



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

LUXEMBOURG: PHASE 2

**REPORT ON THE APPLICATION OF THE CONVENTION ON
COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN
INTERNATIONAL BUSINESS TRANSACTIONS
AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY
IN INTERNATIONAL BUSINESS TRANSACTIONS**

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INTRODUCTION

a) *Luxembourg as a business and financial centre*

1. Following a series of upheavals in the latter half of the 1960s and 1970s, the economic structure of the Grand Duchy of Luxembourg, which had until then being dominated by the steel industry, underwent a considerable transformation, with the rise of the financial sector. Metallurgy, which accounted for nearly 30% of value added in 1970, represented only 2.4% of that value in 1995, and less than 2% by 2001.¹ Today, Luxembourg's economic development is based on a steadily growing financial sector and the emergence of other service industries, in particular services to businesses, computer services, and transport and communications, and a high level of external investment. The gross domestic product per capita of the Grand Duchy is now among the highest in the world, at €48,700. In 2001, the services sector, led by financial services, contributed more than 80% of value added in the Luxembourg economy.²

2. Within the Luxembourg financial sector, it is the interbank market that today plays the key role in the country's economic dynamism, drawing major capital flows into Luxembourg. Given the narrowness of the domestic market, those flows are in turn invested abroad, for the most part, primarily with other banks. The interbank market consists primarily of European banks (70%) and a few American (5%) and Japanese banks (3%). It is now the fourth largest in Europe, and ranks ninth in the world. The total balances of banks established in the Grand Duchy amounted to nearly €700 billion in 2002, compared to €6 billion in 1970.³ Finance and insurance companies also play a significant role. The importance of the financial sector in the economic fabric of Luxembourg is reflected in the fact that its share of total value added rose from 4% in 1970 to more than 25% in 2001, when it accounted for nearly 12% of total employment and more than 40% of the country's fiscal revenues.⁴

3. The banks and the insurance and reinsurance companies are not the only economic and financial players in the Grand Duchy, however. To this circle of dynamic institutions must be added a second, embracing international businesses and locally owned small and medium-scale enterprises (SMEs), nearly all of which (95%) export their output. Apart from steel, the exports of these companies and SMEs include machinery and equipment, agri-food products, tyres and textiles: they represented 30% of Luxembourg's total exports in 2001.⁵ The preferred markets for these businesses are above all the countries of the European Union (85% of all Luxembourg exports in 2002), with a particular focus on bordering countries (Germany, Belgium, and France), which together account for more than 60% of total exports. Luxembourg firms have a lower but still visible profile in other foreign markets, in Asia and in the Americas: between 3% and 4% of Luxembourg goods and services are exported to Asia and the Americas, respectively, while Africa takes less than 1% of those exports.⁶ Overall, according to the figures reported to the examining team by the Luxembourg Chamber of Commerce, nearly 90% of the country's GNP is exported.

¹ Central Statistics and It Economic Studies Office of Luxembourg (STATEC).

² Ibid.

³ Source: Central Bank of Luxembourg

⁴ Source: STATEC

⁵ Ibid. By comparison, services accounted for nearly 70% of the country's total exports in 2001.

⁶ Ibid.

4. Foreign direct investment (FDI) is also an integral component of business strategies, primarily for the finance companies, insurance companies, consulting and engineering firms, and of course international trading companies. European Union countries, in particular Belgium, Ireland and Germany, are the major destinations. Because of the financial market's role in the Grand Duchy, the financial sector is the most important source of Luxembourg FDI, accounting for nearly 30% of external flows.⁷

b) *The exposure of the Grand Duchy to bribery*

5. The Luxembourg financial market, because it attracts massive inflows of capital from abroad, poses a high risk of infiltration by funds of doubtful origin, funds that may, depending on the case, represent either commissions paid in the course of international business transactions, or illegal kickbacks. The great extent to which foreign judicial authorities seek Luxembourg's judicial assistance demonstrates this point: 25% to 30% of cases handled by the Luxembourg police and courts are the result of international rogatory commissions, the bulk of which are seeking information held by a Luxembourg financial institution. The country-of-residence breakdown of persons suspected of laundering money through Luxembourg is another indicator of this phenomenon: more than 90% are non-residents.

6. The financial market is not alone in its exposure to international bribery. While there have not as yet been any criminal or civil proceedings launched for violating the provisions of the 15 January 2001 law approving the OECD Convention, nor any charges of money laundering linked to bribery on foreign markets, or relating to possible complicity of a Luxembourg financial institution or company in such an act, it must be recognised that the Grand Duchy as a whole, including its business corporations, is at risk of exposure to corruption and its channels. Given the country's small size and the reduced scale of its domestic market, international trade and foreign investment are of vital interest for most of the roughly 24,000 businesses registered in the country.⁸

7. The Luxembourg authorities recognise this risk, as do professional bodies such as the Chamber of Commerce. The authorities consider it to be of modest scope, noting for example the low number of prosecutions for bribery that have been pursued in Luxembourg over the last 10 years, and the even lower number of convictions for these or related offences.⁹ The country's small size and low population (under 500,000) may also limit the propensity of economic players operating in the country to engage in illegal activities, including bribery in foreign markets: in a small country where everyone knows everyone else and what others are doing, there may be a kind of self-policing in effect.

8. The manner of implementation of the 15 January 2001 law approving the OECD Convention, as examined in this report, are illustrative of the authorities' assessment of the level of bribery in Luxembourg. In adopting that law, Luxembourg chose "a targeted approach to combating bribery", commensurate with the level of corruption in the country. Considering that bribery is not a risk factor in Luxembourg, nor is it viewed by the public as such (the most recent corruption perceptions index published by Transparency International places the Grand Duchy among the least corrupt countries in the world)¹⁰, the Luxembourg authorities have opted to implement the anti-bribery provisions of the new law

⁷ Source: UNCTAD 2002.

⁸ According to the Economic and Social Council's 2003 report on "Economic, Social and Financial Trends" (Luxembourg, April 25, 2003), there were 23,194 businesses registered in Luxembourg in 2002.

⁹ The examining team was not provided with any statistics on the exact number of prosecutions or convictions for bribery.

¹⁰ *Corruption Perceptions Index 2003*.

as they would those governing any other criminal offence, without making any special provision for putting them into effect.

c) *Methodology and structure of the report*

9. Consistent with the procedures adopted by the OECD Working Group on corruption under Phase 2 of the self- and mutual evaluation of implementation of the Convention and the revised Recommendation, this report examines the structures in place in the Grand Duchy of Luxembourg for implementing the legislation transposing the Convention, evaluates the application of those rules in practice, and assesses Luxembourg's compliance with the 1997 Recommendation. This Phase 2 report is based on the responses provided by the Luxembourg authorities to the general and specific Phase 2 questionnaires, on interviews with government experts, business representatives, lawyers, members of the accounting professions and financial intermediaries, and representatives of civil society with whom the team met between 17 and 21 November 2003 (see the list of institutions consulted in the annex to this report), as well as a study of the relevant legislation, and independent analyses conducted by the lead examiners and the Secretariat.

10. The first part of this report looks at the mechanisms in place in Luxembourg, in both the public and private sectors, for preventing and detecting acts involving the bribery of foreign public officials, and examines ways in which those mechanisms could be made more effective. The second part considers the effectiveness of mechanisms for prosecuting acts of bribery and related offences involving money laundering, accounting practices and tax. The third part of the report deals with the punishment of persons convicted of acts of bribery of foreign public officials and related offences. Finally, at the end of the report are some specific recommendations offered by the OECD Working Group on Bribery, relating to prevention and detection and to prosecution and sanctions. This section also raises some questions that, in the opinion of the Working Group, deserve follow-up or re-examination in the course of further work on this issue.

A. PREVENTING AND DETECTING ACTS OF BRIBERY OF FOREIGN PUBLIC OFFICIALS

1. Preventing the bribery of foreign public officials

a) *Government efforts to create awareness among the general public, and businesses and professionals in particular, about the new offence of bribery.*

11. With the law of 15 January 2001, Luxembourg adopted "a targeted approach to combating bribery", commensurate with the level of corruption in the country, which the authorities judged to be low. In applying this approach, the Luxembourg authorities have felt that it would be disproportionate to go beyond the introduction of new legal provisions specifically criminalising the bribery of foreign public officials, by instituting awareness campaigns for businesses and professionals. Consequently, at the time of the on-site visit no awareness campaign had been launched in Luxembourg to inform businesses and professionals targeted by the Convention specifically about the new offence of bribing a foreign public official, or to encourage them to establish internal mechanisms of surveillance and prevention, as proposed in the 1997 OECD Recommendation. Nor had there been any awareness campaign aimed at the general public or at the government's (roughly) 20,000 employees at the time of the on-site visit by the examining team (see discussion below). The question of the introduction into Luxembourg criminal law of the new offence of bribery of foreign public officials has been raised only in the context of mechanisms put in place to raise awareness of the fight against money laundering on the part of financial intermediaries and other professionals subject to the provisions of the money laundering laws (see below at paras. 47 to 54). However, following the on-site visit, awareness measures were initiated by the Ministry of Justice, which

contacted the Civil Service and Interior Ministries with a view to including the fight against bribery in training provided to civil servants. Furthermore, the introduction in Luxembourg law of provisions concerning bribery in the private sector in the course of the year 2004 may usefully provide an additional opportunity to raise awareness within the administration as well as among the general public on the importance of the fight against transnational bribery.

12. According to the Luxembourg authorities, these anti-bribery provisions taken pursuant to the OECD Convention, while important, do not require any special implementing measures in the case of Luxembourg. Yet this viewpoint fails to take account, as the lead examiners see it, of a significant dimension of the implementation of the law which is that, since the OECD Convention, application of the 15 January 2001 law has become an international as well as a domestic obligation. In fact, the examiners noted that in the case of other international commitments relating, for example, to money laundering the Luxembourg authorities have introduced measures and programmes to inform businesses and professionals about their legal obligations and to encourage private sector self-regulation. In the opinion of the lead examiners, such mechanisms could provide a useful example for the adoption of a policy of public information on bribery targeted at Luxembourg businesses.

b) Private self-regulation

13. Reflecting perhaps the lack of action on the part of the Luxembourg authorities in informing businesses and professionals, the private sector has invested very little effort in organising and disciplining businesses and professionals pursuant to the new law. Neither businesses nor their representative bodies (the Chamber of Commerce of the Grand Duchy of Luxembourg, the Federation of Luxembourg Industries, etc.) have taken any initiatives for awareness-raising and prevention. Reflecting this inaction, only one large Luxembourg business and one professional association responded to the examining team's invitation to discuss internal control measures within Luxembourg businesses with respect to bribery. Without a sufficiently representative sample of businesses and professional bodies, assessing the awareness of Luxembourg companies about the new offence and evaluating the internal prevention mechanisms in place is difficult.

14. Discussions with Luxembourg businesses and the Chamber of Commerce produced three findings. First, it appears that professional bodies such as the Chamber of Commerce have made no effort to inform businesses -- small, medium-sized or large -- about the introduction of the 2001 law, and the risks they run, even though the Chamber publishes a newsletter for businesses, 10 times a year, that includes a legal section, and also sponsors regular seminars. A quick review of the security services (in-house monitoring, antifraud services) available at the web sites of private consulting and audit firms in Luxembourg confirms that this subject, which has become a flourishing market in other countries that have signed the Convention, is still ignored in the Grand Duchy.

