

LUXEMBOURG

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal issues

Luxembourg signed the Convention on 17 December 1997. The Convention was approved and implemented through a single piece of legislation, the "Law of 15 January 2001 approving the Convention of the Organisation for Economic Co-operation and Development on Combating Bribery of Foreign Public Officials in International Business Transactions and relating to misappropriation, destruction of documents and securities, dishonest receipt of money by a public officer, unlawful taking of interests and bribery and amending other legal provisions"¹. The Parliament adopted the bill on 14 December 2000, and the Grand-Duc "sanctioned and promulgated" the Law on 15 January 2001. The Law came into force on 11 February 2001. Luxembourg deposited its ratification instrument with the OECD on 21 March 2001. The Convention will come into force sixty days after Luxembourg this date.

The law seeks partly to update and strengthen the laws against corruption, which had remained unchanged since promulgation of the Criminal Code and which contained obvious shortcomings. It also seems to bring Luxembourg criminal law into line with the standards of public international law that apply in such matters².

The Law of 15 January 2001 amends the Criminal Code, the Code of Criminal Procedure and the Act of 4 December 1967 on income tax. Specifically, in order to meet the requirements of the OECD Convention a new Article 252 has been inserted into the Criminal Code, which makes the laws against corruption in the widest sense applicable to public officials and agents of other States, of the European Communities and of international organisations.

To a large extent, the legislation draws on the new criminal code in France, since the Luxembourg authorities felt that this approach would give courts and lawyers in Luxembourg the advantage of being able to draw on French legal theory and case law. On some points, however, it was deemed preferable to conserve aspects of the current (Belgian) legislation. In other areas, entirely new texts were proposed³ where there was no existing reference text but which received legislative enactment.

The Convention and the Luxembourg legal system

The Luxembourg authorities state that Luxembourg recognises the principle whereby international law prevails over national law although the Convention is not directly applicable in national law. They also point out that the explanatory report of an international convention does not have statutory force. The Commentaries will help those who have the task of implementing the Convention to understand its precise scope. The Luxembourg authorities thus explained that in case of uncertainties concerning the

¹ When the bill was being drafted, the Government also took into consideration the Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests, signed on 27 September 1996. The Law has been published in the *Mémorial* of 7 February 2001, page 698 (official journal of the Grand Duchy of Luxembourg).

² These provisions are therefore liable to further amendment, necessitated by transposition of the Council of Europe and European Union conventions on the fight against corruption.

³ Government explanatory note to the bill, 22 January 1998.

interpretation of the terminology used in the legislation, the Luxembourg courts will refer to the Convention, and in case of uncertainties concerning the interpretation of the Convention, the courts will refer to the explanatory commentaries. As well, in case of contradiction between the terminology used in the legislation and the one of the Convention, the latter prevails.

1. ARTICLE 1 – THE OFFENCE OF BRIBERY OF FOREIGN PUBLIC OFFICIALS

Luxembourg has opted to extend certain provisions of the Criminal Code to foreign public officials (Article 252). These provisions concern passive bribery and trading in influence (Article 246), active bribery and trading in influence (Article 247), active and passive trading in influence by a private individual (Article 248), passive and active bribery ex post (Article 249), passive and active bribery of the judiciary (Article 250) and intimidation of persons exercising a public function (Article 251). The offences provided for in Articles 247, 249 paragraph 2 and 250 paragraph 2 correspond more particularly to the requirements of Article 1 of the Convention. Bribery is now a crime, rather than a simple offence⁴.

Art. 247.– 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, in order that such person:

1. performs or refrains from performing an act in accordance with his function, mission or office or facilitated by its 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 a public authority or administration,

shall be an offence punishable by imprisonment for five to ten years and a fine of LUF 20 000 to 7 500 000.

Art. 249.– 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 who solicits or accepts, without right, directly or indirectly, for himself or for another person, offers, promises, gifts, presents or advantages of any kind whatsoever for having performed 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 whatsoever 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 LUF 20 000 to 7 500 000.

Any person whatsoever who, under the conditions set forth in paragraph 1, gives in to the solicitations of 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, or proposes to him offers, promises, gifts, presents or advantages of any kind whatsoever for himself or for another person, shall be liable to the same penalties.

Art. 250.– 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 whatsoever, for himself or for a third party, for performing or refraining from performing an act in accordance with his function, shall be liable to imprisonment for ten to fifteen years and a fine of LUF 100 000 to 10 000 000.

Any person whatsoever who gives in to the solicitations of a person referred to in the preceding paragraph or proposes to him offers, promises, gifts, presents or advantages of any kind whatsoever for himself or for another person, in order that such person performs or refrains from performing an act in accordance with his function, shall be liable to the same penalties.

Art. 252.– 1. The provisions of Articles 246 to 251 of the present Code also apply to offences involving:
- persons entrusted with or agent of public authority or law enforcement officers or persons holding elected office or charged with a public service mission in another State;

⁴ Translation Note: Three categories of offences exist in Luxembourg criminal law according to the seriousness of the offence: minor offences, simple offences and crimes. There are different legal consequences pertaining to each category.

- 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.
2. The term "Community official" used in the previous paragraph shall mean:
- any person who is an official or other contracted employee within the meaning of the Staff Regulations of officials of the European Communities or the Conditions of Employment of other servants of the European Communities;
 - any person seconded to the European Communities by the Member States or by any public or private body who carries out functions equivalent to those performed by European Community officials or other servants.
- Members of bodies set-up in accordance with the Treaties establishing the European Communities and the staff of such bodies shall be treated in the same way as Community officials inasmuch as the Staff Regulations of officials of the European Communities or the Conditions of Employment of other servants of the European Communities do not apply to them.

1.1 Elements of the offence

The elements of the offence set out in Article 1 of the Convention are covered as follows:

1.1.1 Any person

There is no immunity specific for corruption cases, but in penal law there are several general categories of immunity. The Grand-Duc is immune from all prosecution and sanctions, the penal laws not being applicable to him. Members of Parliament enjoy temporary immunity for the duration of parliamentary sessions with the exception of gross violations or if permitted by the Chamber of Deputies.

Special rules apply to certain persons on account of their functions and status - members of the government, members of the judiciary and law enforcement officers. However, they are essentially procedural rules, which do not allow the individuals concerned to escape prosecution or sanctions.

1.1.2 Intentionally

According to the Luxembourg authorities, bribery is an intentional offence. General intent is an essential condition of any offence, meaning that the perpetrator freely and consciously commits the offence, unless there is a formal provision to the contrary in the Code or unless it is contradicted by the nature of the offence⁵. However, *dolus eventualis* through wilful blindness, negligence or recklessness do not apply in cases of bribery.

1.1.3 To offer, promise or give

Terminology

Under Article 247, it is an offence to propose or give (...) offers, promises, gifts, presents or advantages of any kind whatsoever. Articles 249 (bribery ex post) and 250 (bribing members of the judiciary)

⁵ However, this condition is formally expressed in legislation only in exceptional cases, when it is thought necessary to draw the court's attention to the condition in order to forestall erroneous application of the law; in other cases it is taken as read in the definition of the law and hence also in the judgement of the court which establishes the offence in the terms of the legal definition. Cass. 20 January 1893, P. 3, 20.f

cover any person who gives in to the solicitations of a public official or proposes to him offers, etc. commits an offence. Three terms are used.

Luxembourg law now provides that the act of proposing a bribe constitutes a completed offence. Luxembourg law uses the concept of a "corruption pact", meaning that the briber and the public official share a common intent⁶. Hitherto, however, neither offence was complete until the pact had been concluded, since the Code referred to "those who have bribed" a public official. Consequently, if steps to conclude such a "pact" were unsuccessful, the only offence would be one of attempted bribery.

This has been modified by the new law. While the new provisions of the Criminal Code still refer to a corruption pact, new Articles 247, 249 and 250 now make it an offence to propose offers to a public official with a view to concluding a corruption pact, even if the proposal is rejected or if the public official was not aware of it. The elements that used to constitute attempted bribery now constitute the completed offence of active bribery.

As regards use of the word "give" in Article 247, the government explained that it seemed appropriate in order to comply with the wording of Article 1, paragraph 1 of the Convention, which reads "to offer, promise or give any undue (...) advantage". However, although the term was included in Article 247, it is not mentioned in Articles 249 and 250. The Luxembourg authorities explained however that the case where the briber pays a bribe without a prior offer or solicitation is covered, as the act of paying a bribe is assumed to be encompassed in the offer.

