where the offence was committed has not laid an information.

BOOK I

TITLE I – Authorities responsible for criminal proceedings and investigation

Chapter 2- Public prosecution service

Article 23. (Act of 16 June 1989) (1) The State Prosecutor shall receive all complaints and reports of infringements and decide what action to take.

(2) (Act of 13 February 2011) Any constituted authority, any public officer or official and any employee charged with a public service mission, whether engaged or appointed pursuant to provisions of public law or private law, who, in the performance of his duties, becomes aware of facts that may constitute a felony or misdemeanour, is required to promptly inform the State Prosecutor and transmit to him all information, records and deeds relating thereto, notwithstanding any rule of confidentiality or professional secrecy that may be applicable to him.

(3) (Act of 13 February 2011) Any constituted authority, any public officer or official and any employee charged with a public service mission, whether engaged or appointed pursuant to provisions of public law or private law, is required, on his own initiative, to promptly inform the State Prosecutor of Luxembourg district court if he knows, suspects or has good reason to suspect that money laundering or terrorist financing is taking place, has taken place or has been attempted, in particular on account of the person concerned, his history, the origin of his assets or the nature, purpose or methods of the transaction, and to promptly provide to the above-mentioned State Prosecutor all information, records and deeds relating thereto, notwithstanding any rule of confidentiality or professional secrecy that may be applicable to him.

(4) (Act of 6 October 2009) The State Prosecutor shall inform a victim who has made a complaint, within eighteen months of receiving the complaint, of the action he has taken in the case, including, where relevant, a decision to discontinue the case and the underlying reason for such decision.

(5) (Act of 6 October 2009) Where the case is discontinued, the notice shall state the conditions in which the victim may initiate proceedings by way of a private prosecution or claim for damages. Where the penalties incurred by law in respect of the facts that are the subject of the complaint are those that apply to felonies or misdemeanours, the notice shall include the information that the victim may apply to the State Prosecutor General, who is entitled to direct the State Prosecutor to initiate proceedings.

Chapter III. Preliminary investigation

Article 46. (Act of 6 October 2009) (1) The criminal police officers referred to in Article 13 shall conduct preliminary enquiries either on the instructions of the State Prosecutor or on their own authority, as long as a judicial investigation has not been opened.

(2) They shall inform identified injured parties of their right to seek damages and help by providing them with the information referred to at Article 30.1.

(3) Such operations shall be supervised by the State Prosecutor General.

Article 46.1. (Act of 6 October 2009) Where the State Prosecutor instructs criminal police officers to conduct a preliminary enquiry, he shall set the deadline by which the enquiry must be completed. He may extend the deadline in light of the reasons given by the officers conducting the enquiry.

Where criminal police officers conduct an enquiry on their own authority, without prejudice to Article 12, they shall regularly report on its progress to the State Prosecutor.

Article 47. (Act of 16 June 1989) (1) Premises or homes may not be searched and evidence may not be seized without the express consent of the person on whose premises or in whose home the operation takes place.

(2) Such consent must take the form of a written declaration in the hand of the person concerned; if he does not know how to write, that fact and his consent shall be noted in the report.

(3) The forms provided for at Article 33 shall apply.

Chapter VII - Surveillance

Article 48-13. (Act of 3 December 2009) (1) The State Prosecutor or investigation magistrate may decide to conduct surveillance provided that the enquiry or preparatory investigation so demands and the ordinary means of investigation prove inoperative on account of the nature of the offence and the specific circumstances of the case.

Chapter VIII – Undercover operations

Article 48-17. (Act of 3 December 2009) (1) If the enquiry or preparatory instruction so demands and the ordinary means of investigation prove inoperative on account of the nature of the offence and the specific circumstances of the case, the State Prosecutor or the investigating magistrate to whom the case has been referred may exceptionally

decide that an undercover operation be carried out, under their respective supervision, under the conditions set forth in this chapter for one or more of the offences listed below:

1. felonies or misdemeanours against the security of the State within the meaning of Articles 101 to 123 of the Penal Code,
2. acts of terrorism and of terrorist financing within the meaning of Articles 135.1 to 135.8 of the Penal Code,
3. infringements of the Act of 15 March 1983 as amended on arms and munitions in connection with a criminal conspiracy or organised crime,
4. people trafficking, procuring, prostitution and exploitation of human beings within the meaning of Articles 379 to 386 of the Penal Code,
5. homicide and deliberate assault in connection with a criminal conspiracy or organised crime within the meaning of Articles 392 to 417 of the Penal Code,
6. theft or extortion in connection with a criminal conspiracy or organised crime within the meaning of Articles 461 to 475 of the Penal Code,
7. infringements of the Act of 19 February 1973 as amended concerning the sale of medicinal substances and the fight against drug addiction in connection with a criminal conspiracy or organised crime,
8. money laundering and handling the proceeds of money laundering within the meaning of Articles 505 and 506.1 of the Penal Code
9. bribery and trading in influence within the meaning of Articles 246 to 252, 310 and 310.1 of the Penal Code,
10. aiding illegal entry and residence within the meaning of the Act of 29 August 2008 relating to the free movement of persons in connection with a criminal conspiracy or organised crime,
11. counterfeiting within the meaning of Articles 162 to 170 of the Penal Code,
12. abduction of minors within the meaning of Articles 368 to 371.1 of the Penal Code.

(2) An undercover operation may not be ordered with regard to an accused person after their first questioning by the investigating magistrate and any such operations ordered beforehand must cease, without prejudice to the provisions of Article 48.21.

(3) An undercover operation consists in observing persons with regard to whom there is serious evidence that they are committing one or more of the offences referred to in the previous paragraph, whereby the undercover operative passes himself off to such persons as, for example, a co-perpetrator, accomplice or handler of the proceeds of the offence.

(4) An undercover operation may be performed only by a criminal police officer or a foreign agent authorised by his national law to perform that type of measure, acting under the responsibility of a criminal police officer tasked with coordinating the operation. The criminal police officer or foreign agent is authorised to use a false identity for the purpose and, if necessary, to commit the acts mentioned in Article 48.19, paragraph 1. Such acts may not constitute an incitement to commit offences, otherwise they shall be void.

(5) The coordinating criminal police officer shall draw up a report of the undercover operation. The report shall include the information strictly necessary to find that the offences have been committed and shall not endanger the security of the undercover officer or requisitioned persons within the meaning of Article 48.19, paragraph 2.

TITLE III – INVESTIGATING COURTS

Chapter 1 – Investigating magistrate

Article 51-1. (1) (Act of 5 June 2009) In the context of a preparatory investigation, the competent investigating magistrate pursuant to Article 29 may also proceed in accordance with Article 48.24.

(2) (Act of 22 July 2008) Paragraph 1 shall apply without prejudice to the coercive powers available to the investigating magistrate in the context of a preparatory investigation.

Article 66-2. (Act of 27 October 2010) (1) If the preparatory investigation so demands and the ordinary means of investigation prove inoperative on account of the nature of the offence and the specific circumstances of the case, the investigating magistrate to whom the case has been referred may exceptionally, in connection with one or more of the offences listed below, order such credit institutions as he may designate to inform him if the accused holds, controls or has power of attorney for one or more accounts of any kind, or has held, controlled or had power of attorney for such an account for one or more of the offences listed below:

1. felonies or misdemeanours against the security of the State within the meaning of Articles 101 to 123 of the Penal Code,
2. acts of terrorism and of terrorist financing within the meaning of Articles 135.1 to 135.8 of the Penal Code,

3. infringements of the Act of 15 March 1983 as amended on arms and munitions in connection with a criminal conspiracy or organised crime,
 4. people trafficking, procuring, prostitution and exploitation of human beings within the meaning of Articles 379 to 386 of the Penal Code,
 5. homicide and deliberate assault in connection with a criminal conspiracy or organised crime within the meaning of Articles 392 to 417 of the Penal Code,
 6. theft or extortion in connection with a criminal conspiracy or organised crime within the meaning of Articles 461 to 475 of the Penal Code,
 7. infringements of the Act of 19 February 1973 as amended concerning the sale of medicinal substances and the fight against drug addiction in connection with a criminal conspiracy or organised crime,
 8. money laundering and handling the proceeds of money laundering within the meaning of Articles 505 and 506.1 of the Penal Code
 9. bribery and trading in influence within the meaning of Articles 246 to 252, 310 and 310.1 of the Penal Code,
 10. aiding illegal entry and residence within the meaning of the Act of 29 August 2008 relating to the free movement of persons in connection with a criminal conspiracy or organised crime,
 11. counterfeiting within the meaning of Articles 162 to 170 of the Penal Code,
 12. abduction of minors within the meaning of Articles 368 to 371.1 of the Penal Code.
- (2) If that is the case, the credit institution shall communicate the account number and the balance of the account and transmit to him the information relating to identification of the account, including in particular the documents for opening the account.
- (3) The decision shall be included in the file of the procedure after the procedure is complete.