15. On the other hand, despite the Chamber's positive presentation on the degree of awareness among large Luxembourg companies of the fact that the Convention has been enacted into Luxembourg law, there is no clear evidence that those companies are fully aware of their new obligations under the 15 January 2001 legislation. In fact, the representative of the only Luxembourg business interviewed by the team admitted that he was unfamiliar with the scope of application of the Convention, and he seemed in particular to be unaware that, under the terms of that legislation, acts of bribery committed abroad through intermediaries are now punishable under Luxembourg law. Finally, even if the bigger Luxembourg businesses, including the affiliates of companies headquartered in other countries party to the Convention, are likely to know about transposition of the Convention into Luxembourg law, it would seem that Luxembourg SMEs, which account for 95% of exporting businesses in the country, are very poorly informed on the subject.

16. Nor is there any clear evidence that Luxembourg companies have adopted codes of conduct. In their responses to the Phase 2 questionnaires, the Luxembourg authorities indicated that they had no knowledge of any initiatives to encourage the development of such codes. On the other hand, according to the Chamber of Commerce, this practice is spreading to a growing number of Luxembourg businesses. In fact, the company interviewed by the examining team reported that an internal code of conduct was being developed, and that it would cover situations that employees might encounter in foreign markets, such as the offer of gifts. In the opinion of the lead examiners, if this trend were confirmed, it would be even more important and urgent for awareness and information measures concerning the anticorruption provisions to be taken by the Luxembourg authorities and by private sector bodies so that company codes will reflect the new risks involved and will encourage the adoption of internal mechanisms for preventing and detecting bribery. However, following the on-site visit by the examining team, discussions were initiated by the Ministry of Justice with these representative bodies in order to undertake awareness raising actions within the private sector.

Commentary

The lead examiners were disappointed at the serious inadequacy of the efforts to sensitise the private sector to the new offence of active bribery of a foreign public official, and to encourage the adoption of internal mechanisms for preventing and detecting the offence. They recommend that the Luxembourg authorities move quickly to develop the necessary awareness programmes for combating bribery in international business transactions, in co-operation with the professional organisations and business circles concerned.

2. Detecting acts of bribery of foreign public officials, and related offences

17. Thanks to the “targeted approach” adopted by the Luxembourg authorities, according to whom no specific measures need to be put in place to implement Luxembourg’s anti-bribery legislation, prosecutors must rely on “conventional” sources to detect acts of bribery of foreign public officials in international business transactions. These sources include third-party complaints and tip-offs to the police, rumours, the media, cases compiled in the course of money laundering investigations and turned over to the authorities for action, crimes or offences reported by government departments and agencies to the prosecuting authorities, and any violations that come to light through police reports.

a) Detection based on third-party disclosures

18. Given the low level of public awareness about bribery, and the degree of economic individualism and discretion which are characteristic of the Grand Duchy, the information sources available to the prosecuting authorities on the basis of revelations or complaints by persons outside government (business employees who are witness to misappropriation of funds, professionals who oversee business operations, the media) appear to be very limited when it comes to detecting cases involving economic and financial crime in general, and bribery in particular. In fact, according to representatives of the prosecutor’s office interviewed by the examining team, revelations about bribery in Luxembourg have to date come primarily from competitors cheated out of their market rather than from other groups of society.

i) Revelation by persons implicated in bribery, employees and the media

19. There would seem to be very little likelihood in Luxembourg that a company employee who has been witness to misappropriation of funds will report this to the authorities. According to the union representatives interviewed by the examining team, the main reason for this is the country’s small size: everything becomes known very quickly, and so anyone who reports an offence will soon find himself labelled as an informant and excluded from the labour market. In fact, Luxembourg law contains no

specific provisions to protect employee whistleblowers, and the issue receives little or no attention within businesses, where principles or codes of conduct are still rare. Nor can the vigilant employee look for protection from institutions such as labour unions which, because they are not legal persons, have no standing before the courts.

20. The “watchdog” role of the media is also very limited in Luxembourg, although in some cases they have played a part, when detailed information fell in to their hands, in bringing to light suspicious behaviour. This was what happened in one case, where transport licenses were awarded in return for bribes to a Luxembourg public authority, a fact that became public through revelations in the press.¹¹ According to media representatives interviewed, the shortage of financial and human resources available to the Luxembourg media generally preclude investigative journalism and consequently prevent the revelation of bribery cases. Indeed, it is not clear that the revelation of crooked dealings or suspicions of bribery through the media is always encouraged, as is suggested by a case dating from the mid-1990s where, in actions brought by forest wardens and forestry engineers, a journalist was convicted in a ruling by a lower court, upheld by the Court of Appeals of the Grand Duchy, on charges of slandering departmental officials by publishing a report on alleged acts of bribery on the part of its forest wardens.¹² The fact that Luxembourg law provides no protection for journalists’ sources is a further constraint: the press and publications law of 20 July 1869 authorises search and seizure of journalists’ records, and any journalist called as a witness who refuses to reveal his sources is liable to punishment for refusing to testify. According to the media professionals interviewed, this situation may change for the better in the near future if the bill on freedom of expression in the media, submitted to Parliament on 5 February 2002, is finally debated and adopted.¹³

21. Finally, individuals who have been involved in one way or another in commission of an illegal act are no more likely to be a source of detection in Luxembourg. Luxembourg law (articles 73 to 79 of the Criminal Code) does allow for a reduction in statutory penalties when there are deemed to be mitigating circumstances (see discussion below on applicable penalties), which according to the Luxembourg authorities would include repentance and collaboration with the police, and this might induce a person implicated in a bribery case to report it. In practice, this legal facility has served to persuade one of the persons involved in the scheme -- most frequently the person offering the bribe -- to turn witness during proceedings and so ensure that the prosecution is successful.

Commentary

The lead examiners are disappointed by the lack of efforts to make the Luxembourg public aware of the new offence. They recommend that the Luxembourg authorities move as quickly as possible to sensitise the public to the fight against bribery in international business transactions. As well, given the important role that employees can play in detecting and reporting acts of bribery, the lead examiners urge the Grand Duchy of Luxembourg to adopt measures so that employee whistleblowers acting in good faith are given adequate protection. Moreover, the lead examiners urge the Luxembourg authorities to pursue the steps already taken to adopt legislation that will bolster the freedom of expression of the media and protect their sources, as a means of facilitating detection of the bribery of foreign public officials.

¹¹ Judgment 588/2003, handed down by the Luxembourg district court on March 10, 2003.

¹² The European Court of Human Rights condemned Luxembourg in 2001 for violating the journalist’s freedom of expression.

¹³ This law would replace the press and media law of 20 July 1869, which will be repealed. The new legislation would guarantee protection for journalists’ sources.

ii) Detection and reporting by accountants and auditors

22. The presence of accountants and auditors in a great many of the roughly 24,000 businesses registered in Luxembourg, to which must be added more than 300 internal auditors in the banking industry, suggests that the accounting profession is a potentially important resource for detecting suspicious transactions involving foreign bribes. Chartered accountants as well as external and internal auditors for companies and financial institutions have been required, since 1998, to report to the prosecutor's office of the Luxembourg court any fact that could indicate money laundering in connection with bribery. The penalty for failing to do so can be severe. Failure to report indications of money laundering to the prosecuting authorities is punishable by a fine that can exceed €1 million.

23. It must be noted that the effort devoted by accountants in Luxembourg to the detection of criminal offences is not at all commensurate with their obligation to participate in the detection of economic crime. In fact, since the reporting of suspicions of money laundering was made mandatory in 1998, the number of cases reported to the prosecuting authorities by the accounting profession has been low: in all, seven cases have been reported by chartered accountants, and 21 by company auditors, and not one of them concerned indications of money laundering related to bribery.

24. Representatives of the Luxembourg Institute of Business Auditors explained, essentially, that in performing their oversight duties, company auditors are not held to an obligation of result but only to use their best efforts. Normal diligence is required, and an external auditor undertakes to conduct his work with the diligence that one would normally demand of him: he is not supposed to identify all instances of error or fraud, but only the most significant ones. The tools at the auditors' disposal allow them to look only at a sample of transactions considered significant in terms of the need for the client's annual financial statements to show a true picture: they do not examine all the transactions conducted by the client. Their tests allow them to obtain reasonable assurance about procedures, but not about whether all the transactions are lawful. According to the professionals interviewed, the scope and cost of such an audit would be exorbitant. Internal auditors, for their part, did not appear to be aware of the possibility they have, under the anti money-laundering legislation, to alert directly the prosecuting authorities of suspicions of money-laundering; according to them, they are required simply to report to the company's managers any irregularities found in the course of their work, with the option of alerting the president of the audit committee (if there is one), or the external auditor, according to the internal audit regulations adopted in 1998 by the then-supervisory body of the Luxembourg financial sector, the Luxembourg Monetary Institute. Furthermore, bribery is not a priority concern for them.

Commentary

The lead examiners, noting the important role of auditing the accounts when it comes to detecting violations of anti-bribery legislation, recommend that the authorities of Luxembourg ensure compliance with the reporting obligation to the prosecuting authorities of any suspicion of money-laundering linked to corruption incumbent upon chartered accountants as well as internal and external auditors of companies and financial institutions. In this respect, the authorities of Luxembourg are invited to undertake measures to make accountants and auditors more aware of the anti-bribery provisions of the law, notably by introducing more rigorous audit procedures, and to ensure effective sanctions for non compliance with this reporting obligation. The lead examiners also encourage the authorities to pursue their recent efforts to guarantee greater transparency in corporate accounts.

b) *Bribery detection by government departments and other agencies*

25. In Luxembourg, there is a second level for detecting criminal violations, the administrative level. In addition to detection as part of the general mission of certain government departments, detection can also result from specific inspection activities entrusted to a particular office or agency. Because public and parapublic officials in Luxembourg have little familiarity with the new offence, and because of the secrecy which is incumbent on each government department, reporting by these agencies would appear to offer little or nothing in the way of information sources for the police or the prosecuting authorities.

i) Disclosure by government departments

26. Government departments and agencies in Luxembourg are in principle required to cooperate in the detection of business crime, and of foreign bribery in particular. Article 23.2 of the Code of Criminal Procedure provides that *“any constituted authority, any public official or employee who, in the exercise of his duties, becomes aware of a crime or an offence is required to report this fact immediately to the State prosecutor, together with all relevant information, records and documents.”* According to representatives of the Luxembourg National Institute of Public Administration (INAP) interviewed during the on-site visit, all new government employees are made aware of their obligations under this article during the induction training that the Institute provides new civil servants on their rights and duties.

27. Representatives of all government departments, including finance and foreign affairs, declared in their discussions with the examining team that they were fully aware of their obligation to report any suspected violation, pursuant to article 23.2, while recognising that, in practice, there is almost no reporting of information to the prosecuting authorities. According to the prosecutors (no department keeps statistics on such reports), the rare exceptions concern cases of money laundering and tax fraud. Failure to respect this obligation, moreover, has never attracted disciplinary measures to date, and is not treated as a crime in the legislation. The same representatives said that they were unaware of any training that their staff might have received concerning the new offence, the manner of detecting it, and the obligation to report it. Apart from circulation of the text of the 15 January 2001 law among public servants, who are required to initial it, officials are never given any reminder of their reporting obligation under article 23 of the criminal procedure code, as a supplement to their initial training, and it is left up to them, as it is to the other players involved -- prosecutors and judges, businesses and the police -- to read the Official Gazette in which laws are published.