According to the Luxembourg authorities, the term 'give' corresponds, by analogy, to the term "give in to the solicitations" used in the definition of the offences of bribery (ex post) and bribing members of the judiciary (Articles 249 and 250). In this case, an individual gives in to a person entrusted with public authority who solicits offers (...) of any kind whatsoever with a view to performing or refraining from performing an act within the meaning of the law. Although previously covered by legal theory and case law, this case was not formally reflected in legislation; it is now mentioned expressly.

The Luxembourg authorities explain that this different terminology is meant to take account of whether the offence has been initiated by the briber or the public official.

The new offence of bribery (ex post)

Luxembourg law makes a distinction between two offences according to whether a bribe is offered before or after the foreign public official has performed or refrained from performing the act, i.e., according to whether the corruption pact is prior or subsequent to the acts of the person receiving the bribe.

Hitherto, a bribery offence required the prior existence of a corruption pact: under Luxembourg criminal law, the corruption pact had to be concluded before the receiver performed or refrained from performing the act to which the pact relates. Such a prior pact is extremely difficult to prove, however, and the opposite situation, in which the beneficiary rewarded a public official for performing or not performing an act ex post, did not constitute an offence. However, such a situation would be aberrant, especially if the value of the reward is significant or if the public official violated his duties in the hope of reward, and was strongly criticised by legal theorists and practising lawyers alike. Article 249

⁶ Both proposing and receiving a bribe presuppose "an unlawful agreement, definite and certain", a "pact freely granted". "The law sought to cover an unlawful contract with regard to exercise of a public office, namely subordination of an act in accordance with the office to an advantage offered or promised by an individual and accepted or received by the official. The fraudulent pact is essential to the abuse of office." Citations, respectively, from RIGAUX et TROUSSE, *Les Crimes et Délits du Code Pénal*, Tome IV, Bruxelles, Bruylant, 1963, p. 279; *Répertoire Pratique du Droit Belge*, Bruxelles, Bruylant, 1950, Tome VI, V° Forfaiture, No 2 et 3; RIGAUX et TROUSSE, *op. cit.*, p. 290.

closes the loophole, by creating the offence of bribery ex post: the act or omission on the part of the public official precedes the conclusion of the corruption pact⁷. Bribery ex post establishes the link between the person who performs or refrains from performing the act and the beneficiary. The beneficiary may be the direct recipient of the act (for example, a person to whom an authorisation is granted) or a third party (for example, a business rival of a person from whom an authorisation is denied).

Thus, whether or not there is a prior corruption pact (Article 247 or 249), corruption is sanctioned.

1.1.4 Any undue pecuniary or other advantage

Any pecuniary or other advantage

Articles 247, 249 and 250 refer to offers, promises, gifts, presents or advantages of any kind whatsoever, taking up the same terms that are used in French law.

Previously, the law referred to "offers", "promises", "gifts" and "presents" as the consideration of the corruption pact. The new Law of 15 January 2001 adds "any advantages whatsoever" to this list, reflecting the Luxembourg authorities' wish to include among the things offered in addition to money and material objects, any other advantage whatsoever, whether material, intellectual or social, for the offender or for any other person. The term covers approaches of all kinds, recommendations, favourable interventions, votes, sexual relations, etc.⁸.

Undue advantage

The new articles of the Criminal Code relating to bribery do not include the term "undue" contained in the OECD Convention. The result, according to the Luxembourg authorities, is to make so-called "facilitation" payments an offence under Luxembourg law. The Luxembourg authorities considered that including the word "undue" in its domestic legislation would mean that facilitation payments or petty gifts were tolerated. Instead of fighting bribery more effectively, the law would in fact be looking on it more indulgently, since it would accept that certain practices, though harmful, would no longer fall within the scope of the law. Luxembourg considers that this would be a step backward in the fight against bribery and how it is perceived. In the opinion of the *Conseil d'Etat*, "it would be inconsistent to tolerate facilitation payments while at the same time criminalising other payments because they involved larger sums of money"⁹.

On the other hand, Articles 246, 249 paragraph 1 and 250 paragraph 1 relating to passive bribery and Article 247 relating to "classic" active bribery contain the words "without right". According to the Luxembourg authorities, "these terms exclude from the scope of the relevant texts any salary, wage, remuneration, indemnity or advantage legally due, hence formally provided for by statute. In contrast, advantages that do not meet this criterion are not excluded, even if they were tolerated or even accepted by an immediate superior. It is unacceptable, and entirely incompatible with the probity and integrity of public service, for a public official to accept or solicit an advantage in correlation with performance of an act of public service in the absence of any statute entitling him to do so, even with the consent of an immediate superior." The Luxembourg authorities indicate that their legislation thus complies with the requirements of Commentaries 4 and 7.

These terms are not included in Articles 249 paragraph 2 and 250 paragraph 2. However, as Article 249 paragraph 2 refers explicitly to the "conditions set forth in paragraph 1", it may be assumed that

⁷ Commentaries on articles of the bill, document N° 4400 of 22 January 1998. However, if a payment is made after performance or non-performance of the act in execution of a prior promise, the offence is one of "classic" bribery (JCL Pénal, Art.432-11, by André VITU, 11, 1993, No 95).

⁸ JCL Pénal, op. cit., No 89-90

⁹ However, it is clear that the gift has to be offered with the intention to bribe for it to be sanctioned.

the "without right" condition is covered. Article 250 paragraph 2 makes no such reference. However, the Luxembourg authorities consider that while the reference to paragraph 1 is not explicit, it is implicit, and that the element "without right" is covered by article 250 paragraph 2.

1.1.5 Whether directly or through intermediaries

Bribery through intermediaries is explicitly covered in cases of active bribery (Article 247) by inclusion of the words "directly or indirectly". However, that is not the case for the offences of active bribery ex post (Article 249 paragraph 2) or active bribery of members of the judiciary (Article 250), which could pose problems of interpretation.

However, the Government explanatory note explains clearly that this element, which had not been expressly mentioned hitherto, was recognised both in legal theory and in case law. Consequently, its inclusion renders explicit what had previously been implicit and jurisprudential. Whether the words "directly or indirectly" are mentioned or not, bribery through intermediaries is covered in practice. In addition, the Luxembourg authorities indicate that it is not necessary for the intermediary to be close to the official or person offering the bribe, or for the official or the person offering the bribe to be aware of the intermediary's role. Lastly, the Luxembourg authorities indicate that an intermediary is liable to punishment as an accomplice.

1.1.6 To a foreign public official

Under the terms of Article 1 paragraph 4 of the Convention, a "foreign public official means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation".

New Article 252 extends the provisions relating to bribery to three categories of persons: public officials of other States, Community officials, and the officials or agents of other public international organisations.

Persons entrusted with, or agents of, public authority or law enforcement officers or persons holding elected office or charged with a public service mission in another State

National and foreign public officials are defined in identical terms (Articles 247 and 252). The new Luxembourg law takes up the terms used in French law – "persons entrusted with a public authority, charged with a public service or holding an elected office" – with some modifications. The previous law referred to "any public official or officer, any person charged with a public service"¹⁰.

- *Persons entrusted with, or agents of, public authority or law enforcement officers*: French legal theory defines a person entrusted with public authority as "a person who holds a power of decision and coercion over individuals and things which he manifests in the exercise of permanent or temporary duties and which is vested in him by delegation from the public authorities"¹¹. This broad concept includes representatives of the State and communes (ministers, secretaries of State, members of Cabinet, mayors and councillors), public officials (except for members of the judiciary, expressly covered by new Article 250), public officers (notaries, justice of the peace) and all other persons exercising functions of authority (such as,

¹⁰ According to the Luxembourg authorities, the terms used (applicable to both natural persons and legal entities), while not profoundly changing the scope in relation to the legislation previously in force, have the advantage of greater clarity.

¹¹ Government explanatory note to the bill; ref. to JCL Pénal, Art. 432-11, (11.1993) by André Vitu, n° 55

for example, returning officers and tellers at polling stations)¹². A president of the Republic or a sovereign may be classed as a public official and members of the armed forces are regarded as law enforcement officers.

The words “agents of” and “law enforcement officers” have been added to the French terminology in order to clearly encompass both the concept of someone acting on behalf of the public authority and someone carrying out law enforcement.

- *Persons holding elected office*: this category is a sub-group of the preceding group¹³. Its inclusion, which was not therefore logically necessary, shows that the authors of the Law wanted to make the law perfectly clear and comprehensible on this point. The provision refers to members of parliament and municipal councillors. The terms would also apply to the presidents and elected members of professional corporations. Persons who hold legislative office without having been elected fall into the category, not of persons "holding elected office" but of "persons entrusted with public authority", given the nature of their functions.