Article 66-3. (Act of 27 October 2010) (1) If the preparatory investigation so demands and the ordinary means of investigation prove inoperative on account of the nature of the offence and the specific circumstances of the case, the investigating magistrate to whom the case has been referred may exceptionally, in connection with one or more of the offences listed below, order a credit institution to inform him for a specified period of any transaction that will be performed or is due to be performed on the account of the accused whom he shall specify:

1. felonies or misdemeanours against the security of the State within the meaning of Articles 101 to 123 of the Penal Code,
2. acts of terrorism and of terrorist financing within the meaning of Articles 135.1 to 135.8 of the Penal Code,
3. infringements of the Act of 15 March 1983 as amended on arms and munitions in connection with a criminal conspiracy or organised crime,
4. people trafficking, procuring, prostitution and exploitation of human beings within the meaning of Articles 379 to 386 of the Penal Code,
5. homicide and deliberate assault in connection with a criminal conspiracy or organised crime within the meaning of Articles 392 to 417 of the Penal Code,
6. theft or extortion in connection with a criminal conspiracy or organised crime within the meaning of Articles 461 to 475 of the Penal Code,
7. infringements of the Act of 19 February 1973 as amended concerning the sale of medicinal substances and the fight against drug addiction in connection with a criminal conspiracy or organised crime,
8. money laundering and handling the proceeds of money laundering within the meaning of Articles 505 and 506.1 of the Penal Code
9. bribery and trading in influence within the meaning of Articles 246 to 252, 310 and 310.1 of the Penal Code,
10. aiding illegal entry and residence within the meaning of the Act of 29 August 2008 relating to the free movement of persons in connection with a criminal conspiracy or organised crime,
11. counterfeiting within the meaning of Articles 162 to 170 of the Penal Code,
12. abduction of minors within the meaning of Articles 368 to 371.1 of the Penal Code.

(2) The measure shall be ordered for a duration stated in the order. It shall cease automatically one month from the date of the order. However, it may be extended for a month at a time, the total duration not exceeding three months.

(3) The decision shall be included in the file of the procedure after the procedure is complete.

Article 66-4. (Act of 27 October 2010) Where such a measure will help to reveal the truth, an investigating magistrate may order a credit institution to provide him with information or documents concerning accounts or transactions performed during a specified period on one or more accounts that he shall specify.

Article 66-5. (Act of 27 October 2010) (1) Notice of the order provided for at Articles 66.2, 66.3 and 66.4 shall be served on the credit institution concerned by a law enforcement officer, by registered letter with acknowledgment of receipt, by fax or by e-mail.

(2) The credit institution on which notice of the order has been served shall communicate the information or documents requested to the investigating magistrate by e-mail within the time limit stated in the order. The investigating magistrate shall acknowledge receipt by e-mail.

(3) Refusal to assist with the execution of orders on the grounds of Articles 66.2 and 66.3 shall be punishable by a fine of 1,250 to 125,000 euros.

Section 6 of the report (Money laundering)

Penal Code

Article 506-1. (Act of 12 August 2003) The following shall be liable to imprisonment for one to five years and a fine of 1,250 euros to 1,250,000 euros or only one of those penalties:

1) (Act of 27 October 2010) persons who have knowingly facilitated by any means false justification of the nature, origin, location, disposal, movement or ownership of the property referred to at Article 32.1, paragraph 1 (1) that is the object or the proceeds, direct or indirect,

- (Act of 27 October 2010) of an infringement of Articles 112.1, 135.1 to 135.6 and 135.9 of the Penal Code;

- of felonies or misdemeanours in the context of or in connection with a conspiracy within the meaning of Articles 322 to 324ter of the Penal Code;

- (Act of 13 March 2009) of an infringement of Articles 368 to 370, 379, 379bis, 382.1 and 382.2 of the Penal Code;

- (Act of 12 November 2004) of an infringement of Articles 496.1 to 496.4 of the Penal Code,

- of a bribery offence;

[...]