28. Suspicions of violations of Luxembourg's anti-bribery law are thus unlikely to be expressed in the normal course of government affairs, even during information and counselling sessions for exporters and investors conducted by Luxembourg representatives abroad. The embassies, through their economic section, the commercial counsellor, or ad hoc trade missions, are traditionally important sources of information for businesses seeking to invest in a given market. Because officers of the Ministry of Foreign Affairs, External Trade, Co-operation and Defence are not sufficiently informed, the country's diplomatic missions are probably not in a position to detect violations of the 15 January 2001 law approving the OECD Convention, or to advise Luxembourg companies on the level of corruption in the market where they intend to operate (for example, providing warnings about untrustworthy intermediaries or agents), or to intervene with foreign government authorities in cases where bribes are requested.

29. The lead examiners have some questions about the practical effectiveness of the Luxembourg strategy, which holds that the new anti-bribery law, however important it might be, does not require any particular measures to ensure its application by government employees. If government personnel who are in a position, in the course of their duties, to detect acts of corruption are not properly alerted and informed that this new offence exists, what constitutes that offence, how bribes can be detected in their respective field of responsibility, and the means to be put in place for such detection to happen, it would seem

unlikely that such violations will be brought to light. The small number of players concerned, given the size of the country and its government apparatus, could however facilitate co-ordination of detection policy and control measures.

Commentary

The lead examiners think that the explicit legal obligation on Luxembourg's government departments and officials to report to the prosecuting authorities any criminal violations, including bribery of foreign public officials, that come to their knowledge is an important measure in combating transnational bribery. Luxembourg is encouraged to raise the level of awareness of the offence of foreign bribery among the public agencies that could play a role in detecting and reporting bribery, including the country's representatives abroad, such as by explaining the situations in which the offence may arise, and ways of recognising it. The lead examiners recommend as well that the Luxembourg authorities remind their public officials of the importance of reporting crimes and offences of which they become aware in the course of their duties, pursuant to article 23.2 of the Code of Criminal Procedure, and the disciplinary penalties applicable for non observance of that obligation.

ii) Detection and disclosure by the tax authorities

30. Like other government departments, the Luxembourg tax administration has so far played no role in detecting irregularities relating to bribery in foreign markets. The Luxembourg tax authorities could however constitute another important source of information and reporting on bribery of foreign public officials, particularly since the January 2001 law approving the OECD Convention establishes, pursuant to article 12.5 of the December 1967 income tax law, the principle that bribes are not tax deductible. According to that article, no deduction is allowed for “*advantages of any nature and the expenses incurred in obtaining a pecuniary or other advantage from any person in a position of public authority or enforcement or responsible for a public service, either in the Grand Duchy of Luxembourg or in another State, Community officials and members of the Commission of the European Communities, the European Parliament, the Court of Justice and the Court of Auditors of the European Communities [...] and officials or agents of any other public international organisation*”. Tax officials can thus detect suspect payments or financial flows during an inspection. Tax officials, like other public servants, must report any crime to the prosecuting authorities, including bribery of foreign public officials, on the basis of article 23 of the Code of Criminal Procedure.

31. Given the number of companies concerned and the substantial stakes involved, it must be recognised that the tax administration has insufficient capacity when it has to verify the legality of transactions and the truthfulness of statements made by companies. The authorities conduct three types of controls: summary control, which involves only an audit of documentation submitted, or the request for missing documentation; on-site control, where inspectors announce their visit in advance; and in-depth inspections. It became readily apparent to the lead examiners that the offices of the Direct Contributions Administration (ACD), which is responsible for inspecting companies, are singularly lacking in resources, both human and technical, for fulfilling their mission. The number of tax cases handled by the hundred or so agents of the corporate taxation offices exceeded 44 000 in 2002, or an average of more than 420 cases per agent.¹⁴ Consequently on-site business inspections which, according to article 162.10 of the general taxation act should be conducted every three years for all companies with 50 employees or more, are in fact extremely rare, and are performed on a sampling basis using criteria such as grounds for doubt as to the truthfulness of declarations, or the amounts at stake. By way of illustration, of the 22,000 companies

¹⁴ Annual Report 2002, Direct Contributions Administration.

subject in 1997 to the local government income tax, only 43 had had on-site inspections.¹⁵ By all indications, the situation has not improved since then.

32. As to the inspections conducted by the ACD Audit Office, the mission of which according to its amended charter of 1964 is to conduct in-depth inspections of company accounts, the situation is still more tenuous. While the “execution regulation” of 1977 set its total staff number at 12, it had only six or seven agents at the time of the on-site visit to Luxembourg. Lacking sufficient human resources, the office’s in-depth inspection of businesses covers on average only about 50 companies per year, which would amount to inspecting all the businesses registered in Luxembourg every 30 years, whereas the statute of limitations on taxes is five years. The 1997 report on tax evasion in Luxembourg, prepared by MP Jeannot Kercké, citing a letter dated 14 June 1995 from the director of the Direct Contributions Administration, noted that, even if fully staffed, its human resources would be inadequate in light of the number of companies registered in Luxembourg, the growing complexity of their transactions, and the importance to the Grand Duchy of the financial industry. In practice, it is left to the overburdened companies’ taxation offices to conduct documentary and on-site inspections, and only if a company has been unable to provide convincing explanations to those officials, or where there are grounds for suspecting major fraud, will the case be turned over to the audit office for in-depth inspection.

33. Supervision of holding companies is the responsibility of the Registration and Properties Administration (AED), which, in the view of the lead examiners, is also short of resources. At the time of the on-site visit, there were only three persons responsible for supervising Luxembourg’s 13,500 holding companies, and their activity was focused solely on those that exceeded their authorised powers, something that is subject to only commercial, and not criminal, penalties. With only 200 inspections every year, the only time that the use of holding companies for illegal purposes is likely to be detected is on the occasion of enquiries undertaken by the prosecuting authorities, as was illustrated by the investigations conducted in the winter of 2003-2004 into companies controlled by the Italian dairy group Parmalat. The examination of one of these businesses, a holding company controlled from the Netherlands, showed that it was merely a shell company, which, in violation of Luxembourg law, had published no annual financial statements since 1999.¹⁶

34. Inspectors’ information sources are very limited, both in law and in practice, in the view of the lead examiners. Under Luxembourg law (article 22 of the general taxation law), tax secrecy applies not only to third parties but also among the different administrations within the Luxembourg Tax Administration (direct contributions, properties and customs) – with the exception of specific provisions authorising exchange of information. Thus, a tax official who may have detected in the course of his activities a transaction contravening the tax law is not allowed to report this fact to the tax administration concerned by the operation.¹⁷ When, in the rare cases stipulated in the laws, co-operation is permitted, it is, in practice, for the most part subject to the vagaries of human relations, and the legal provisions remain optional. Thus, while the exchange of information between the Registration and Properties Administration and the Direct Contributions Administration is authorised by article 31 of the law of 28 January 1948 on registration and succession duties, nothing obliges the AED to inform the ACD when it discovers that a Luxembourg holding company has exceeded its authorised powers, so that the ACD could undertake a

¹⁵ Report on Tax Evasion in Luxembourg, by Jeannot Krecké, M.P. (Grand Duchy of Luxembourg, 1997).

¹⁶ “Italy asks for Luxembourg’s help in the Parmalat inquiry”, *Le Monde*, January 22, 2004, page 19; “Luxembourg at the heart of the Parmalat system”, *Le Monde*, January 24, 2004, page 21.

¹⁷ Tax secrecy is not, however, applicable among tax officials within the same administration. Thus, communication of information from one tax office to another is not forbidden, as specified in several circulars addressed by the ACD to its agents and concerning transmission of files among agents in this administration.

more thorough inspection of the company's activities. ACD officials interviewed during the visit could not recall receiving a single recent communication from the AED, made on its own authority, on the failure of a holding company to respect the limits in its charter. According to the head of the ACD, the number of communications from the AED to the ACD would amount to approximately 12 per year.

35. Obtaining data from third parties is also restricted, in the view of the lead examiners, especially for ACD agents.¹⁸ For reasons of statistical confidentiality, the Central Statistics and Economic Studies Office (STATEC) is not allowed to provide the tax authorities with comprehensive data, for example, on a company's turnover. For the sake of protecting postal communications, the Luxembourg tax authorities no longer have access to postal records. The principle of banking secrecy also limits the investigation and reporting rights of the ACD when it comes to financial institutions: the tax authorities have no information on bank accounts in the financial market, and they do not even have the right to ask for this information from a bank, under the terms of article 1 of the 1989 regulation defining their investigation and reporting powers.¹⁹ It is only in the restrictively defined case of tax fraud, as defined in article 396.5 of the general taxation law, that the tax authorities can demand information held by the banks. Tax fraud is defined as: "criminal violation in which: (a) the amount of tax evaded, either as an absolute amount or as a portion of the annual tax due, is significant; and (b) the alleged criminal acts constitute systematic use of fraudulent means to conceal pertinent facts from the fiscal authority or to persuade it of inaccurate facts". This is one of the narrowest definitions of the concept of tax fraud in any OECD country.²⁰

36. In the view of the lead examiners, the laws also impede collaboration in criminal investigations and prosecutions. Thus, the secrecy of investigations places severe limits on co-operation between the judicial police, responsible for investigating economic and financial crimes, and the tax administration when a criminal offence is under investigation: the secret nature of investigation proceedings in effect prohibits involvement by the tax authorities.²¹ This means, in practice, that if the investigating magistrate finds evidence, in the course of the investigation, pointing to fraud or a tax evasion manoeuvre, it is prohibited from so informing the tax authorities for purposes of their own investigations. It is only at the stage of preliminary investigations that police authorities are under the obligation to report promptly on tax offences to the Tax Administration, as provided under article 427, paragraph 2 of the general taxation law.

¹⁸ A broader rule allows the AED to obtain information from other departments and from individuals. Article 30 of the 1948 law, as amended by a regulation dated 24 March 1989, provides that "any department or public service of the national or a municipal government, public or parapublic establishments, State-owned agencies and services, associations, companies or corporations with their principal establishment, a branch or an operations office in the country, banks, exchange agents, business agents, entrepreneurs, public or ministerial officials, and all persons subject to inspection pursuant to the taxation laws are required, when so requested by officials designated by the Director of Registration and Properties, to provide all information in their possession [...] which those officials deem necessary for assessing or receiving registration, succession, mortgage and stamp duties payable on their own or another party's account"

¹⁹ According to this article, tax officials are not authorised "to require financial institutions to provide individual information on their clients, except in cases stipulated by the 28 January 1948 law for ensuring fair and accurate collection of registration and succession duties".

²⁰ See the 2000 OECD report: "Improving access to banking information for tax purposes", and the 2003 Progress Report, "Improving access to banking information for tax purposes".

²¹ Article 8 of the Code of Criminal Procedure: "Except where the law provides otherwise, and without prejudice to the rights of the defence, investigation and examination proceedings are secret. Any person involved in those proceedings is bound by professional secrecy subject to the conditions and penalties of article 458 of the Criminal Code."

In the view of representatives from the Finance and Justice Ministries and from the prosecuting authorities, this obligation is however rarely applied in practice, if at all.

37. The information sources available to inspectors are still for the most part limited to VAT registrations, based on business license data provided by the *Ministère des Classes Moyennes*, on legal data such as the name, business and capital stock of the company, and on financial data, mainly the company's annual financial statements, contained in the Registry of Businesses and Corporations, the official registry of all natural and legal persons doing business in Luxembourg. Additionally, under article 179 of the general taxation law, other administrations are under the obligation to provide, in general, all necessary information to the ACD, with the exception of specific legislation which may apply in particular circumstances and allow for professional secrecy with respect to this administration. In practice, the diversity of compulsory steps that companies must take with respect to the Registry makes it of little use for keeping a closer watch over businesses used for the transit or exit of suspect funds. Even examining the published financial statements of businesses is often a complicated matter. At the time of the on-site visit, virtually no corporation or individual trader was required to follow a specific accounting scheme: the only obligation on corporations was to prepare their annual statements on the basis of one of the formats detailed in the law of 2 December 1993, adapting the amended business corporations law of 10 August 1915 to European Council Directive 90/606/EEC of 8 November 1990. Those formats constitute the "minimum required" and do not for the most part permit an in-depth analysis of the situation.