- *Persons charged with a public service mission*: a person, public or private, charged with a public service mission is one who "without having received a power of decision or coercion deriving from the exercise of public authority, is charged with performing acts or exercising a function whose purpose is to satisfy a general interest"^{14, 15}.

- *Members of the judiciary or any other person holding judicial office, or any arbitrator or expert appointed either by a court or by the parties*: Although these terms of Article 250 are not repeated in Article 252, it begins with the words "The provisions of Articles 246 to 251 of the present Code also apply to offences involving [foreign public officials]". As the penalties for bribing a member of the judiciary are more severe, this distinction probably also has to be made where a foreigner is concerned. Concerning the persons encompassed by this category, there is no distinction between judges and prosecutors (which hitherto had not been governed by these special rules)¹⁶, between those attached to civil and criminal courts or to administrative jurisdictions, or to ordinary or special courts. The expression "any other person holding judicial office" refers, for example, to associate judges, employers' and employees' representatives on employment tribunals, or members of the armed forces sitting in military courts.

The Luxembourg authorities have specified that in order to determine whether or not the person concerned is a foreign public official, the courts should refer to the Luxembourg definitions of public authority, law enforcement and public service mission and not to the definitions in use in the foreign public official's own country. As the new text is based on French law, the courts may also refer to

¹² Government explanatory note to the bill; ref. to JCL Pénal, Art. 432-11, (11.1993) by André Vitu, n° 57-69

¹³ Government explanatory note to the bill; ref. to JCL Pénal, Art. 432-11, (11.1993) by André Vitu, n°55

¹⁴ op. cit., loc. cit., No 55

¹⁵ This category includes in particular: administrators in bankruptcy and court-appointed liquidators of commercial companies; members of "officially instituted commissions charged with giving opinions to the public authorities or taking decisions themselves about applications, projects or plans that require official authorisation" (op. cit., loc. cit., No 71), such as members of the advisory commission on immigration, the Interministerial Committee for Regional Development, the Tender Commission, etc.; agents of agencies "which are not public administrations within the meaning of the term in administrative law, but bodies that enjoy a greater or lesser degree of managerial autonomy, existing within the different legal entities of the State ... or of communes" (op. cit., loc. cit., No 72): examples of this very varied category include the Centre Hospitalier de Luxembourg, the decredere office, the national land consolidation office, the viti-vinicultural institute, etc.

¹⁶ NOVELLES, Droit pénal, Tome III, Bruxelles, Larcier, 1972, No 4254

French case law. The Luxembourg authorities also clarify that the participation of the State in an enterprise operating on a normal commercial basis in a market does not automatically render the law on corruption and trading in influence applicable, unless the person concerned is a State representative who has the status of a State official or public agent. The Luxembourg authorities added that in case of difficulties of interpretation, the courts would refer to the Convention and its commentaries.

The Luxembourg authorities also specify that persons not officially performing public functions, such as political party officials in one-party States, are covered if they exercise a de facto power of decision or coercion delegated by the public authorities. The decisive factor is not the status or capacity of the person concerned but the function they perform, which must be of a public nature. In contrast, a bribery offence is not committed where advantages are promised or granted to a person in anticipation of his appointment as a public official or to a person who falsely presents himself as performing such a function, though they may fall within the more general scope of trading in influence.

Lastly, "another State", according to the Luxembourg authorities, is any sovereign State other than Luxembourg. This notion seems to be more restrictive than the one of "foreign country" used in the Convention. The Luxembourg authorities explained however that if some difficulties of interpretation on this provision would appear concerning non sovereign territories, the Luxembourg courts would interpret this notion according to the Convention and commentary 18 which defines a foreign country¹⁷.

European Community officials

Article 252 paragraph 2 states that "the term "Community official" used in the previous paragraph means:

- any person who is an official or other contracted employee within the meaning of the Staff Regulations of officials of the European Communities or the Conditions of Employment of other servants of the European Communities;
- any person seconded to the European Communities by the Member States or by any public or private body who carries out functions equivalent to those performed by European Community officials or other servants.

Members of bodies set-up in accordance with the Treaties establishing the European Communities and the staff of such bodies shall be treated in the same way as Community officials inasmuch as the Staff Regulations of officials of the European Communities or the Conditions of Employment of other servants of the European Communities do not apply to them."

This definition is the one contained in the Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests, signed on 27 September 1996.

Officials or agents of another public international organisation

The Luxembourg law specifies public international organisations in order to exclude private international organisations from its scope¹⁸. However, it is not necessary for Luxembourg to be a member of the organisation concerned. The Luxembourg authorities specify that the status of official or agent is determined in accordance with the statute of the international organisation and with the function exercised by the official or agent.

¹⁷ Commentary 18: "Foreign country" is not limited to states, but includes any organised foreign area or entity, such as an autonomous territory or a separate customs territory.

¹⁸ Conseil d'Etat, opinion of 15 February 2000.

1.1.7 For that official or for a third party

A bribery offence is committed whether the briber offers the public official advantages “for himself or for a third party”. In other words, the offence is committed even if the recipient of the advantages proposed or given is not the person to whom the bribe is addressed. This therefore covers the situation where the advantage does not benefit the public official directly but a third party, such as a political party. In addition, the Luxembourg authorities have specified that no link needs to be proved between the public official and the third party, and that it is immaterial whether the advantage has been provided directly to the third party or through the public official¹⁹.

The Luxembourg authorities state that a beneficiary third party may be punished either for complicity (insofar as he has performed acts which facilitated the preparation or commission of the offence), or for knowingly receiving an object or thing obtained by means of an offence.

1.1.8 In order that the official act or refrain from acting in relation to the performance of official duties

The Luxembourg legislation covers both aspects – acting or refraining from acting – of the possible involvement of a foreign public official.

More specifically, it refers to acts in accordance with a public official's function, mission or office (Articles 247, 249 and 250) or facilitated by his function, mission or office (Articles 247 and 249), thus taking up the terms used in French law. Under the Luxembourg legislation, trading in influence by a public official is also an offence (Article 247, 2°).

The term "an act in accordance with his function, mission or office" means "an act that the official is required by statute or regulation to perform or to refrain from performing". This concept encompasses acts included in the express attributions of the holder of the function or position, and more generally all those that the discipline of the function requires, even if that discipline results not from statute but merely from a sort of unformulated, albeit certain, code of ethics or practice. It is immaterial whether the public or elected official has the power on his own to perform the act he has agreed to undertake; what matters is that he has disposed of his share in a collective power for valuable consideration. Likewise, it is immaterial that the public official does not have the power himself to perform the act in question, if paving the way for its performance by prior acts falls within his attributions²⁰.

As the law makes no distinction between acts for which the official has discretionary power and those for which he does not, both situations are covered.

More specifically, the function of persons holding public office is to issue opinions in assembly, to deliberate and to vote. Their function is also to prepare the deliberations of such assemblies by means of reports. An act in accordance with the office is thus one which relates to these activities and must be distinguished from approaches and interventions facilitated by an elected official's influence with regard to public authorities. In order for a bribery offence to be constituted, the act concerned must be in accordance with the office; approaches and interventions come within the scope of trading in influence²¹.

An act "facilitated by his function, mission or office" is any act which, while not arising directly from his prerogatives expressly granted by statute or regulation, is nonetheless derived from those duties.

¹⁹ This additional nuance seems to be entirely consistent with the law as it was and is not therefore really new. The previous law did not state that the advantage had to benefit the public official directly and personally. Nevertheless, it seemed appropriate to draft the legislation in its present form with a view to clarity and legal certainty and in order to forestall any future discussion of its scope.

²⁰ JCL Pénal, op. cit., No 97 to 105

²¹ JCL Pénal, op. cit., No 103

This is the case, for example, if a junior public official takes advantage of his situation to consult files to which he does not normally have access and cashes in on the information obtained thereby²².

Article 250 relating to bribing members of the judiciary makes no provision for acts facilitated by the office. The Luxembourg authorities consider that, as the more stringent provisions of Article 250 cover specific functions, it does not apply to acts facilitated by the office, for which members of the judiciary are liable to the same penalties as any other public official under the terms of Article 247.