Section 7 of the report (Accounting standards, external audit and corporate compliance and ethics programmes)

Act of 18 December 2009 on the audit profession

Article 24. Professional obligations

Company auditors, licensed company auditors, audit firms and licensed audit firms are subject to the following professional obligations as defined by the Act of 12 November 2004 as amended relating to the fight against money laundering and terrorist financing:

– know-the-customer obligations pursuant to Articles 3, 3.1, 3.2 and 3.3 of the above-mentioned Act;

– appropriate internal organisation obligations pursuant to Article 4 of the above-mentioned Act; and

– obligations to cooperate with the authorities pursuant to Article 5 of the above-mentioned Act.

Article 27. Auditing standards

Statutory audits shall be performed in accordance with international auditing standards as adopted by the European Commission.

The CSSF may also issue standards relating to statutory audits in areas not covered by the auditing standards referred to in the previous paragraph.

Article 73. Transparency report

The licensed company auditors and audit firms of public interest entities shall publish on their website, within three months of the end of each accounting period, an annual transparency report containing at least the following information:

a) a description of their legal structure and ownership;

b) where a licensed audit firm belongs to a network, a description of the network and the legal and structural arrangements of the network;

c) a description of the governance structure of the licensed audit firm;

d) a description of the internal quality control system and a statement by the administrative or management on the effectiveness of its functioning;

e) the date of the last quality assurance audit referred to at Article 59;

- f) a list of public interest entities for which the licensed company auditor or audit firm has conducted a statutory audit during the elapsed financial year;
- g) a statement concerning the licensed audit firm's independence procedures, confirming that an internal review of independence practices has been conducted;
- h) a statement on the licensed audit firm's policy concerning continuous training as mentioned at Article 9;
- i) financial information showing the size of the licensed audit firm, such as total sales with a breakdown according to fees received for statutory audits of company and consolidated financial statements and fees received for other insurance services, tax advice services and any other non-audit services;
- j) information about the basis for the remuneration of partners.

The transparency report shall be signed by a licensed company auditor or the licensed audit firm, as the case may be. For a licensed audit firm, the transparency report shall be signed by a licensed company auditor who is a member of the licensed audit firm.

Article 75. Independence

(1) In addition to the provisions set forth at Articles 18, 19 and 20, licensed company auditors and licensed audit firm of public interest entities shall:

- a) confirm their independence in relation to the audited public interest entity to the audit committee each year in writing;
- b) inform the audit committee each year of additional services provided to the audited entity; and
- c) examine with the audit committee the risks to their independence and safeguard measures taken to mitigate such risks, recorded by them in accordance with Article 19.3 of this law.

(2) The senior partner(s) tasked with conducting a statutory audit shall be replaced in their statutory audit mission at the latest seven years as of the date of their appointment and shall not be authorised to participate in the audit of the audited entity until expiry of a period of at least two years.

Act of 5 April 1993 relating to the financial sector

Article 37-1. Organisational requirements.

(Act of 13 July 2007)

(1) Credit institutions and investment firms must put in place appropriate policies and procedures to ensure that they, the persons responsible for their management, their employees and their tied agents comply with the obligations established by the laws and regulations applicable to them.

Credit institutions and investment firms must also define appropriate rules applicable to personal transactions carried out by persons responsible for their management, their employees and their tied agents.

(2) Credit institutions and investment firms must maintain and apply effective organisational and administrative measures, with a view to taking all reasonable steps to prevent the conflicts of interest referred to in Article 37.2 from damaging the interests of their clients.

(3) Credit institutions and investment firms must take reasonable steps to guarantee the continuous and regular provision of their services and the performance of their activities. To this end, they must put in place appropriate and proportionate systems, resources and procedures.

(4) Credit institutions and investment firms must have a sound administrative and accounting organisation, an appropriate internal control system, effective procedures for assessing risk, and control and security mechanisms for their information systems.