38. To rectify the latter situation, at the end of 2002 Luxembourg adopted the "Law of 19 December 2002 on the Registry of Businesses and Corporations and on the accounts and annual financial statements of the latter, and amending other legal provisions", with a view to increasing transparency by requiring businesses to disclose more information on their financial status, and strengthening controls over the compulsory steps that companies must take with respect to the Registry. The first part of that law, which came into force in 2003, introduces significant amendments in the management of the Registry of Businesses and in the contents of the company files that are kept in the Registry. The second part requires Luxembourg corporations to use a standardised form of accounts beginning in 2005 (with certain exceptions relating to consolidated accounts). A committee was also being set up within the Ministry of Justice to advise the government, to develop accounting doctrine, and to formulate regular accounting principles through opinions or recommendations. Further changes in valuation methods should also result from the transposition of a new European directive.

Commentary

The meagre resources devoted to tax inspection, together with the lack of any clear and explicit procedure among official agencies for exchanging essential information, suggests to the lead examiners that measures for the detection of suspicious transactions by the tax administration are insufficient for the obligation to report to the prosecuting authorities to have much impact. The examiners recommend that the Luxembourg authorities develop instructions prescribing the kinds of inspections to be conducted for detecting bribery of foreign public officials, and take immediate steps to train those responsible for carrying out those instructions, as well as ensure that sufficient human and financial resources are made available to tax administrations for effective controls.

- iii) Detection and disclosure by agencies responsible for controlling bribery in export credits and bilateral aid.

39. Among the government or para-governmental bodies that can help to detect the offence of bribery there are two other agencies that exercise control over corruption as part of their activities. The first is the Office du Ducroire, a public agency responsible for export credit insurance in the Grand Duchy, and

one of its functions is to ensure that publicly supported export credits are not tainted by bribery. The other is Lux Développement SA, the Luxembourg government's agency for development co-operation, which is responsible for nearly all bilateral projects financed by the Grand Duchy, and for certain emergency or food aid operations. Yet, from a reading of the regulations and from discussions with representatives of these institutions, it would seem that their ability to detect, and *a fortiori* to report, acts of bribery to the law enforcement authorities are just as constrained as those of other Luxembourg government agencies.

40. The State of Luxembourg has been responsible for providing the Ducroire with the means to carry out its functions since it was set up. This is done through a very wide-ranging reinsurance and technical cooperation agreement between the Office de Ducroire in Luxembourg and the Office national de Ducroire in Belgium, the principle of which is to ensure that the conditions of insurance are the same for exporters from Luxembourg and Belgium. By virtue of this cooperation agreement, Luxembourg businesses have access to export credit insurance even though the technical structure in Luxembourg is very small. Decisions are taken by the Committee of the Luxembourg Office du Ducroire which holds regular meetings and makes its decisions on the basis of opinions drawn up by the Belgian Office national du Ducroire on each individual request made by an exporting company. Since the clauses on corruption applied by the Belgian Office national du Ducroire are automatically applicable to Luxembourg by virtue of the cooperation agreement, the staff of the Belgian Office national du Ducroire are responsible for reviewing this aspect during their examination of a file, and they have the power to raise any questions they consider necessary. The Luxembourg Office du Ducroire requires every exporter applying for credit insurance to sign a statement declaring that he is aware of the 15 January 2001 law approving the OECD Convention, and promising to comply with it.²² As well, the insured undertakes to advise the Luxembourg Ducroire of any prosecution or conviction against him pursuant to that law, and cover is forfeited if the insured is convicted.²³

41. The lead examiners questioned the adequacy of the human and technical resources available to the Luxembourg Ducroire to verify how the anti-corruption clause is applied in practice: the office handles more than 2,000 credit insurance contracts a year, but has only about four people to perform its various tasks. The office has little information available for ensuring that businesses receiving these credits are not and have not been involved in corrupt practices, given the legal and practical obstacles to the exchange of information between government departments and public agencies in Luxembourg. In most cases, the Office du Ducroire receives no information from other government departments or from the prosecution and judicial authorities with respect to suspected bribes involving a Luxembourg business. Finally, the Ducroire Secretariat is part of the Chamber of Commerce, and its staff are not public servants, and therefore not subject to the reporting requirements of article 23.2 of the Code of Criminal Procedure.

²² The declaration signed by the insured reads: "The undersigned declares that the exporter as well as the bank involved are aware of the law of 15 January 2001 "approving the OECD Convention of 21 November 1997 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", that the exporter and the bank involved are compliant with that legislation, and are aware that any infraction will expose the parties concerned to the penalties stipulated by the law of 15 January 2001, and also to penalties that may include cancellation of the insurance contract and exclusion from all future concessional aid".

²³ The anti-bribery clause inserted in the credit insurance application reads: "The insured forfeits his rights and is required to reimburse any indemnity he may have received if he is convicted on the basis of the criminal provisions enacted in implementation of the OECD Convention on combating the bribery of foreign public officials in international business transactions, signed in Paris on 17 December 1999. The obligations of the Ducroire are suspended automatically in cases of prosecution of the insured on the basis of those provisions. The insured is required to declare immediately any judicial proceedings or criminal conviction against him".

42. Lux Développement SA, a 61% State-owned corporation, would also seem to have limited capacity to exert control over official development aid (which represents about 1% of GDP). For one thing, because it is a corporation under private law, its staff is not bound, as public servants are, by the duty to report to the prosecuting authorities, pursuant to article 23.2 of the Code of Criminal Procedure. As well, while Lux Développement SA provides for an anti-bribery clause in its bilateral development assistance contracts, according to which “any attempt by a bidder to influence the contracting authority in the process of examining, clarifying, assessing and comparing bids, and in the award of the contract, will be grounds for rejection of the bid”²⁴, that clause applies only to bribery attempts prior to contract award, and there is no provision for cancelling the contract and penalising the firm involved if it is found, after the contract is awarded, that undue influence was exerted on the contracting authority. According to the representative of the Ministry of Foreign Affairs interviewed by the team, the only sanction in cases of confirmed acts of bribery would be the withdrawal of all development assistance provided by Luxembourg in the beneficiary country. Yet such a drastic measure would likely be taken only in cases where that country’s government in general gives its backing to the bribery of public officials.

Commentary

The lead examiners feel that agencies charged with preventing corruption in the award of export credits and bilateral aid should take forceful measures to reduce the risks of bribery of foreign public officials, by ensuring that personnel responsible for screening applications and enforcing regulations are more fully aware of the offence. The lead examiners also recommend that procedures for alerting the prosecuting authorities should be put in place for personnel of these agencies who are not now subject to article 23.2 of the Code of Criminal Procedure.

c) Discovery of bribery by the police and judicial bodies

43. Other agencies can help in detecting bribery in foreign contracting. In addition to the police, who may detect acts of bribery through police investigations, or the criminal prosecuting authorities, through a civil party petition (*constitution de partie civile*, where prosecution is triggered by a victim or plaintiff, obliging the authorities to investigate), one obvious means is the financial investigation unit of the prosecutor’s office in the Luxembourg district court, the principal function of which is to examine reports of suspected money laundering provided by financial intermediaries and, as necessary, to initiate prosecution if those reports are substantiated.

i) Detection by the police and judicial bodies

44. In the absence of sufficient legal means available to detectives during the police enquiry for verifying information on suspected acts of bribery, the Luxembourg police have very limited capacity to prepare sufficiently substantiated and accurate files in corruption cases to persuade the prosecuting authorities to initiate action. It is generally admitted that the quality of a police enquiry, which is a strategic step in the handling of the case, after which the prosecutor will have the power to shelve the case or to pursue it, depends heavily on the legal means available to the investigators for compiling evidence.

45. Police officers interviewed during the visit noted that few resources were available at the “police enquiry” stage, which is the preliminary enquiry: apart from the impossibility of imposing police custody and using other coercive means (for example, under the terms of articles 46 and 47 of the Code of Criminal Procedure, searches and confiscation of evidence are prohibited without the express consent of the persons concerned), they are also unable to obtain information from other government departments (this is true

²⁴ Article 28.8 of the General Regulations for the Procurement of Works, Supplies and Services of Lux Développement SA.

even for basic information such as the whereabouts of the suspect who may be attempting to cover his tracks), or the banks. Resort to “cross-disciplinary investigations” with other government departments is also impossible. Citing the fact that, in order to decide whether or not to transmit a file to the investigating magistrate, the prosecutor’s office requires a sufficient level of evidence to offer “reasonable prospects of success” in any prosecution, police representatives complained that their powers of investigation at this stage do not allow them to compile sufficient evidence to satisfy the prosecutors’ needs, and that as a result some cases may become stalled (see discussion below on the initiation of public prosecution).

46. The fact that civil party petitions are little used in Luxembourg also deprives the local prosecuting authorities of a potential source of detection. Complaints laid via this route relating to economic and financial matters account for only a small proportion (between 10% and 15%) of criminal cases brought before the courts in Luxembourg. For example, during the judicial year 2001-2002, of a total of 1,601 cases handled by the district court of Luxembourg, 245 originated with a petition from a private party.²⁵ According to representatives of the legal profession, this limited use of the possibility of becoming a civil party in a criminal proceeding reflects the time-consuming procedures involved in criminal prosecution in Luxembourg, and the fact that investigating magistrates are overburdened (see below), and so plaintiffs are more likely to opt for the civil procedures route, in hopes of obtaining reparations more promptly.

ii) Detecting foreign bribes through anti-money laundering mechanisms

47. Luxembourg has a powerful legal arsenal for detecting money laundering operations, and since 1998 bribery has been included on the list of major offences for purposes of enforcing money laundering legislation. To facilitate the detection of money laundering transactions, the law of 5 April 1993 as amended on the financial sector, and the law of 6 December 1991 on the insurance sector, as modified by the law of 18 December 1993, impose a duty of vigilance on banking, insurance and other professionals. The penalty for failing to respect those obligations can be severe: since 1998, according to the money laundering legislation, any failure, regardless of whether there is money laundering involved²⁶, can be punished by fines exceeding €1 million. In 2001, the courts handed down four convictions for violation of these obligations by insurers and wealth managers, and several investigations of a similar kind were underway at the time of the lead examiners’ visit.

48. The first of these professional obligations is to identify the client and his assets. The professionals concerned are required to identify any clients with whom they do business and, in the absence of such a relationship, to insist on identification for every transaction exceeding €10,000.²⁷ Any transaction below that threshold that poses a risk of money laundering also requires identification of the client. When clients are not acting for their own account, bankers and finance professionals are required by article 39 of the law of 5 April 1993 as amended to take “reasonable steps to obtain information on the real identity of the persons for whose account those clients are acting.” Two circulars of the Financial Sector Oversight Commission, one dated 11 December 2000 and the other dated 14 November 2001, specify the scope of the identification obligation and the mechanisms that the financial sector must introduce to meet that obligation. The first circular draws the attention of financial institutions to the importance of monitoring

²⁵ Grand Duchy of Luxembourg, Ministry of Justice, Annual Report 2002.

²⁶ The preparatory studies for the law of 11 August 1998 show that violation of professional duty is a material offence independent of any moral element. Law of 11 August 1998, Official Gazette A-73 of September 10, 1998, pages 1456 to 1460.