According to the Luxembourg authorities, the Luxembourg courts should refer to the rules governing the attributions of the foreign public official in order to establish that the act is either a part of his function or facilitated by it. However, this requirement will not hamper criminal proceedings since, by virtue of the principle of the admissibility of evidence in criminal law, the court is entirely unfettered in its assessment of the evidence brought before it in order to establish whether the prerequisites for the offence are met. The court will therefore determine, in the light of the evidence, whether the act is part of the function or facilitated by it, without being required to refer strictly to the laws and regulations establishing the foreign public official's duties; the court may also refer to the ethical principles of the public service.

Trading in influence: the Law of 15 January 2001 proposes the introduction into Luxembourg criminal law of the offence of trading in influence. The relevant texts are taken from France's new criminal code. Trading in influence is distinguished from bribery by the objective pursued, namely that the public official "abuses his actual or presumed influence in order to obtain distinctions, employment, business or any other favourable decision from a public authority or administration" (Article 247, 2°).

Unlike bribery, the public official acts not within but outside the framework of his functions. He uses or, more precisely, abuses the credit he possesses (or is believed to possess) as a result of his position in the administration, and also as a result of his friendships with other persons, or the relationships he has formed with officials in other public services. In other words, the offender trades not his function but his status. The influence he claims to have may be "actual or presumed"²³.

The prohibited favours are obtaining "distinctions, employment, business or any other favourable decision from a public authority or administration". The authorities or administrations concerned may be legislative, administrative or judicial²⁴.

An offence is committed, although incurring lesser penalties, if a private individual concludes a "pact" of this type with another private individual with a view to abusing his influence for the same ends, or if the latter gives in to the former's solicitations or proposes a "pact" to him²⁵.

1.1.9 In order to obtain or retain business or other improper advantage in the conduct of international business

Luxembourg's legislative provisions on bribery do not mention the purpose or the sphere of activity of bribery specifically. According to the Luxembourg authorities, whatever the objective sought, including to obtain or retain business or other improper advantage, is covered by the legislation. The offence of bribery of a foreign public official is not restricted to obtaining advantages in international business, since the nature of the activity has no bearing on whether or not the facts constitute an offence.

²² JCL Pénal, op. cit., No 115 et 107

²³ JCL Pénal, Art. 432-11, No 119 à 121.

²⁴ JCL Pénal, op. cit., No 129

²⁵ An example of this case would be if "an individual (A) were to offer consideration to a private person (B) who is friendly with a member of the judiciary (C) so that B intervenes with C in order to have a report of an offence dropped" (JCL Pénal, Art. 433-1 et 43-2, No 28).

1.2 Complicity

Article 1.2 of the Convention requires the Parties to take the necessary measures to establish complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official as a criminal offence.

Article 66 of the Criminal Code states that "the following shall be punished as the perpetrators of a criminal offence: (i) persons who commit an offence or cooperate directly in committing it; (ii) persons who in any way whatsoever aid or abet those committing an offence if it could not have been committed without their assistance; (iii) persons who, through gifts, promises, threats, abuse of authority or power, plots or deception, directly cause an offence; (iv) persons who, either through speeches in meetings or in public places, or through posters, or through writings, whether printed or not, that are sold or distributed, directly cause an offence to be committed, without prejudice to the last two provisions of Article 1 of the Act of 20 July 1869".

Article 67 of the Criminal Code states that "the following shall be punished as accomplices of a criminal offence: (i) persons who give instructions to commit an offence; (ii) persons who procure weapons, tools or any other means used to commit the offence, knowing that they were intended to be used for that purpose; (iii) persons who, except in the cases provided for in Article 66.3, knowingly aid or abet the perpetrator or perpetrators in preparing, facilitating or committing the offence".

According to the Luxembourg authorities, these provisions should cover incitement and authorisation.

Co-perpetrators incur the same penalty as perpetrators (Article 66), while accomplices incur the penalty immediately below the one they would have incurred if they had been perpetrators (Article 69), namely imprisonment for at least three months²⁶ in the case of bribery or bribery ex post and for 5 to 10 years in the case of bribing a member of the judiciary. Moreover, the Luxembourg authorities specify that it is not necessary that the offence be committed for the complicity to be punished.

1.3 Attempt and conspiracy

Article 1.2 of the Convention requires each Party to take measures necessary to establish attempt and conspiracy to bribe a foreign public official as criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

Attempt

In Luxembourg law, "attempt is an offence when the intent to commit a crime or offence is demonstrated by outward acts that constitute a first step towards committing the crime or the offence and were suspended or proved ineffective only by circumstances beyond the perpetrator's control" (Article 51 of the Criminal Code). Consequently, if the individual voluntarily withdraws his proposal before the public official has accepted or refused it, he has voluntarily desisted and has not committed the offence²⁷.

As bribery is a crime, attempted bribery is automatically an offence (this is not the case for an offence). As attempt incurs the penalty immediately below the one for the crime itself²⁸, the penalty

²⁶ In all events, imprisonment for a lesser indictable offence is 5 years at most (Article 15 of the Criminal Code).

²⁷ RIGAUX et TROUSSE, op. cit., p. 312

²⁸ Article 52 of the Criminal Code

for attempted bribery is imprisonment for at least three months²⁹ in the case of "classic" bribery or bribery ex post and for 5 to 10 years in the case of bribing a member of the judiciary.

Conspiracy

Conspiracy, within the meaning of Anglo-Saxon law, is not punishable under Luxembourg law³⁰. Conspiracy, in the sense of pertaining to a criminal association or to organised crime³¹, is punishable. These offences would be considered as *de facto* aggravating circumstances when pronouncing a sentence for corruption.

2. RESPONSIBILITY OF LEGAL PERSONS

Under Article 2 of the Convention, each Party is required to take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

2.1. Criminal liability of legal persons

At present, the Luxembourg legal system does not recognise the criminal liability of legal persons. As criminal liability is personal, under current Luxembourg law, a sentence may be imposed only on the natural person who perpetrates the offence, not on a legal person.

If a criminal offence is committed within the framework of a legal person, the corollary to the adage "*societas delinquere non potest*" is that the natural persons who by their actions have individually substituted themselves for the commercial company should be regarded as the perpetrators of the offence. These natural persons are liable not as the company's managing body but as individuals who have committed the unlawful act. The courts therefore have to establish the identity of the natural person by whose fault the fictitious person of the company infringed the criminal law.

In an opinion of 15 February 2000, the *Conseil d'Etat* found that the text of the bill failed to provide for penalties in accordance with the requirements of Article 3 paragraphs 2 and 4 of the Convention. It therefore stated that "the Convention is thereby not correctly transposed into our domestic law".

The Luxembourg authorities stated that a Justice Ministry working group has been set up to prepare a reform which would introduce the principle of criminal liability of legal persons. The Luxembourg authorities specified that a bill should be presented to Parliament at the end of this year.

2.2. Non-criminal liability of legal persons

According to the Luxembourg authorities, an indirect sanction exists since commercial companies which carry on activities contrary to the criminal law may be dissolved and liquidated. However, the *Conseil d'Etat* said that, "while it is true that under the terms of Article 203 of the Act of 15 August 1915 on commercial companies as amended the *Tribunal d'Arrondissement* (district court) may order the dissolution and liquidation of any company which carries on activities contrary to the criminal law, this provision is nonetheless by no means a measure that may be regarded as fully transposing the Convention. Article 18 of the Act of 21 April 1928 on non-profit associations and foundations as amended may contain a similar provision, but the way in which action may be taken against other legal persons, such as public establishments or other associations, does not seem to be given.

²⁹ In all events, imprisonment for a lesser indictable offence is 5 years at most (Article 15 of the Criminal Code).

³⁰ The term "conspiracy" is used in the Luxembourg penal law in the specific context of plots against the Grand-Duc, the Royal family, and the Government. (Articles 101 and following of the Criminal Code).

³¹ Articles 322 and 324bis of the penal code.

Furthermore, the sanction of dissolving the legal person concerned may be regarded as inappropriate and disproportionate to the offence committed."

Concluding that Luxembourg law should be supplemented, the *Conseil d'Etat* made proposals with regard to both introducing the criminal liability of legal persons into Luxembourg law and the various sanctions that could be envisaged for the bribery of foreign public officials.

Luxembourg law does not therefore comply with Articles 2 and 3 of the Convention with regard to legal persons.