(5) Where they rely on a third party for the execution of operational functions that are critical for the continuous and satisfactory provision of services to clients or for the continuous and satisfactory performance of activities, credit institutions and investment firms must take reasonable steps to avoid an undue increase in operational risk. The outsourcing of important operational functions must not be done in such a way that it significantly damages the quality of the credit institutions' and investment firms' internal control, or in such a way that it prevents the CSSF from verifying that credit institutions and investment firms comply with their obligations under this law.

(6) Credit institutions and investment firms must ensure that they keep a record, in accordance with the time limits stipulated in the Commercial Code, of any service they have provided and any transaction they have carried out which is sufficient to allow the CSSF to verify that they comply with their obligations under this law and, in particular, their obligations to their clients or potential clients.

(7) Where they hold financial instruments for clients, credit institutions and investment firms must take appropriate measures to protect the ownership rights of such clients, particularly in the event of the credit institution's or

investment firm's insolvency, and to prevent the use of clients' financial instruments for own account other than with the client's express consent.

(8) Where they hold funds belonging to clients, credit institutions and investment firms must take appropriate measures to protect the rights of such clients and, except in the case of credit institutions, to prevent the use of clients' funds for own account.

(9) The measures taken for the enforcement of this article shall be set forth in a Grand Ducal Regulation.

Section 8 of the report (Tax measures against bribery)

Act of 4 December 1967 concerning income tax

Article 12. Without prejudice to the provisions relating to special expenses, the expenses listed below may not be deducted from either the different categories of net income or from the total of net income:

1. expenses incurred in the interest of the taxpayer's household and for the maintenance of family members. Such expenses include lifestyle expenses resulting from the taxpayer's economic or social position, even where they are incurred with a view to benefiting his profession or business or may do so;

2. gifts, donations, subsidies. The same applies to allowances which, being neither operating expenses nor business expenses, are paid to persons who, if they were in need, would be entitled, under the provisions of the Civil Code, to claim maintenance from the taxpayer, even where such allowances are liable to enforcement;

3. the income tax of natural persons, wealth tax, succession duties and foreign personal taxes, without prejudice to the provision set forth at Article 13 below;

4. criminal or administrative fines, confiscations, settlements and other penalties of any sort imposed upon the taxpayer for non-compliance with provisions of the laws or regulations, even where such penalties have an economic link with one or more categories of net income;

5. advantages of any kind whatsoever and the expenses relating thereto granted with a view to obtaining a pecuniary or other advantage by

– any person entrusted with or agent of public authority or any law enforcement officer or any person charged with a public service mission or holding elected office, either in the Grand Duchy of Luxembourg or in another State;

– Community officials and members of the Commission of the European Communities, the European Parliament, the Court of Justice and the Court of Auditors of the European Communities, in full respect of the relevant provisions of the treaties instituting the European Communities, the Protocol on the Privileges and Immunities of the European Communities, the Statutes of the Court of Justice, and the implementing regulations thereof, with regard to the withdrawal of immunities;

– officials or agents of another public international organisation.

Act of 19 December 2008 relating to inter-agency and judicial cooperation

Article 1. The *Administration des Contributions Directes* (Income Tax Administration) and the *Administration de l'Enregistrement et des Domaines* (Registration and Properties Administration) shall exchange information such as to enable them to correctly assess and collect the taxes, duties, excise and licence fees they are responsible for collecting, with the help of automated processes or not. Automated processes shall be performed by means of data interconnection and under guarantee of secure, limited and controlled access. The conditions, criteria and methods of exchange shall be determined by Grand Ducal regulation.

Article 2. The Income Tax Administration and the Registration and Properties Administration may carry out simultaneous or joint on-site inspections of the tax situation of taxpayers or persons liable to tax, according to each administration's own procedures.

Article 3. With a view to assessing and collecting the taxes, duties, excise and licence fees they are responsible for collecting, any information, document, record or deed discovered or obtained by the Income Tax Administration or the Registration and Properties Administration may be cited by the other administration to which it has been transmitted.

Article 4. The *Administration des Douanes et Accises* (Customs and Excise Administration) and the Registration and Properties Administration shall exchange information such as to enable them to correctly assess and collect import and export duty, excise duty, road vehicle tax and value added tax, with the help of automated processes or not.