²⁷ The law of 1 August 2001, in force since 1 January 2002, reduced the threshold at which identification of casual clients becomes obligatory from €12,400.

very closely the assets or accounts belonging directly or indirectly to “persons exercising important public functions in a state, or persons and corporations that, in a recognisable manner, are close to or connected with those persons”. The second circular stresses the minimum standards of oversight, which include verifying the identity of the apparent client and of the real client, as well as the origin of the funds.²⁸

49. These identification requirements are supplemented by a duty to report to the prosecutor of the district court of Luxembourg any fact that could indicate money laundering. Initially limited to institutions, agencies and professionals in the banking and insurance sector, the scope of application of the information obligation has been progressively extended, by the law of 11 August 1998, to notaries, casinos and gambling houses, to accountants and auditors, and, under the terms of the law of 31 May 1999, to providers of “mailbox” addresses to companies (*domiciliataire*). This list should be expanded through the inclusion, with the transposition now underway of the second European money laundering directive of 2001, of new sectors in the detection arsenal (real estate agents, sellers of high-value goods, lawyers and, under certain conditions, traders and artisans).²⁹

iii) Money laundering provisions in practice

50. Despite the existence of this powerful legal arsenal for detecting suspect financial flows in Luxembourg, the number of declarations that have pointed to criminal activity linked to bribery has remained modest in recent years. Of a total of 1,202 declarations received by the State prosecutor of the district court of Luxembourg during the years 2000, 2001 and 2002, only 10 (or fewer than 1%), upon analysis, revealed predicate offences of bribery: 3 in 2000, 6 in 2001, and one case in 2002.³⁰ Representatives of the financial unit interviewed by the examining team offered several explanations for this situation.

51. The principal explanation has to do with the variation of practices from one professional group to the next, some of which apply reporting procedures rigorously, while others take a fairly lax approach, deliberately or otherwise.³¹ The number of declarations submitted during the period 1998-2003 by the non-financial professions (corporate auditors, chartered accountants, casinos, etc.) was still insignificant (33 declarations out of a total of 1,425 between 1998 and 2002), while there have been almost no declarations from notaries and the “mailbox” companies (only one declaration since 1999 on the part of a notary, even though the conversion of funds originating from bribery into real property is an increasingly frequent technique: four cases on the part of “mailbox” companies). Declarations from the insurance sector, while they have been rising since 2000, are still relatively few, representing no more than 15% of total declarations received by the prosecutor’s office in 2002.

52. The situation was somewhat more satisfactory in the banking sector, as can be seen in the steady rise in the number of declarations submitted by credit institutions. Yet a portion of the Luxembourg banking industry is still apparently reluctant to report suspicions. According to statistics compiled by the unit, of 200 credit institutions in Luxembourg, only 59 (or 30%) reported suspicions in 2001, and 80 (40%)

²⁸ Circulars 00/21 and 01/40 of 11 December 2000 and 14 November 2001.

²⁹ The draft law transposing the second European Directive of 4 December 2001, adopted by the government in May 2003, was the subject of consultation with the professions concerned at the time of the examiners’ visit.

³⁰ Public Prosecutor of Luxembourg, Financial Investigation Unit, Activities Report for 2001 and 2002 (Luxembourg, March 2003). The first group of predicate violations emerging from the analysis of declarations received by the prosecutor concerned fraud (embezzlement, misuse of corporate assets, breach of trust, etc.).

³¹ Financial Investigation unit, Activities Report for 2001 and 2002.

in 2002. Among the 59 declaring institutions in 2001, 8 had made 160 of the 265 declarations submitted by the banks in that year, or 60% of the total. In 2002, among the 80 reporting institutions, 11 made 160 of the 265 declarations from credit agencies. The first investigations conducted by the prosecutor with Luxembourg banks and financial institutions holding assets of the Italian agri-food group Parmalat confirmed that some Luxembourg banks show little enthusiasm for fulfilling their reporting obligations: not only did some of them wait to report their suspicions of money laundering to the prosecutor until *after* the announcement of Parmalat's collapse at the end of December 2003, but others remained much more discreet.³²

53. Another explanation offered by the prosecutor's office relates more specifically to the practice of some Luxembourg banks, which prefer simply to refuse to do business with dubious clients, rather than report their suspicions.³³ The most recent statistics from the Luxembourg anti-money laundering unit reveal a continuing reluctance in the financial industry to comply with this obligation: although declarations filed after refusing to enter into a business relationship rose over the last three years, they represented barely 10% of the total number of declarations of suspect operations filed in 2001 and 2002.³⁴ In the opinion of the prosecutor's office, this reluctance imposes a further constraint on the effectiveness of the obligation to report suspect transactions.

54. The banking and insurance supervision and regulatory authorities -- the Financial Sector Oversight Commission (CSSF) and the Insurance Commission (CAA) -- assured the examining team of their determination to enforce the law fully. Efforts have been made to raise awareness among the profession³⁵, through circulars and training, at least for banking professionals; the CSSF has prepared an internal programme for analysing the implementation of Luxembourg regulations, while the CAA has established a special internal committee to review existing legislation governing insurance in order to assess and improve co-operation by all professionals with the judicial authorities. Finally, the CSSF and the CAA are participating in the work of the Money Laundering Steering Committee (COPILAB), an interdisciplinary body established in 2002 to advise the government on money laundering policy.

55. As the lead examiners see it, the creation of COPILAB and the work it has been doing constitute an encouraging factor. COPILAB has been given a broad mandate, as part of an action plan. Its activities include co-ordinating the efforts of all parties in dealing with the problem of money laundering, with the

³² Statement of Carlos Zeyen, head of the financial investigation unit, to AFP, 8 January 2004.

³³ In its 1998 report on Luxembourg, the FATF illustrates this phenomenon by citing the example of a credit institution visited by the team of evaluators: in 1997 it entered into a business relationship with more than 1,800 new clients, it refused 181 clients deemed suspicious, and it filed only two declarations of suspect transactions: Mutual Evaluation Report of Luxembourg by the FATF (points 135 to 137), September 16, 1998

³⁴ Financial Investigation unit, Public Prosecutor of Luxembourg, Activities Report for 2001 and 2002 (Luxembourg, March 2003).

³⁵ CAA Circular 01/9 of 30 November 2001 reminded professionals in the sector that the information obligation covers cases where the professional was in contact with a person or company without entering into a business relationship, or without conducting a transaction, where the decision not to establish a business relationship or not to conduct a transaction was motivated by an indication of money laundering. That circular echoed the circular of 14 November 2001 from the CSSF. The Association of Luxembourg Banks and Bankers has prepared a 167 page reference manual for implementing mechanisms for identifying and detecting money laundering activity: ABBL, *Professional Obligations of the Banker in Combating Money Laundering and the Financing of Terrorism: Reference Manual for Development of Procedures*, Summary Working Document of the Professional Obligations Committee of the ABBL.

declared objective of eliminating discrepancies in the application of Luxembourg law; reviewing the regulations on money laundering; strengthening procedures for enforcing banking regulations through on-site inspections; strengthening the sensitisation and training of professionals and reviewing the recommendations addressed to them, so they will pay greater attention to the applicable regulations and to good practices; and examining the reasons for the small number of reported suspicions of money laundering, in comparison to other countries where there are similar reporting mechanisms. The COPILAB has met 15 times since its creation in 2002, and is expected to submit its recommendations to the authorities by the end of 2004. One of its expected proposals will be to reorganise the current system by setting up a body with responsibility for securing the voluntary agreement of all the State institutions and bodies so as to enable adequate measures to be put in place to apply the anti-money laundering laws more effectively.

Commentary

The lead examiners believe that the recent measures taken by the Luxembourg authorities are a step in the right direction towards better detection of money laundering, in particular as linked to the predicate offence of bribery, but that efforts to date are inadequate in light of the financial market's importance in Luxembourg. They encourage the Luxembourg authorities to move ahead firmly with the action plan against money laundering, and to adopt a vigorous policy against the laundering of funds linked to foreign bribery in all areas of the banking and financial industry.

d) Interagency co-operation and detection of bribery of foreign public officials

56. As the lead examiners acquired an overall picture of the methods for detecting economic and financial crime in general, and foreign bribery in particular, it became clear that discovering and prosecuting such crimes under the anti-bribery and accounting provisions of Luxembourg law must depend to a large degree on co-operation between governmental and para governmental agencies. Since the offence of bribing foreign public officials covers a very broad spectrum of activities, it requires close co-ordination among the various agencies and departments that, in the course of their general or supervisory duties, are in a position to detect at least certain components of an act of foreign bribery, if not the overall scheme.

57. It must be recognised that the scattered nature of provisions governing interagency co-operation, and the legal insecurity that may result for the officials concerned, the sometimes disputed status of some of those provisions, and the prohibition imposed by other provisions on communications made of their own accord or spontaneously, constitute major handicaps for the government's capacity to exchange information that is often crucial for bringing to light illegal transactions or suspicious movements of funds. There is no interagency procedure to facilitate the detection of bribery, such as a memorandum of understanding. The constraints noted earlier on the fiscal authorities' ability to obtain data from other administrations, as well as the principle of secrecy which prevents the investigating magistrates from sharing the information gathered during its investigation and passing it on to agencies such as the Office du Ducroire or the development assistance agency, which could find such information useful in their own investigations. As noted above, even where the exchange of information is authorised by law, this seems to be done in an ad hoc way, dependent on interpersonal relations, or does not take place, as is the case concerning collaboration between the police and the Tax Administration at the stage of preliminary investigations.

58. In the opinion of the lead examiners, the lack of an overall picture and the "fire walling" of information increase the risks that offences of bribery will not be detected, and tend to encourage unlawful transactions. Moreover, the dispersal of available information complicates research procedures and

impedes a more thorough use of data for analytical purposes by departments and agencies that, moreover, are often understaffed.

Commentary

The lack of a formal, clear and explicit procedure for exchanging essential information and reporting suspicions of violations between official agencies suggests to the lead examiners that measures for detecting suspicious transactions are not sufficient to produce much impact from the obligation to report to the prosecuting authorities. The lead examiners recommend therefore that the Luxembourg authorities make co-operation among these agencies more effective, by introducing clearer procedures for seeking information and for regular communication among them for purposes of exchanging essential data and revealing offences linked to foreign bribery, and, in this respect, ensure that professional secrecy does not constitute an impediment.