3. SANCTIONS

The Convention requires the Parties to establish "effective, proportionate and dissuasive criminal penalties" comparable to the penalties applicable to the bribery of their own public officials. The Convention also requires, in the case of natural persons, that criminal penalties include "deprivation of liberty sufficient to enable effective mutual legal assistance and extradition". In any event, the Convention requires each Party to take such measures as may be necessary to ensure 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 seizure and confiscation or that provision is made for monetary sanctions "of comparable effect". Lastly, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

In Luxembourg, the same penalties apply to the bribery of foreign public officials as to the bribery of domestic public officials (Article 252).

3.1 Criminal penalties for bribery of a domestic or foreign public official

3.2

Luxembourg law does not provide for criminal sanctions that would apply to legal persons in the event of bribery of foreign public officials.

As regard natural persons, Articles 247 and 249 provide for imprisonment for five to ten years and a fine of LUF 20 000 to 7 500 000. The law makes a distinction between public officials, whether domestic or foreign, who perform judicial functions and other public officials. The penalties are increased to imprisonment for ten to fifteen years and a fine of LUF 100 000 to 10 000 000 if the offence involves "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"³².

The determination of the sanction within these limits is left to the discretion of the court, and there are no criteria or guidelines other than Article 28 of the Criminal Code which states that the amount of the fine is determined taking into account the circumstances of the offence and the assets and liabilities of the accused. The *Cour de Cassation* does not control the choice, between these limits, of the level of the sanction applied, and the lower court is not obliged to explain its decision. However, in practice, the court takes into account various factors, including the seriousness of the damage, the repetition and organisation of the offence, the criminal record of the perpetrator, etc..

The criminal courts are authorised to apply lesser penalties than those provided for the offence in law if they consider that there are mitigating circumstances³³. Consequently, the court may reduce a penalty of imprisonment for five to ten years to imprisonment for three months at least³⁴, and the

³² 100 Luxembourg francs are equivalent to 2.47894 euros (2.36 US dollars on 12 January 2001), representing a fine under Articles 247 and 249 of 496 to 185 920 euros.

³³ Articles 73 to 79 of the Criminal Code

³⁴ Article 74 of the Criminal Code as amended. In all events, imprisonment for a lesser indictable offence is 5 years at most (Article 15 of the Criminal Code).

minimum fine is decreased to 10,001 francs. In addition, the court can also decide to pronounce only one of the sanctions of imprisonment or fine³⁵. In this case, the nature of the offence changes: a crime becomes an offence, and decriminalisation has legal consequences. The penal code does not foresee any list of possible mitigating circumstances, their application being left to the discretion of the court. These can be, *inter alia*, the low gravity of the offence, the absence of a criminal record of the accused person, the repentance and collaboration with the authorities, indeed even the “constraint” exercised by the public official. The Luxembourg authorities indicate that these possibilities, which are not specific to corruption offences, should not be applied to cases of active corruption of foreign public officials foreseen by the Convention, but rather to cases of “small corruption”, for example small facilitation payments.

Regardless of the offence (including bribery offences) probationary measures, such as a suspended or conditional sentence, may be accorded³⁶.

3.3 Penalties and mutual legal assistance

The penalties entailing deprivation of liberty are sufficient to permit effective mutual assistance.

Under the terms of Article 5 of the Act of 8 August 2000 on international mutual legal assistance in criminal matters, one of the conditions that the request for assistance must meet is that "the fact on which the request is based must be such as to constitute a criminal offence incurring a penalty of imprisonment for a maximum period of at least one year under Luxembourg law and the law of the State submitting the request".

3.4 Penalties and extradition

According to the Luxembourg authorities, pursuant to Article 2 of the European Convention on Extradition of 13 December 1957, persons committing offences punishable by deprivation of liberty for a maximum period of at least one year or by a more severe penalty may be extradited. This provision would cover the penalties provided for by the Luxembourg law.

3.5. Non-criminal penalties applicable to legal persons in the event of bribery of foreign public officials

Luxembourg law does not provide for non-criminal penalties applicable to legal persons in the event of bribery of foreign public officials, other than the dissolution of the legal person.

3.6 Seizure and confiscation of the bribe and its proceeds

Seizure

According to the Luxembourg authorities, instruments as well as proceeds of bribery are covered by the provisions on seizure³⁷. The prosecutor can seize all things and other assets which have been produced by the offence or which have been acquired through the proceeds of the offence.

Confiscation

Article 31 of the Criminal Code states that "special confiscation applies to: items that are the object of the offence; items that were used or intended to be used to commit the offence, when they belong to the convicted person; proceeds from the offence or items acquired with the help of the proceeds from the offence". The same Article adds that "the confiscation judgement shall order, should it not be

³⁵ Article 20 of the Criminal Code.

³⁶ Articles 619 and following of the Code of Criminal Procedure

³⁷ Articles 66 and following of the Code of Criminal Procedure

possible to enforce confiscation, a fine that may not exceed the value of the confiscated item. Such fine shall constitute a penalty." Thus, the confiscation of assets belonging to a third party or a legal person is possible only concerning the proceeds, and not the bribe.

Article 32 states that "special confiscation shall always be ordered for a crime", which is the case for bribery. It may be ordered for a simple offence.

The Luxembourg authorities indicate that there are plans to amend Article 31 of the Criminal Code by generalising the possibility of ordering confiscation of equal value.

International co-operation regarding seizure and confiscation

For the purpose of international co-operation regarding seizure and confiscation, Luxembourg signed on 28 September 1992 the Council of Europe Convention of 8 November 1990 on money-laundering, search, seizure and confiscation of the proceeds from crime³⁸.

3.8 Additional civil, administrative and criminal sanctions

Article 10 of the Criminal Code provides for disqualification: persons sentenced to imprisonment for more than 5 years, which would normally be the case for bribery, are mandatorily deprived of public titles, grades, functions, positions and offices.

Persons sentenced to imprisonment for five to ten years may lose all or some of the following rights, for life or for ten to twenty years: the right to (i) occupy public functions, positions or offices; (ii) vote, be elected or stand for election; (iii) wear decorations; (iv) be an expert, witness or certifier of official instruments; (v) give evidence, except mere information; (vi) be a member of a family council or occupy any function in arrangements for the protection of legally incompetent adults or minors (...); (vii) bear or possess arms; (viii) hold school or teach or be employed in an educational establishment (Articles 11 and 12 of the Criminal Code).

Moreover there exist indirect administrative sanctions for corruption, which entails a lack of trustworthiness prejudicial to certain economic activities. Thus, judicial authorities can intervene with the competent authorities in order to revoke a licence or permit in cases where there has been a criminal conviction (example revoking a commercial establishment authorisation, exclusion from participating in public procurements³⁹, etc.). The Luxembourg authorities add that if the natural person convicted is a director of a legal person, this revocation of authorisation could affect the legal person.

4. ART. 4 - JURISDICTION

Article 4 of the Convention requires each Party to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part on its territory, whether or not a national of the said Party is involved. The Convention also requires States which have jurisdiction to prosecute their nationals for offences committed abroad to take such measures as may be necessary to establish their jurisdiction to do so in respect of the bribery of a public official according to the same principles. The Commentaries state that the territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

³⁸ Luxembourg also approved, by the law of 17 March 1992, the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

³⁹ Article 23 paragraph 1 of the Grand Ducal regulation of 27 January 1994 implementing of EEC directives relating to works, supplies and services in Luxembourg law.

4.1 Territorial jurisdiction

Article 7ter of the Code of Criminal Procedure states that "when an act characterising an essential element of an offence has been performed in the Grand Duchy of Luxembourg, the offence shall be deemed to have been committed on the territory of the Grand Duchy of Luxembourg". It is sufficient for an act characterising an essential element of an offence to have been performed in Luxembourg; it is not therefore necessary for an essential element of the offence itself to have been performed on Luxembourg territory⁴⁰. The example was given of a case of fraud where the act took place abroad and where the victims were also located abroad and the funds were deposited in a Luxembourg bank. As well, the Luxembourg authorities indicate that the transit of a bribe through a Luxembourg banking account is sufficient to establish territorial jurisdiction. Finally, the Luxembourg authorities indicate that complicity that takes place in Luxembourg for facts committed abroad is enough to establish jurisdiction. According to the universality principle, the location of the offence is independent of the place where the offence was completed or the place where the effects were realised.

4.2 Nationality jurisdiction

Pursuant to Article 5 of the Code of Criminal Procedure, "any Luxembourg national who has committed outside the territory of the Grand Duchy a crime in Luxembourg law may be prosecuted and tried in the Grand Duchy". Otherwise, offences referred to in Article 5 are prosecuted "only if the accused is found in the Grand Duchy or if the government obtains his extradition" (Article 5, last paragraph).