Automated processes shall be performed by means of data interconnection or consultation via direct access to personal data files, under guarantee of secure, limited and controlled access. The conditions, criteria and methods of exchange shall be determined by Grand Ducal regulation.

Article 5. The Customs and Excise Administration and the Registration and Properties Administration may carry out simultaneous or joint on-site inspections of the tax situation of one or more taxpayers, economic operators or persons liable to tax, according to each administration's own procedures.

Article 16. (1) The Income Tax Administration and the Registration and Properties Administration shall transmit to the judicial authorities upon request any information that may be useful in the context of criminal proceedings brought in relation to a felony or misdemeanour.

(2) Where the Income Tax Administration or the Registration and Properties Administration becomes aware of a felony or misdemeanour in the exercise of its powers and duties, it shall promptly inform the State Prosecutor of the fact and transmit to that magistrate all information, report, records and documents relating thereto.

Section 10 of the report (Raising public awareness and the reporting of transnational bribery)

BOOK 1 – INDIVIDUAL AND COLLECTIVE LABOUR RELATIONS

Labour Code

Title III – The employment contract

Article L. 124-12.

(1) Where the employment tribunal considers that the right to terminate a permanent employment contract has been used improperly, it shall order the employer to pay the employee damages, having regard to the harm suffered by him as a result of such termination.

(2) When ruling on the damages awarded to an employee who has been unfairly dismissed, the employment tribunal may, at the employee's request submitted during the proceedings or when it deems that the conditions for continuation or resumption of the employment relationship are met, recommend that the employer agree to reinstate the employee in compensation for his unfair dismissal.

Effective reinstatement of the employee with his rights of seniority shall release the employer from the burden of the damages it has been ordered to pay him in compensation for his unfair dismissal.

An employer who does not wish to agree to reinstate an employee who has been unfairly dismissed as recommended by the employment tribunal may be ordered, at the employee's request, to supplement the damages referred to in paragraph (1) with the payment of compensation corresponding to one month's salary.

(3) Where the employment tribunal finds the termination to have been deficient in form due to the infringement of a formality that it deems material, it must examine the substance of the dispute and, if it deems the termination not to have been unfair in substance, order the employer to pay the employee an amount in compensation that may not exceed one month's salary.

The compensation referred to in the preceding paragraph may not be awarded where the employment tribunal deems the termination to have been unfair in substance.

(4) In the cases of avoidance of termination provided for by law, the employment tribunal must order the employee to be kept on in the enterprise if he so requests. In such cases, the provisions of Articles 20599 to 20666 of the Civil Code shall apply.

The provisions of Article L. 124-11 apply to judicial action for avoidance.

Title VII – Protection of employees in connection with the fight against bribery, trading in influence and illegal acquisition of interests

Article L. 271-1.

(1) Reprisals may not be taken against an employee who protests against or refuses an act that he considers in good faith to constitute illegal acquisition of interests, bribery or trading in influence within the meaning of Articles 245 to

252, 310 and 310.1 of the Penal Code, whether such act be the work of his employer or any other line manager, work colleague or outside person having links with the employer.

(2) Likewise, reprisals may not be taken against an employee who has reported such an act to a line manager or to the competent authorities or who has given evidence thereof.

(3) Any contractual stipulation or any act contrary to paragraphs 1 and 2, and in particular any termination of the employment contract in breach of these provisions shall be automatically void.

(4) In the event of termination of the employment contract, the employee may, within fifteen days following notice of such termination, on an application to the president of the employment tribunal ruling in expedited procedure, the parties having been heard or duly summoned to a hearing, ask him to find the termination of the employment contract to be void and to order the employee to be kept on or, as appropriate, reinstated pursuant to the provisions of Article L. 124-12, paragraph 4.

(5) The order of the president of the employment tribunal is provisionally enforceable; it may be appealed by submitting an application, within forty days following notice via the court registry, to the judge who presides the division of the Appeal Court which has jurisdiction for appeals in matters relating to labour law. He shall rule in expedited procedure, the parties having been heard or duly summoned to a hearing.

(6) The summons via the court registry provided for at paragraphs 4 and 5 shall contain the information set forth at Article 80 of the New Code of Civil Procedure, otherwise it shall be void.