B. PROSECUTING BRIBERY OF FOREIGN PUBLIC OFFICIALS AND RELATED OFFENSES

1. Initiating public action

59. Because the bribery of foreign public officials is a crime in Luxembourg law, a 10-year statute of limitations, which runs from the date the crime was committed, applies to prosecution. It is up to the prosecutors, in general, to initiate action in Luxembourg. Prosecutors are appointed pursuant to article 90 of the Constitution by the Grand Duke, on the recommendation of the Minister of Justice. Luxembourg has two public prosecution offices (*parquet*, a term that applies collectively to the institution of the public prosecutor's office and to the individual prosecutors), which are placed under the authority of State prosecutors (*procureurs d'Etat*): one is attached to the district court of Luxembourg, and the other to the district court of Diekirch. The General Prosecution Office (*Parquet Général*), which is attached to the Superior Court of Justice (which includes the Court of Appeals and the Court of Cassation of Luxembourg), and falls under the authority of the Prosecutor General (*Procureur Général*), supervises all State prosecution personnel.

a) The role of the prosecuting authorities in initiating prosecution

60. Criminal proceedings in Luxembourg are governed by the principle of *opportunité des poursuites*, i.e. discretionary prosecution, and the prosecuting authorities have sole competence to decide which action to take when a complaint is lodged or an offence is reported. According to this principle, it is up to the prosecuting authorities to receive complaints and reports of offences, as well as offences referred by the police, and any report made by a public official pursuant to article 23.2 of the Code of Criminal Procedure. Additionally, article 19 of the Code of Criminal Procedure prohibits the Minister of Justice from ordering the prosecuting authorities not to pursue a case; the Minister may however order the Prosecutor General to initiate prosecution.³⁶ In practice, this power is exercised only exceptionally: the last occurrence dates back to over 20 years ago, and involved a radio broadcasting case. While the prosecutors are entirely free therefore to decide how to pursue offences brought to their attention, they must substantiate their decision to shelve a case, and they may also reverse that decision in light of new evidence. There appears to be no improper influence, of either an economic or political nature, on the decision not to prosecute. According to representatives of the prosecutor's office interviewed by the examining team, a transnational bribery case would, on the contrary, have particular priority, the decision to prosecute or not depending solely on an assessment of the level of indications gathered at the stage of the preliminary enquiry (also referred to as "police enquiry"): if such a level were not reached, or if the

³⁶ A principal confirmed by the Chambre des Mises (Indictments division), January 24, 1972.

anticipated length of proceedings threatens could result in insignificant penalties because of failure to respect the “reasonable time”, such elements may weigh in the decision to prosecute. Similarly, the fact that judicial proceedings are already under way abroad could induce the prosecutor not to prosecute.

61. The lead examiners, while recognising the broad guarantees of independence enjoyed by the prosecutors and by the judiciary as a whole, are concerned about the relevance of the notion of “sufficient indications” as a criterion for deciding whether to prosecute, particularly when it comes to cases involving bribery of foreign public officials. The practice of commissions and kickbacks and the use of multiple intermediaries (often located abroad) can make it very difficult to collect substantiated indications. Moreover, because the powers of the police, as noted above, are limited at the preliminary or police enquiry stage, the prosecuting authorities may consider that the level of indications is insufficient to request that a case be further investigated. This difficulty could also explain why the prosecutor may sometimes prefer, in cases of bribery of a domestic public official, to secure the cooperation of the briber in order to ensure that solidly substantiated evidence is available against the recipient of the bribe, in which case the briber will not himself be prosecuted (see the discussion below on the penalties handed down by the courts).

62. The same may be said with respect to money laundering linked to bribery, which is a complicated matter to prove because, under Luxembourg law, the predicate offence of bribery underlying the money laundering must also be proved. Thus, in money laundering cases involving suspects abroad, the prosecuting authorities, instead of seeking to establish a direct link with a specific predicate offence which, in their opinion, would be difficult because the individual and the evidence are to be found abroad, and thus deciding to prosecute, may prefer that the financial intelligence unit confine itself to exchanging the information at hand with the competent foreign authorities, and leave it to them to decide whether or not to prosecute their own nationals.³⁷

63. It should be noted that Luxembourg criminal law contains an instrument for overriding the inertia of the prosecuting authorities if they decide not to refer a file to the investigating magistrate on the grounds that the indications gathered are not sufficient to engage further investigation: this is the civil party petition (*constitution de partie civile*). Under this procedure, the injured party has the opportunity (provided that, according to clearly established jurisprudence, that party can demonstrate real personal and direct injury) to have criminal proceedings initiated. According to the magistrates interviewed by the examining team, a person who feels he has been cheated out of a contract through a bribe by a less scrupulous competitor may file such a petition and thus overcome possible inertia on the part of the prosecuting authorities. There is however no jurisprudence to confirm or contradict this opinion: to date, the courts have had to deal only with a civil party petition brought by a mayor who was the target in a case involving attempted active bribery, which resulted in a conviction that was upheld on appeal (Order no. 161/95 V of April 4, 1995). Besides this, as has been noted above, actions where a civil party petition is filed account, in practice, for only a small proportion of criminal cases which reach the courts – in the order of 10 to 15 per cent. The reasons for this have to do with the fact that investigating magistrates are overburdened with cases, which results in plaintiffs choosing instead to commence civil proceedings in order to obtain compensation more rapidly.

b) *The role of the prosecuting authorities in criminal proceedings*

64. If the prosecutor decides to launch criminal proceedings he may, depending on the gravity of the offence, conduct a preliminary enquiry with the help of the judicial police and lay charges directly before the court or, if the case is serious enough to require arrests, searches, seizures and other measures of this

³⁷ On this point, see the *Activity Report for 2001 and 2002* of the Financial Intelligence Unit at the Prosecutor’s Office of Luxembourg.

kind, he may refer it to an investigating magistrate (*juge d'instruction*). Since bribery has been classified as a crime in Luxembourg law, such investigation by the investigating judge will be automatic in bribery cases.³⁸ Once the case is referred to the investigating magistrate, the prosecutor is barred from further investigation. It is now up to the investigating judge to take all the steps he deems necessary in search of the truth. If the judge, in the course of his examination, discovers new offences, he must report them to the prosecutor, who will then decide whether to ask the judge to investigate additional charges. Under article 126 of the Code of Criminal Procedure, all acts and decisions of the investigating judge may be appealed by the public prosecutor, by the accused, by the civil party, by the civilly liable party, and by any third party who can demonstrate a legitimate personal interest.

65. Once the investigating judge is satisfied that the information is complete, he orders the investigation closed. He then hands over the case to the State prosecutor, who advises the district court of his conclusion, which will be either to refer the case to the court for trial, if there are sufficient indications of guilt, or to dismiss the case. Any civil parties to the case may also apply to the court, under article 127 of the Code of Criminal Procedure.

Commentary

The lead examiners encourage the Luxembourg authorities to draw the attention of the prosecuting authorities to the potential risks implied for effective prosecution of the foreign bribery offence if the level of indications gathered at the preliminary enquiry stage is appreciated too narrowly.

2. Prosecution of offences

66. Because no special measures have been put in place for the implementation of the anti-bribery provisions of Luxembourg law, the investigation and prosecution of bribery relies on the general system of law enforcement, i.e. the police and the courts.

a) Staffing and resources of the prosecuting authorities and the investigating magistrates responsible for economic and financial offences

67. As indicated above, Luxembourg has two public prosecution offices, placed under the authority of State prosecutors: one is attached to the district court of Luxembourg, and the other to the district court of Diekirch. While there is, strictly speaking, no specialised unit for handling economic and financial crimes in these two offices, the Luxembourg office has 8 to 10 magistrates specialised in economic and financial affairs, out of a total of 25 magistrates, while the Diekirch office has one specialist in a total of four. Luxembourg does not provide any special training for magistrates, but they can take courses in Germany or in France. None of the prosecutors or the investigating magistrates interviewed reported having received any specific training in corruption matters.

68. The two prosecutors' offices of Luxembourg and Diekirch have to make increasingly active use of their available resources. For example, during the judicial year 2001-2002, the Luxembourg prosecutors' office recorded 35,510 cases, an increase of 1,573 over the previous year. With 10 magistrates, the "economic prosecution" function is notoriously understaffed, and the prosecutors assigned to this section at the Luxembourg district court must make do with very limited means. The office sets its priorities in consultation with the General Prosecution Office, and routine or common-law disputes receive priority in practice. This frank assessment was given by the representatives of the Luxembourg

³⁸ Article 49 of the Code of Criminal Procedure: "Except where there are special provisions, the preparatory investigation is obligatory in criminal cases (*crime*), and optional in lesser offences (*délit*)".

prosecutor's office. The situation was deplored by the State prosecutor at the Luxembourg district court in a letter contained in the 2002 annual report of the Ministry of Justice, but it has yet to improve.

69. The situation within the office of the investigating magistrates is scarcely more propitious for effective prosecutions. As in the case of the prosecutor's office, specific offences relating to bribery of foreign public officials fall first under the responsibility of the specialised economic and financial magistrates of the district court of Luxembourg, or that of Diekirch, as appropriate. These offices are just as understaffed as the prosecutors' offices. A recent inventory³⁹ showed that during the judicial year 2001-2002, the 10 investigating judges (five of whom are economic and financial experts) attached to the Luxembourg district court handled 1,600 cases, not including international requests for judicial assistance involving coercive measures (which amounted to 352 cases during this period, or about 25% of the judges' workload). Each of the court's investigating judges was thus responsible, on average, for 200 cases, in addition to judicial assistance requests, at the time of the examining team's visit. For many of these judges, the cases were far from simple, standard disputes: because of Luxembourg's role as a financial centre, cases were on the contrary frequently voluminous and highly complex.

70. In the view of the lead examiners, the situation was just as tight for the lone investigating magistrate at the Diekirch district court. During the judicial year 2001-2002, he was seized of nearly 300 new cases, in addition to 37 international rogatory commissions.⁴⁰ In total, 167 cases were under examination in 2001-2002 (compared with 110 in 2000-2001, and 139 in 1999-2000). In addition to these cases, the magistrate also has other functions relating to the internal organisation of the Diekirch court, including serving as judge in summary proceedings and participating in appointing the civil and commercial chambers of the court, a situation that, according to the Ministry of Justice's activities report for 2003, is hardly conducive to sound investigative work.

71. The lead examiners noted the problems that the situation poses for the effective prosecution of transnational bribery, which is usually a highly complex process, demanding in terms of resources. The lack of resources in the Luxembourg investigating judges' offices increases the risk of delay in handling cases, which means that they will be referred for trial very late, or not at all, as the Luxembourg State prosecutor complained in the activities report for 2003. According to that report, cases posing relatively little threat to public order (for example drunk driving cases) were systematically prosecuted, while in many other cases, notably those involving economic and financial affairs, public action was duly initiated via referral of the case to an investigating magistrate but did not reach any conclusion in many instances.

72. This lack of resources for the investigating magistrates has a further consequence: according to the magistrates interviewed by the examining team, defence attorneys deliberately employ procedural manoeuvres and dilatory tactics to delay the referral of cases for trial, thereby allowing defendants to plead that the investigation has exceeded the "reasonable time" rule. If the trial judges accept this argument, it can result in reduced penalties. The effectiveness of prosecution is thereby compromised. In one case involving bribes paid between 1995 and 1997 to an employee of a private company carrying out technical inspections of vehicles for a public authority, the district court of Luxembourg, in its judgment 1057/2002 of 25 April 2002, ruled that the penalty should be reduced because of the four years that had elapsed between the time the facts were confirmed until the case was brought to trial: this was considered to have exceeded the "reasonable time" rule in article 6.1 of the European Convention on Human Rights. As a result, the defendant was fined €1000 and given a six-month suspended sentence (Judgment 1057/2002).

³⁹ Ministry of Justice, Activity Report 2002-2003.

⁴⁰ Ministry of Justice, Activities Report 2002-2003. For 1999-2000 and 2000-2001, respectively, 223 and 235 new cases were brought to the office. Ministry of Justice, Activities Report 2001.

73. In another recent case of passive bribery involving a middle-ranking government official who accepted bribes from several Luxembourg firms in return for issuing transport licenses, the Luxembourg district court decided to impose a reduced penalty, again on the “reasonable time” grounds of the European Convention (Judgment 588/2003 of 10 March 2003). One magistrate interviewed by the team confirmed that the defence often argues “reasonable time” and that in most cases this leads to a reduced penalty: prison sentences are suspended, and punishment is limited to a fine. Although the State prosecutor in the Luxembourg district court has been citing this problem in the Ministry of Justice activity reports since the mid-1990s, the difficulty in disposing of cases within the “reasonable time” stipulated by the European Convention is, according to the Luxembourg authorities, being resolved by measures recently taken by the legislature to reinforce the ranks of investigating magistrates as well as of the judiciary in general. Under the law of 24 July 2001, which put in place a programme of recruitment over several years as part of the organisation of the judiciary, and the law of 12 August 2003 increasing the numbers of investigating magistrates at the district court of Luxembourg, and modifying the law of 7 March 1980, as amended, on the organisation of the judiciary, the total number of investigating magistrates at the Luxembourg district court should be increased to thirteen by the autumn of 2004, and the overall number of judges should rise.