Dual criminal liability is not required in case of crimes (Article 5 paragraph 1). However, this condition is required for a simple offence, and hence applies to cases where bribery is decriminalised on account of mitigating circumstances (Article 5 paragraph 2)⁴¹.

The Luxembourg authorities state that the filing of a complaint or a denunciation is not a precondition for prosecution of the briber. On the other hand, a denunciation by another State does not affect the principle of discretionary prosecution.

4.3 Consultation procedures

Article 4 of the Convention states that when more than one Party has jurisdiction over an alleged offence involving bribery of foreign public officials, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

Article 42 of the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters provides for the option of providing information with a view to prosecution if the judicial authorities of one party deem it appropriate for the judicial authorities of another Party to engage proceedings.

The same possibility is found at Article 21 of the 1959 European Convention on Mutual Legal Assistance, ratified by Luxembourg.

Moreover, consultations and eventual transfers of a case to another State with which Luxembourg does not have a treaty relationship may be envisaged under condition of reciprocity. However, such a demand has so far not occurred.

⁴⁰ Conseil d'Etat, opinion of 15.02.00

⁴¹ Dual criminality means that the acts have to be punished by the law of the country where they took place, even if under a different criminal statute.

4.4 Effective jurisdiction

The Luxembourg authorities consider that, unless practical problems arise, the basis of Luxembourg's territorial and nationality jurisdiction is effective in the fight against bribery of foreign public officials.

5. ART. 5 – ENFORCEMENT

Article 5 of the Convention states that investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. It also states that each Party must guarantee that investigations and prosecutions "shall not be influenced by consideration of national economic interests, the potential effect upon relations with another State or the identity of the natural or legal persons involved".

5.1 Rules and principles applying to investigation and prosecution

Investigations and prosecutions in cases of bribery of a foreign public official are carried out according to the general rules contained in the Code of Criminal Procedure and the Criminal Code.

Consequently, pursuant to the principle of discretionary prosecution, the State Prosecutor's office has sole authority to decide what action to take when an offence is reported⁴². However, the Luxembourg authorities specify that implementation of the principle of prosecutorial discretion necessarily entails an evaluation of the disturbance to public order caused by the facts at issue, taking into account their seriousness, as measured in particular by the amount of the bribe.

The State Prosecutor does whatever is necessary to investigate and prosecute criminal offences, or ensures that it is done. It is thus for the State Prosecutor alone, to the exclusion of all other members of the judiciary or even his immediate superiors, to decide to take no further action⁴³. The Prosecutor has to justify its decision to take no further action, and can revoke his decision, in particular if new elements are communicated to him.

While only the prosecutor can decide not to take further action, criminal proceedings can be initiated by an injured party on the basis of a complaint, and by the State Prosecutor General or the Minister of Justice via the former through an order of prosecution.

In Luxembourg law, it is up to the plaintiff to establish the grounds of its (criminal or civil) complaint. In applying the general rules of civil procedure, only parties that have suffered direct harm due to an offence may claim damages for such harm. According to jurisprudence, the damage suffered must be certain, personal, and direct. It is not certain whether a competitor who has lost a contract due to bribery of a foreign public official could be considered an injured party but there is no jurisprudence to this effect. Thus, the competitor will be able to initiate the prosecution, even if it not assured that he would be recognised as a victim.

5.2 Economic, political or other considerations

According to the Luxembourg authorities, the independence of the judiciary from the executive and legislative powers ensures that investigations and prosecutions of bribery offences are influenced neither by economic considerations, nor by the possible effects on relations with another State or by the identity of the natural or legal persons concerned.

⁴² The decision of the Prosecutor is final, and there is thus no obligation on the prosecutor's office to comply with any criteria or guidelines that might be laid down by a criminal policy circular of the Ministry.

⁴³ The prosecutor's superiors, namely the State Prosecutor General and the Minister of Justice via the State Prosecutor General, can not give orders of non-prosecution.

While the Justice Minister may provide information about offences to the State Prosecutor General and urge him to engage proceedings or refer the matter to the competent court, he cannot under any circumstances order the State Prosecutor to refrain from a given prosecution.

Article 3 of the Act of 8 August 2000 on international mutual legal assistance in criminal matters states that "the State Prosecutor General may refuse mutual legal assistance if the request for assistance is liable to prejudice the sovereignty, security, public policy or other essential interests of the Grand Duchy of Luxembourg (...)". Furthermore, "without prejudice to the provisions of conventions, any request for mutual legal assistance shall be refused if it concerns offences relating to tax, customs or foreign exchange matters under Luxembourg law". However, if there is a corruption offence independent of the fiscal offence, mutual legal assistance will be provided.

6. ART. 6 – STATUTE OF LIMITATIONS

As bribery of a foreign public official is a crime, criminal proceedings are barred after ten years have elapsed from the day on which the offence was committed⁴⁴. The delay is interrupted by investigation or judicial proceedings in Luxembourg (Article 637 of the Code of Criminal Procedure). Even if theoretically the statute of limitations can be indefinitely interrupted, the requirement of a reasonable delay laid down in article 6 of the European Convention on Human Rights must be respected.

Previously, according to case law, if the crime was decriminalised because of mitigating circumstances, the offence was deemed to have been a simple offence from the outset and the statute of limitations was reduced from ten to three years. However, it is conceivable that engagement of proceedings may be delayed if the offence does not cause immediate prejudice and it is not in the interest of any of the persons aware of the offence to reveal it, as is the case with bribery or trading in influence. If, in cases where the courts deem that penalties for simple offences are sufficient, criminal proceedings cannot be engaged until three years after the offence was committed.

The law of 15 January 2001 changes this situation, since the statute of limitation is no longer affected by decriminalisation. The Luxembourg authorities considered that this change was particularly important for the offence of bribery, which is secret by nature and has no direct victim suffering an immediately perceptible prejudice⁴⁵.

Penalties arising from judgements in criminal cases are barred after twenty years have elapsed from the date of the judgement (Article 635 of the Code of Criminal Procedure).

7. ART. 7 – MONEY LAUNDERING

Article 7 of the Convention states that each Party that has made bribery of its own public officials a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.

7.1 Bribery of Luxembourg and foreign public officials

7.2

The Act of 11 August 1998 introducing organised criminal activity and money laundering as criminal offences into the Criminal Code and amending various special laws extended the list of predicate offences to bribery for the purposes of the application of its money laundering legislation.

⁴⁴ According to the Luxembourg authorities, the triggering event can be, for example, the date where the corruption pact has been concluded, the date of the last bribe has been given, or the date where the act has been performed by the foreign public official.

⁴⁵ The Conseil d'Etat also considered that a complete review of the statute of limitations for criminal offences was necessary in Luxembourg.

Under new Article 506-1 of the Criminal Code, persons who:

- 1) knowingly facilitate, by any means whatsoever, misleading proof of the origin of goods or income deriving (...) from a bribery offence;
 - 2) knowingly assist in the investment, concealment or conversion of the object or direct or indirect proceeds of the offences referred to at paragraph 1;
 - 3) acquire, hold or use the object or direct or indirect proceeds of the offences referred to at paragraph 1 in the knowledge, at the time they received them, that they derived from one of the offences referred to at paragraph 1 or from participation in one of those offences;
 - 4) attempt to commit an offence referred to at paragraphs 1 to 3 above,
- are liable to imprisonment for one to five years and a fine of LUF 50 000 to 50 000 000 or one only of those two penalties.

According to the Luxembourg authorities, the money laundering offence applies both to the bribe and the proceeds of bribery.

The Luxembourg authorities note that the reference to the bribery offence in paragraph 1 covers both bribery of a national or foreign public official. Money laundering is also a criminal offence when the predicate bribery offence has been committed in another country. However, the offence must also be a criminal offence in the State where it was committed (Article 506-3 of the Criminal Code).

Lastly, the law extends the mechanism for detecting and preventing money laundering, hitherto limited to the financial sector, to other professions. Under the law, notaries, casinos and similar gaming establishments, and auditors are required "to inform the State Prosecutor promptly and on their own initiative of any fact that has come to their attention which could constitute evidence of money laundering". Notaries are also required to know the identity of the real beneficiary of any transaction relating to the instrument they receive if there is any suspicion of money laundering or when the amount is LUF 500 000 or more.