(7) An employee who has not invoked avoidance of his termination and asked to be kept on or, as appropriate, reinstated in accordance with paragraph 4 of this article may seek damages through the courts in compensation for wrongful termination of the employment contract on the basis of Articles L. 124-11 and L. 124-12.

Code of Criminal Procedure

Preliminary provisions

Article 3-1. (Act of 13 February 2011) Any association of national importance that has legal personality and has been approved by the Ministry of Justice may exercise the rights granted to the civil party with regard to acts that constitute an offence within the meaning of Articles 245 to 252, 310, 310.1, 375, 382.1, 382.2, 401*bis* and 409 of the Penal Code or Articles 444(2), 453, 454, 455, 456, 457, 457.1, 457.2, 457.3 and 457.4 of the Penal Code and cause direct or indirect harm to the collective interests it is their purpose to defend, even if it does not establish a material or moral interest and even if the collective interest for which it acts fully overlaps with the social interest whose defence is ensured by the public prosecution service.

In the case of an offence within the meaning of Articles 444(2), 453, 454, 455, 456, 457, 457.1, 457.2, 457.3 and 457.4 of the Penal Code committed against persons taken individually or an offence within the meaning of Articles 245 to 252, 310, 310.1, 375, 382.1, 382.2, 401*bis* and 409 of the Penal Code, the association may exercise the rights granted to the civil party in principal proceedings only on condition that such persons expressly state in writing that they do not oppose such action.

Section 11 of the report (Public benefits)

Act of 25 June 2009 on public procurement

Article 13. (1) A Grand Ducal regulation shall stipulate the terms and conditions for the application of penalty clauses and the imposition of coercive fines by the contracting authority on a successful bidder who does not comply with the terms and conditions of the public procurement contract he is responsible for executing.

The specifications for a given contract must state the penalties that may be imposed.

They must be appropriate to the nature and size of the contract. The fine may not exceed twenty per cent of the total amount of the bid.

(2) The specifications may provide for early completion bonuses for public procurement contracts.

(3) If an economic operator commits one of the irregularities listed in paragraph 4 of this article, the contracting authority may impose on him the following sanctions, which may be cumulative:

– temporary disqualification from public procurement procedures organised by the contracting authority for a period that may not exceed two years,

– termination against the successful bidder of the contract in connection with which the irregularity was committed.

(4) The following are irregularities within the meaning of paragraph 3 above:

a) breach of the terms of the contract or failure to comply with the deadlines set;

- b) serious negligence in performance of the contract;
 - c) lack of commercial integrity.
- (5) Disqualification and termination may take place only after service of notice clearly stating the contracting authority's intentions. The economic operator must be allowed at least eight days in which to submit his written observations.
- (6) The disqualification decision and the termination decision must be substantiated; the Tendering Commission must be consulted beforehand.
- (7) Disputes arising from decisions relating to disqualification shall be heard by the Administrative Court, ruling on the merits.
- (8) Disqualification decisions and termination decisions shall be notified to the economic operator concerned, the public services involved and the Tendering Commission.

Grand Ducal Regulation of 3 August 2009 implementing the Act of 25 June 2009 on public procurement

Article 222. Any tenderer or bidder that the contracting authority knows to have been finally convicted of one or more of the following offences shall be disqualified from public procurement procedures:

- a) an infringement of Articles 322 to 324ter of the Penal Code relating to participation in organised crime,
- b) an infringement of Articles 246 to 249 of the Penal Code relating bribery;
- c) an infringement of Articles 496.1 to 496.4 of the Penal Code relating to fraud and deceit;
- d) an infringement of Article 506.1 of the Penal Code relating to money laundering or Article 8.1 of the Act of 19 February 1973 as amended concerning the sale of medicinal substances.

With a view to enforcing this article, contracting authorities shall, as appropriate, ask tenderers or bidders to provide the documents referred to in Article 224 and may, where they have doubts about the personal situation of such tenderers or bidders, apply to the competent authorities to obtain such information about the personal situation of such tenderers or bidders as they deem necessary. Where such information concerns a tenderer or bidder established in another State, the contracting authority may ask the competent authorities to cooperate. According to the national law of the Member State of the European Community in which the tenderers or bidders are established, such requests shall relate to legal persons or natural persons, including, as appropriate, chief executives or any person having power of representation, decision or control with regard to the tenderer or bidder.