74. The lack of resources available to the prosecuting authorities and the investigating magistrates, together with the priority that the Luxembourg authorities give to handling international rogatory commissions (IRCs), has yet another consequence. As noted earlier, international requests for mutual assistance are a major burden on the investigating judges (350 to 400 cases a year), and, in accordance with article 7 of the law of 8 August 2000 on international mutual assistance in criminal matters, they must be “*handled as urgent matters with priority*” over domestic cases. As a result, the magistrates spend more than a quarter of their working time on IRCs, and, they claim, research and investigation of domestic cases suffers accordingly. The lead examiners, while applauding the diligence with which the Luxembourg authorities handle requests for mutual assistance, including those relating to bribery, have noted the potentially negative impact that the situation can have for the detection and prosecution of domestic cases involving the bribery of foreign public officials.

b) The support structures for the prosecuting authorities and investigating magistrates

75. The responsibility for conducting investigations lies with the national police (Police Grand-Ducale), under the authority of the Minister of the Interior. This is true for both the preliminary enquiry and the examination phase. At the time of the Phase 2 Luxembourg examination, the national police force was divided into central and regional services. The central services consist of the Judicial Police Service (SPJ), comprising eight sections including the general crime section, the organised crime section, and the economic and financial crime section. There are six regional services, each with its own research and criminal investigation unit.

76. In principle, economic and financial crimes (bribery, tax –related offences and others relating to business law) are the responsibility of the economic and financial section (ECOFIN) of the SPJ, while the organised crime section handles the money laundering cases: it is responsible for the analysis and preliminary processing of suspicious activity declarations before they are handed over for judicial proceedings, and it also assists the magistrates in conducting their enquiries and dealing with rogatory commissions. During the on-site visit, the division of responsibilities among the sections of the police did not appear very clearly defined, particularly when it came to bribery cases. The Ministry of Justice indicated, in its responses to the Phase 2 questionnaires, that bribery cases of international dimension would be handled by the economic and financial crime section (which is also responsible for international judicial assistance requests), and this view was supported by an investigating judge during the visit. However, the SPJ’s internal directives make the general crime section responsible for bribery, and a judicial police inspector said the same thing during the visit. Finally, it should be noted that, in terms of in-service training for police officials, the issue of bribery is covered only in training for the organised crime

section. The distribution of tasks, then, is not very clear, and in the opinion of the lead examiners it would be preferable to have the ECOFIN section handle all corruption enquiries, and to give its members the proper training, particularly with respect to the bribery of foreign public officials.

77. The difficulties faced by the Judicial Police Service in combating economic and financial crimes, bribery and bribery-related money laundering are similar to those with which the prosecutors and investigating judges must cope. At the time of the on-site visit, the central police services had only 100 judicial investigation officers (whereas the framework law of 31 May 1999 provided for 140). Of these, about 30 were assigned to the economic and financial section. The organised crime section of the SPJ had only five investigators to handle all cases of money laundering and terrorism financing. The discussions during the on-site visit revealed that it was common for an investigator to be handling several dozen cases at the same time, each of them, in principle at least, requiring several weeks' work. Moreover, a great majority of those cases involve international mutual assistance, which takes priority, to the detriment of "domestic" cases of economic and financial crime.

78. From all the discussions with the police services it emerged that, despite some recent improvements (such as the increase from 100 to 140 in the number of investigators, thanks to the 31 May 1999 law, and the fact that the services can now turn to economic and financial experts for assistance), the lack of available resources and expertise for handling economic and financial crimes is still glaring: at the time of the visit, the economic and financial crime section had more than 560 pending cases involving "white-collar" crimes. Moreover, the fact that young police recruits with economic and financial training must first serve an extended term in the local services is a potentially significant handicap in efforts to reinforce the judicial police with trained and motivated officers. According to representatives of the police services and the Justice Ministry interviewed during the on-site visit, the situation should improve in the near future, with the reorganisation of the ECOFIN section into four subsections, responsible for bankruptcy and misuse of corporate assets, for international mutual assistance, for offences concerning banks, insurance companies, taxation and insider trading, and for common economic and financial offences. This reorganisation is intended to make the section more operationally effective by striking a better balance between the number of cases referred to it and the staff and resources at its disposal.

79. Other constraints, having to do with the police services' independence of action, were raised by the police representatives interviewed by the team. These include the requirement, pursuant to article 31 of the Code of Criminal Procedure, that every police officer who learns of an offence must report it and consequently hand over the investigation to the prosecuting authorities: thus the effectiveness of the police enquiry depends heavily on the attention that the prosecuting authorities give to the case. This should be taken together with the divergences of view which can crop up in cooperation between the police services and the prosecuting authorities, which were already noted in the report on the first round of the GRECO evaluation. The police representatives complained that the prosecuting authorities were overly cautious, initiating judicial proceedings only when they considered the file transmitted by the police to be thoroughly substantiated -- a virtually impossible task, they argued, given their lack of power at the preliminary enquiry stage. As another example of such divergences, police representatives reported differing viewpoints between the police services and the prosecuting authorities in case 288/2003, a passive bribery case decided on 10 March 2003: according to the police, the prosecuting authorities initially asked for the case to be dismissed despite "numerous indications" of guilt, and it was ultimately due to a difference in appreciation by the prosecutor's office of Luxembourg that the Prosecutor General appealed against the dismissal, which was then reversed, thus allowing the case to proceed to a hearing. For their part, the representatives of the prosecuting authorities complained of lack of initiative by the police in investigating certain cases where information has been made public, citing four cases under way that betrayed inactivity by the police.

Commentary

The lead examiners note that the police and judicial bodies are singularly lacking in the human resources needed for the effective prosecution of offences involving bribery of foreign public officials. They recommend that the Luxembourg authorities provide firm political and financial support for strengthening the human and material resources of the justice and the police systems, as well as specialised training for various professionals (police officers, prosecuting authorities, investigating magistrates), in the area of bribery and related economic and financial offences.

c) *Means of investigation*

80. According to the general law of criminal evidence in Luxembourg, the prosecuting authorities must establish the guilt of the accused. To do so, the prosecution has various means, the extent of which varies depending on whether the evidence is being sought during the preliminary enquiry or during the examination phase.

i) General and specialised means

81. In the case of an offence that is the subject of a preliminary investigation, the Luxembourg Code of Criminal Procedure provides for resort to a great variety of investigative means, including on-site inspections, searches and seizures, taking evidence from witnesses, interrogatories, cross-examination, and testimony from experts. The use of undercover agents is also possible, despite the lack of specific regulations covering this topic: provided the State prosecutor or the investigating judge agrees, the police can use undercover agents, subject only to the limitations on police provocation determined in case law. If such provocation is confirmed, the courts will annul the entire proceedings.

82. These general means available for investigating any offence are accompanied by more specific techniques, when the investigation involves offences punishable by imprisonment above a certain threshold. The monitoring of all forms of communication is thus possible in any enquiry into a offence punishable by a maximum prison term of two years or more (article 8.1 of the Code of Criminal Procedure), as is the tracing of telephone calls (article 67.1 of that code). Offences of bribery and money laundering are both covered by these provisions. The magistrates interviewed during the visit confirmed that even if the offence of bribery is downgraded by the court to a lesser offence (see below, part 3), such specific investigation techniques remain admissible.

83. The investigative tools available to the investigating magistrates and the police should be reinforced shortly with the introduction of witness protection provisions into Luxembourg's criminal law. For the moment, there is no system for protecting witnesses, except for a provision in the Criminal Code that punishes the intimidation of witnesses, or violence or threats against individuals. This situation should be corrected with adoption of a bill that was submitted to the Chamber of Deputies in May 2003, strengthening the rights of victims of offence, and improving the protection of witnesses. If this bill is adopted, it will be possible to protect witnesses by keeping their identity secret under certain conditions, during investigations of charges of corruption or money laundering relating to foreign bribery. In the opinion of the judicial police officers and magistrates interviewed by the team, adoption of this measure would significantly improve the investigation tools at their disposal. The future of the bill was still uncertain at the time of the Luxembourg Phase 2 examination. Media representatives interviewed by the team maintained that the professionals concerned, in particular legal professionals, were by no means unanimous on the subject, and a petition has been submitted opposing the law, on the grounds that it would infringe the rights of the defence.

ii) Obstacles to investigation

84. While there is usually no problem in employing most of the investigative means available for criminal prosecution, some of them appear to be seldom used. Apart from the lack of resources available to the police during the “police enquiry” stage, already noted, the investigators and investigating magistrates also face constraints during the judicial investigation itself. These include constraints on searches and seizures, and the slow pace of international legal co-operation. In the latter case, while it generally functions well among countries which are Parties to the Convention, the magistrates interviewed by the team complained of a systematic lack of co-operation on the part of certain other countries, which made it difficult or impossible to pursue investigations, particularly in cases of money laundering.

85. With respect to searches (article 65 of the Code of Criminal Procedure) and seizures (article 31.3 and 66 of that code), these are permitted only in cases of *flagrante delicto*, which according to those interviewed would not happen in the case of bribery, or after a judicial investigation has been opened by the prosecuting authorities. Furthermore, a search under the supervision of the investigating magistrate is used only to confirm pre-existing suspicions: the magistrate is in effect precluded from ordering search and seizure unless there are already serious indications that a criminal offence has been committed.⁴¹ This limitation is comparable to the practice of magistrates when it comes to searches involving banks. The police officers and investigating magistrates interviewed during the on-site visit indicated that such searches were conducted only after the banks has been asked to supply the wanted documents: it would seem that “surprise” bank searches are never conducted, a fact that made the lead examiners wonder about the real effectiveness of these searches, and about the judicial authorities’ ability to look for assets relating to foreign bribery that may be sheltered in Luxembourg banks. Responding to these questions, the Luxembourg authorities indicated that “surprise searches” would be necessary if, for instance, it was suspected that an employee of the bank in question was implicated in the case, or if banking documents had been tampered with or falsified.

86. On the other hand, professional secrecy does not seem to pose an obstacle to a legally ordered search. In the case of searches, external auditors, bankers or lawyers cannot resist judicial seizure of their clients’ books and documents kept on their premises. A judgment of 8 June 2000 by the Correctional Tribunal of Luxembourg noted that all persons subject to professional secrecy are required to comply with the orders of an investigating magistrate who, at his own initiative or on the basis of rogatory commissions, orders search and seizure. At the most, professional secrecy may pose an obstacle to the hearing of witnesses (apart from the case where the professional is co-operating with the judicial authorities for the enforcement of money laundering legislation). While under the terms of article 458 of the Criminal Code, the disclosure of secrets is punishable “apart from the case where the persons party to this secret are required to give testimony before the courts, or where the law compels them to testify”, the fact is that case law, now embodied in the Code of Criminal Procedure (article 71), gives persons subject to professional secrecy the right not to testify during criminal proceedings. According to that jurisprudence, “persons constrained by professional secrecy... may, if called to testify, reveal secrets entrusted to them by reason of their profession, but they can never be forced to testify”. (Superior Court of Justice, November 3, 1976, *Pasicrisie Luxcembourgeoise*, XXIII, p. 469).