8. ART. 8 - ACCOUNTING

8.1 Maintenance of books and records

Luxembourg law contains provisions of a general nature concerning book-keeping that apply to merchants, whether natural or legal persons. In particular, under the terms of Article 8 of the Commercial Code all transactions have to be entered in a single ledger or specialist subsidiary ledgers; consequently, it is not permitted to keep off-the-book accounts that are not taken back into the accounting records.

Under the terms of Article 9 of the Commercial Code, all vouchers must be kept so that, where necessary, recorded transactions can be verified on the basis of accounting records.

The Luxembourg authorities add that Luxembourg criminal law generally prohibits the falsification of business, banking or private documents and the use of false documents in general. There are also specific provisions in Luxembourg company law against false balance sheets.

Moreover, Article 477 of the Commercial Code considers as fraudulent bankruptcy the fact to fraudulently remove, delete, or falsify the content of the books and/or to fraudulently recognise itself as a debtor of undue sums in the balance sheet.

8.2 Companies subject to these laws and regulations

The provisions of the Commercial Code apply to merchants, whether natural or legal persons. The provisions of the Criminal Code regarding false documents apply to any person committing the relevant offence. The provisions of company law apply to commercial companies.

Bodies, administrations and services of the State are subject to the law on State Accounts.

8.3 Penalties for omissions or falsifications

According to the Luxembourg authorities, in the event of failure to comply with the provisions of the Commercial Code, the books may not be represented or relied on in court.

The penalty for falsification of business, banking or private documents is imprisonment for five to ten years.

Likewise, under company law the penalty for presenting a false balance sheet is imprisonment for more than five years or a fine of LUF 200 000 to 1 000 000 (4 957.87 to 24 789.35 euros).

Lastly, Article 489 of the Criminal Code states that a fraudulently bankrupted person is liable to imprisonment for 5 to 10 years.

The Luxembourg authorities also state that companies are required to have their accounts audited. Above a certain threshold⁴⁶, companies are required to use an outside auditor. The Institute of Auditors draws up recommendations concerning the preparation or auditing of accounts. Any irregularities are mentioned in the report that the auditor is required to draw up after completing the audit. The report must be deposited with the commercial register open to the public⁴⁷.

Internal controls are not a statutory requirement under Luxembourg law except in certain regulated sectors. This is the case of banking and other professions in the financial sector since 1998, and of bodies, administrations and services of the State since last year.

9. ART. 9 – MUTUAL LEGAL ASSISTANCE

The OECD Convention requires each Party, "to the fullest extent possible under its laws and relevant treaties and arrangements" to provide "prompt and effective" legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of the Convention, and for non-criminal proceedings within the scope of the Convention brought by a Party against a legal person. The Convention further establishes dual criminality when that is a condition for mutual legal assistance. Lastly, the Convention requires Parties not to refuse mutual legal assistance for criminal matters on the ground of bank secrecy.

9.1 Laws, treaties and agreements enabling mutual legal assistance

In Luxembourg, mutual legal assistance is based on various instruments:

- the Act of 8 August 2000 on international mutual legal assistance in criminal matters;
- the Treaty on Extradition and Mutual Assistance in Criminal Matters between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands of 27 June 1962, approved by Luxembourg by the Act of 26 February 1965, supplemented by a protocol of 11 May 1974 approved by the Act of 20 June 1977 (these texts apply only to relations between the Benelux countries);
- the Convention implementing the Schengen Agreements of 19 June 1990;
- the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959. 39 States, including Luxembourg, have ratified the Convention under the auspices of the

⁴⁶ Recourse to an external auditor is required when an enterprise, for two consecutive exercises, meets two of the following three criteria: a balance sheet of 3.125 millions Euro; a net turn-over of 6.25 millions Euro; 50 full-time employees.

⁴⁷ Article 252 of the law of 10 August 1915 on business firms, as amended.

Council of Europe; Luxembourg has also ratified the additional protocol to the Convention on 2 October 2000, which came into force on 31 December 2000;

- two bilateral treaties on mutual assistance in criminal matters have been concluded, one with Australia on 24 October 1988, approved by an Act of 10 January 1994, the other with the United States, approved by an Act of 23 November 2000.

The Act of 8 August 2000 "applies to requests for mutual assistance in criminal matters whose purpose is to cause a seizure, search or other investigative measure displaying a similar degree of coercion to be conducted in the Grand Duchy, where such request is issued by judicial authorities of States not bound to the Grand Duchy of Luxembourg by an international agreement relating to mutual assistance, judicial authorities of States bound to the Grand Duchy of Luxembourg by an international agreement relating to mutual assistance, unless the provisions of this Act are contrary to those of the international agreement, or an international judicial authority recognised by the Grand Duchy of Luxembourg" (Article 1).

Article 5 sets out the conditions under which mutual assistance may be granted, Article 6 defines the competent authorities for execution of the request, and Article 7 states that "matters of mutual assistance 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".

According to the Luxembourg authorities, the international instruments on mutual legal assistance to which Luxembourg is a Party allow prompt and effective mutual legal assistance within the scope of the conventions. In particular, the Luxembourg authorities consider that the absence of criminal liability of legal person in Luxembourg would not prevent mutual legal assistance, so long as a natural person (even if not identified) is also prosecuted.

9.2 Dual criminality

Under the terms of Article 5 of the Act of 8 August 2000, mutual legal assistance is subject to a dual criminality requirement (see point 3.3).

According to the Luxembourg authorities, the elements of the offence do not have to be exactly the same under the laws of both countries. It is sufficient for the matter to be a criminal offence in Luxembourg law, even under a different statute, for mutual assistance to be granted. As bribery is a criminal offence in Luxembourg law, the dual criminality condition is met.

According to the Luxembourg authorities, dual criminality is deemed to exist if the offence for which the assistance is sought is within the scope of the Convention.

9.3 Bank secrecy

According to the Luxembourg authorities, bank secrecy⁴⁸ is not a ground for refusing mutual assistance in criminal matters, since article 40 paragraph 1 of the law of 5 April 1993 as modified, provides that the professional concerned has the obligation to supply an answer and to co-operate as fully as possible to all legal requests of the competent authorities. Bank secrecy cannot be relied on against an order from an investigating magistrate, which means that a banker can never assert bank secrecy as a ground for refusing to comply with a request for mutual assistance pursuant to letters rogatory.

Under the terms of the Act of 11 August 1998 introducing organised criminal activity and money laundering as criminal offences into the Criminal Code and amending various special laws, notaries,

⁴⁸ Bank secrecy, which is part of the overall professional secrecy incumbent on all professionals in the financial sector, is provided for in Article 41 of the law of 5 April 1993 as amended.

casinos and similar gaming establishments and auditors are required "give an answer to and co-operate as fully as possible with all legal requests that the law enforcement authorities put to them in the performance of their duties".

10. ART. 10 - EXTRADITION

10.1 Extradition for bribery of a foreign public official

In Luxembourg, bribery of a foreign public official is an extraditable offence under the following laws and legal instruments:

- the Act of 13 March 1870 on the Extradition of Foreign Criminals;
- the European Convention on Extradition of 13 December 1957, Article 2 of which states that extradition may be allowed for offences punishable by a penalty entailing deprivation of liberty for a maximum period of at least one year. 40 States, including Luxembourg, have ratified the Convention;
- the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters of 27 June 1962, which provides for a minimum of 6 months' imprisonment.
- two bilateral treaties on extradition with Australia and the US.
- a bill approving the Convention relating to extradition between Member States of the European Union has been presented to the Parliament for examination.

The Act of 13 March 1870 on the Extradition of Foreign Criminals states that "the Government may deliver to the Governments of other countries, subject to reciprocity, any foreigner detained or charged or convicted by such countries' courts for any offence listed below that has been committed on their territory: (...) for bribery of public officials (Articles 246 to 256)".

10.2 The Convention as a legal basis for extradition

Luxembourg has stated that it considers the Convention to be a legal basis for extradition between Luxembourg and another Party.

10.3 Extradition of nationals

10.4

Luxembourg does not permit the extradition of its nationals as the law on extradition only refers to foreigners. Moreover, Luxembourg has made a reservation to Article 6 of the 1957 European Convention on Extradition, stating that it will allow neither the extradition nor the transit of its "nationals", meaning persons of Luxembourg nationality as well as foreigners integrated into the Luxembourg community⁴⁹. This reservation reflects long-standing case law⁵⁰.

Whether a foreigner is designated as a "foreigner integrated into the Luxembourg community", is determined taking into account concrete circumstances, such as the length of residency in Luxembourg, and integration of the family, as well as whether the person carries out professional activities.

⁴⁹ "The Government of the Grand Duchy of Luxembourg declares that so far as the Grand Duchy of Luxembourg is concerned, "nationals" for the purposes of the Convention are to be understood as meaning persons of Luxembourg nationality as well as foreigners integrated into the Luxembourg community in so far as they can be prosecuted within Luxembourg for the act in respect of which extradition is requested."

⁵⁰ Cour 23 January 1878, P. 1, 447. "The Luxembourg Government may surrender to foreign Governments (...) solely if the individual whose extradition is requested is not a Luxembourg national."

Should nationality be the sole ground for refusing extradition, the Luxembourg authorities state that the authority requesting extradition can always lay an information about an offence to the Luxembourg authorities for the purposes of engaging proceedings, if such a possibility is provided for by a bilateral or multilateral convention⁵¹ to which the countries concerned are party.

If extradition is requested by a State with which Luxembourg does not have a treaty on extradition, and where the request is refused on the basis of nationality, the person will be prosecuted in Luxembourg on condition of reciprocity (principle *aut-dedere aut-judicare* applies) and according to the principle of discretionary prosecution.

10.5 Dual criminality

Article 10.4 of the Convention states that where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of the Convention.

Luxembourg makes extradition conditional on the existence of dual criminality pursuant to Article 2 of the European Convention on extradition, which states that "extradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party".

As bribery of a foreign public official is an offence punishable under Luxembourg law, the dual criminality condition is met.

11. ART. 11 – RESPONSIBLE AUTHORITIES

11.1 Designation of responsible authorities

Article II of the Law of 15 January 2001 states that "the Minister whose portfolio includes Justice and the State Prosecutor General, acting within the framework of their respective legal duties, are designated as responsible authorities for the missions referred to in Article 11 of the Convention".

Thus, the competent authority with regard to mutual legal assistance as set forth in Article 9 of the Convention and consultation set forth in Article 4 paragraph 3 is the State Prosecutor General, pursuant to the Act of 8 August 2000 on international mutual assistance in criminal matters; the competent authority with regard to extradition as set forth in Article 10 of the Convention is the Justice Minister⁵².

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

3. TAX DEDUCTIBILITY

The revised Recommendation of 1997 strongly urges Member countries to promptly implement the 1996 Recommendation on the tax deductibility of bribes to foreign public officials: [the Council recommends] "that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility". Similarly, the Commentaries on the Convention state that "in addition to accepting the revised Recommendation of the Council on Combating Bribery, a full participant also accepts the Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, adopted on 11 April 1996, C(96)27/FINAL".

⁵¹ Article 6.2 of the European Convention on Extradition: "if the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate".

⁵² Conseil d'Etat, supplementary opinion of 7 November 2000.

The Law of 15 January 2001 adds a paragraph 5 to Article 12 of the Income Tax Act, as follows: "Without prejudice to the provisions relating to special expenses, the expenses listed below are deductible neither from the different categories of net income nor from the total 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."

Under the terms of this Article, non-deductibility extends not only to bribes but also to all undue advantages. According to the Luxembourg authorities, this wording leaves a measure of discretion to the persons who have to apply the text.

The Luxembourg authorities indicate that there are no exceptions to this provision which is of a general character (*d'ordre général*). The terms "Without prejudice to the provisions relating to special expenses" is meant to cover expenses which would not be tax deductible but which have otherwise been accepted by the legislator for fiscal policy or other reasons.

The Luxembourg authorities indicate that a false declaration aimed at hiding a request of deductibility of bribes may be an offence of tax fraud and sanctioned by a fine of a maximum of four times the amount of the sum in question.

According to the Luxembourg authorities, a prior conviction of corruption is not required to deny tax deductibility of bribes.

Regarding the exchange of information between the tax administration and the judicial authorities, the Luxembourg authorities specified that there was no general principle of communication as it would be incompatible with tax confidentiality⁵³. However, tax confidentiality is less restrictively interpreted in case of a request from a judicial authority such as an investigating magistrate. In any case, communication of fiscal information would be provided exclusively to the judicial authorities on their request or upon the initiative of the tax authorities.

The text refers solely to taxpayers who are natural persons. However, the Luxembourg government indicated, when it tabled this amendment, that according to Article 162 of the Income Tax Act, the provisions of Title I (personal income tax) can apply with regard to determining the income tax liability of enterprises insofar as they are specified by a Grand Ducal regulation. Under the terms of the Grand Ducal regulation of 3 December 1969, paragraphs 2 to 4 of Article 12 of the Income Tax Act apply to enterprises. The regulation therefore has to be supplemented in order to include the new point 5 of Article 12 of the Income Tax Act, so that the non-deductibility of bribes also applies with regard to taxpayers that are legal persons subject to enterprise income tax pursuant to Article 159 of the Income Tax Act.

This Grand Ducal regulation was published in the *Mémorial* of 27 April 2001.

⁵³

Confidentiality can be overridden where there is consent by the tax payer, where there is a legal text authorising communication, or in the public interest. These derogations are granted on a case by case basis taking account of the nature of the offence, the mode of execution, and the extent of harm caused.

EVALUATION OF LUXEMBOURG

General comments

The Working Group complimented the Luxembourg authorities on the conscientious way in which they had implemented the Convention in domestic law. Delegates thanked the authorities for having provided complete and detailed replies and for their co-operation, which had facilitated the review process.

In order to meet the requirements of the Convention and the Recommendation, the Luxembourg Parliament adopted the Law of 15 January 2001⁵⁴. This Law amends the Criminal Code, the Code of Criminal Procedure and the Law of 4 December 1967 on income tax.

The Working Group was of the opinion that Luxembourg's implementing legislation generally meets the requirements set by the Convention, and on some important points, even goes beyond the requirements of the Convention. However, there is a serious loophole in the Luxembourg legislation concerning the liability of legal persons. In addition, some aspects of the Luxembourg legislation might benefit from follow-up during Phase 2 of the evaluation process.

Specific Issues

1. Liability of legal persons

Luxembourg criminal law so far provides for only one general sanction against legal persons, namely the dissolution and liquidation of certain legal persons which carry on activities contrary to the criminal law. In addition, there is no possibility of imposing fines on legal persons. The Working Group considered that this situation falls short of the requirement of the Convention that Parties at least establish effective, proportionate and dissuasive non-criminal sanctions for legal persons, including monetary sanctions, for the offence of bribery of foreign public officials (Articles 2 and 3). Moreover, this may limit the possibilities of confiscation, as well as mutual legal assistance where investigations are against the legal person only.

The Luxembourg authorities stated that a Justice Ministry working group has been set up to prepare a reform which would introduce the principle of criminal liability of legal persons. The Luxembourg authorities indicated that a bill would be presented to Parliament at the end of 2001.

The Working Group noted that Luxembourg failed to correctly transpose the requirements of the Convention on this issue and urged the Luxembourg authorities to implement Articles 2 and 3 of the OECD Convention as soon as possible.

2. Confiscation

During the discussions, doubts were raised whether the provisions on confiscation could be efficiently applied in all cases of bribery covered by the Convention as confiscation of the instruments of bribery is dependent on the condition that the convicted person is the owner of the assets. Confiscation would not be possible therefore when the assets belong to a non-convicted third party or to a legal person. In addition, the Working Group is not certain whether confiscation of the proceeds of corruption when it belongs to a legal person is possible.

The Group encouraged Luxembourg to review the effectiveness of its legislation concerning confiscation, in light of the present evaluation.

⁵⁴

Law of 15 January 2001 approving the Convention of the Organisation for Economic Co-operation and Development on Combating Bribery of Foreign Public Officials in International Business Transactions and relating to misappropriation, destruction of documents and securities, dishonest receipt of money by a public officer, unlawful taking of interests and bribery and amending other legal provisions

3. Rules for instituting prosecutions

In Luxembourg, the principle of discretionary prosecution applies including with regard to the prosecution of a person whose extradition has been refused on the sole ground that the person is a Luxembourg national. There are no written guidelines on the exercise of this discretion.

The Luxembourg authorities indicated that the discretion of the State Prosecutor is nevertheless limited by the possibility of a prosecution being ordered by his superiors as well as by the filing of a complaint by an injured party. While there is no judicial precedent on this point, Luxembourg confirmed that the competitor who has lost a contract due to bribery of a foreign public official can be considered an injured party and thereby initiate prosecution. In addition, the decision not to prosecute can be revoked at any time by the State Prosecutor's office.

The Working Group recommended that this issue be followed-up in Phase 2.