Commentary

The lead examiners invite the Luxembourg authorities to consider ways of improving bribery detection by the agencies responsible for investigation and prosecution, and in particular to examine how the police services could be empowered to conduct effective preliminary enquiries

⁴¹ In Luxembourg criminal procedure, the investigating judge cannot order general searches: the search must be confined to specific offences attributed to specific persons.

that will bring to light acts of bribery. As well, in light of the work already done in this field, the lead examiners encourage Luxembourg to pursue its efforts to offer greater protection for witnesses.

d) *Mutual judicial assistance and Luxembourg's treatment of international rogatory commissions*

87. The importance of Luxembourg as a European and international financial centre makes the Grand Duchy the target of many requests for mutual judicial assistance. On average, Luxembourg receives between 350 and 400 international rogatory commissions (IRCs) each year. 86% of these come from "Schengen area" countries.⁴² In 2002-2003, 19 requests referred to bribery among the offences cited. The legislative arsenal that the Grand Duchy has adopted in the last three years has removed some practical, legal and procedural obstacles that in the opinion of certain requesting states, and more broadly of the international community⁴³, were frustrating international mutual legal assistance in criminal matters. Among the recent measures was the entry into force, on 8 August 2000, of the law on international mutual legal assistance in criminal matters.

88. The notable innovation of the 8 August 2000 law, according to the magistrates interviewed by the team, is to facilitate procedures for handling international rogatory commissions. Article 7 of that law establishes the principle that "mutual legal assistance matters are treated as urgent priority cases". The law removes the procedure of transmitting international rogatory commissions from the executive branch, and reserves this exclusively to the Prosecutor General, whereas, under the former system, the Minister of Justice (or the Department of Justice) was the recipient of all IRCs addressed to Luxembourg. Requests for assistance may now be sent directly from magistrate to magistrate, or through the Prosecutor General. The law forbids any delay in the execution of IRCs on grounds of simultaneous or successive lodging of several appeals. Formerly, the possibility of lodging appeals (for annulment, for restitution, for release of confiscated goods, or a move to quash the decision, etc.) against an order of the investigating magistrate in execution of an IRC, and the suspensive effect of such appeals when used as delaying tactics by persons or institutions targeted by the IRC, could delay the handling of the request for information by several months. Under the terms of article 8 of the law, the number of appeals is now limited to two, and they must be resolved at the same time, something that, according to the magistrates interviewed, is shortening procedures considerably. If delays are still a problem, this is essentially due to the scope of the assistance requested.

89. The magistrates interviewed were not aware of any IRC having been refused on grounds of the discretionary prosecution principle or of proportionality.⁴⁴ In the opinion of the lead examiners, this represents a significant shift from the previous situation: in fact, between 1997 and 1999, the Minister of

⁴² Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Italy, Netherlands, Norway, Portugal, Spain and Sweden. Figure cited in the "Evaluation Report on Luxembourg with regard to judicial assistance and urgent requests for tracing and freezing or seizure of assets" (Council of the European Union, 15 February, 1999).

⁴³ See the "Evaluation Report on Luxembourg with regard to judicial assistance and urgent requests for tracing and freezing or seizure of assets" (Council of the European Union, 15 February, 1999).

⁴⁴ Article 3 of the Act of 8 August 2000 on international mutual legal assistance in criminal matters states that "the 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 (...)". Article 4 provides that a demand for assistance will also be refused if, without the need for an examination of the substance, it is foreseeable that the means to be employed are not suitable to the objective of the request, or go beyond what is necessary to achieve it.

Justice objected to execution of more than 20 IRCs.⁴⁵ Refusals to execute IRCs have been based either on the absence of dual criminality, or on the fiscal nature of the request. In the latter case, IRCs are not executed if they relate to simple tax evasion: to receive a favourable response they must fall under the definition of tax fraud (see below, the discussion on the distinction between tax evasion and tax fraud). With respect to dual criminality, the investigating magistrates confirmed that, for a request for assistance to be granted, it is sufficient that the deed be punishable under Luxembourg law, even if under a different criminal provision than in the requesting State. The Ministry of Justice stressed that the 19 IRCs relating to bribery had all been executed or were in the course of execution.

90. Moreover, when it comes to granting a request for assistance relating to legal persons, since legal persons have no criminal responsibility in Luxembourg law (see discussion below), the authorities indicated that they would be able to respond to requests for judicial assistance relating to legal persons, and that the legality of executing the request would be assessed in light of the facts constituting the offence as stated by the requesting authority. The prosecutors and investigating judges interviewed during the visit confirmed that they would respond favourably to such requests. It would seem, however, that mutual assistance in this field will be conditional upon the existence of legal proceedings against some natural person, even if unidentified. At the present time, there is no practical experience to go by, because Luxembourg has not had to deal with such requests as yet.

91. Along with this new provision, the Grand Duchy has also adopted a law to make mutual assistance more effective in the area of money laundering: the 14 June 2001 law approving the Convention of the Council of Europe on laundering, tracing, seizure and confiscation of the proceeds of crime. Three requests for assistance dealing with money laundering in connection with predicate offences of bribery were received by the Luxembourg prosecuting authorities and executed over the last three years. According to the prosecuting authorities, the notable innovation of the 2001 legislation is that henceforth, with respect to requests from other parties to that Convention, confiscations ordered by foreign courts can now be enforced in Luxembourg: confiscation of assets located in Luxembourg can now be ordered on the basis of a foreign judgment relating to facts that constitute one or more predicate offences (including the bribery of foreign public officials) covered by Luxembourg legislation defining the offence of money laundering.

92. The law also provides for mutual legal assistance prior to the final phase (detection and seizure/freezing) in order to deprive criminals of the proceeds of their offences, including bribery: under these provisions, some €11 million was frozen in 2001 and 2002 pursuant to about 30 IRCs that included money laundering among the offences cited.⁴⁶ The 2001 law also introduces a supplementary provision to the Criminal Code, article 32.1, establishing the principle of confiscation of assets of equivalent value, connected with the laundering of the proceeds of transnational bribery.

93. To supplement this mechanism, the Luxembourg financial intelligence unit has entered into a number of cooperation agreements (“MOUs”) with other financial intelligence units (“FIUs”) and makes use of the European Union Council Decision of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member States in order to exchange any information, either on its own initiative or at the request of foreign financial units, which could be useful to them in their enquiries into financial transactions involving money laundering. In the view of the Luxembourg authorities, this spontaneous exchange of information has allowed the authorities in some states to bring

⁴⁵ See the “Evaluation Report on Luxembourg with regard to judicial assistance and urgent requests for tracing and freezing or seizure of assets” (Council of the European Union, 15 February, 1999).

⁴⁶ Public Prosecutor’s Office, Luxembourg, Financial Intelligence Unit, Activities Report for 2001 and 2002 (March 2003).

successful criminal prosecutions against the perpetrators of the predicate offences of money laundering, including bribery in foreign contracting.

94. Lastly, aside from improvements to the machinery which relate to mutual assistance in criminal matters in general as well as to money laundering in particular, extradition provisions in Luxembourg have been completely overhauled by the law of 20 June 2001 “approving the Brussels Convention of 10 March 1995, the Dublin Convention of 27 September 1996, the Additional Protocol to the European Convention on Extradition (Strasbourg) of 15 October 1975, and the extradition treaty signed between Luxembourg and the United States on 1 October 1996”, as well as by the law of the same day on extradition in the absence of a treaty. These extradition provisions will be further amended upon enactment into Luxembourg law of the European Arrest Warrant of 13 June 2002. At the time of the on-site visit, Luxembourg had not received an extradition request relating to bribery.

Commentary

The lead examiners welcome the improvements in the processing of mutual assistance requests by Luxembourg. They nevertheless invite the Luxembourg authorities to give greater attention to the issue of resources so that domestic investigations can be pursued with diligence, without prejudice to the execution of international requests for assistance.

3. *Establishing the offence of bribery*

95. Under Luxembourg judicial procedure, it is up to the prosecutor to prove the facts constituting an offence or crime, and the trial judges form an opinion as to the guilt of the accused on the basis of the evidence supplied. In the absence of case law relating to the bribery of foreign public officials, it is difficult to predict how the courts will interpret the elements constituting the offence. The magistrates interviewed by the examining team reserved their opinion on the interpretation to be given to certain elements of the offence, preferring to await a specific case, while representatives of the legal profession, who were still not thoroughly familiar with the provisions of the law, were not in a position to assess the definitional scope of the new offence.

96. The elements constituting the offence have however already received a judicial interpretation. As indicated in Phase 1, the Luxembourg courts, when considering cases that fell under the old articles of the Criminal Code, have ruled on a number of the elements making up the offence of bribery of foreign public officials: notions of “offers”, “promises”, “gifts” and “presents”, “public officials”, and the terms “act in accordance with his function” or “act facilitated by his function”. Other elements, which were raised during the Phase 1 examination, continue to give rise to uncertainties, because their scope has yet to be tested before the courts. Among these are the necessity to demonstrate the “corruption pact” and the interpretation of the meaning of the term “without right”. Magistrates and lawyers have indicated that, when faced with a problem of interpreting the new law, they would not hesitate to seek interpretations provided by Belgians and French courts, to the extent that Luxembourg law is largely based on the legislation of those two countries.

a) *Elements of the offence*

i) The “corruption pact”

97. With respect to the “corruption pact”, i.e. the need for a meeting of minds between the briber and the public official, the prosecutors and investigating magistrates auditioned by the examining team were of the opinion that the new provisions of the Criminal Code introduced by the law of 15 January 2001 should make this easier to prove. Prior to the introduction of the new provisions, the offence of bribery required, as indicated in Phase 1, the prior existence of a pact concluded before the official performed or abstained

from the act in question: steps taken unsuccessfully in order to make such a “pact” could only be prosecuted, where appropriate, as an attempt. Since proving this prior condition was extremely difficult, in the opinion of practitioners, it posed perhaps the most serious problem in establishing the offence of corruption, which is a secret offence. The existence of such a pact would be even more difficult to establish in the case of active bribery of foreign public officials, because it would then be necessary to prove the intent of an official located abroad.

98. In introducing the offence of bribery *ex post facto*, Article 249 of the Criminal Code makes an offence of an unlawful corruption pact concluded after the public official has performed or abstained from the act. According to the magistrates interviewed, the mere payment of a bribe would henceforth suffice to establish the offence of active bribery, without the need to demonstrate the existence of a prior agreement between the two parties. In the absence of case law, however, all participants agreed that this point could not be definitely confirmed until the Luxembourg courts have had the opportunity to rule on the matter.

ii) The notion of “without right”

99. The new provisions of the Criminal Code introduced by the law of 15 January 2001 also refer to the notion of advantages offered or given “without right”, following the French law that uses the same terms. According to the Luxembourg authorities’ responses in Phase 1, these terms were intended to exclude from the scope of the Criminal Code any salary or advantage that is formally provided by statute. The lead examiners note, however, that this notion could be applied in cases of active bribery of foreign public officials where the legislation of the official’s State provides for the possibility of receiving fees or advantages. The magistrates interviewed during the visit reserved their opinion on the interpretation to be given to these terms, in the absence of a concrete case, and it will be necessary therefore to examine Luxembourg case law in this area in order to ensure that the notion of “without right” does not create an additional element in the definition of the offence of active bribery of foreign public officials that is not foreseen in the Convention. On this point, future jurisprudence of the French courts could also provide useful guidance. Nonetheless, in the view of some magistrates, there is no justification for future case law to distance itself from the notion of “improper advantage” used in the Convention, so that there should be no reason in principle, according to them, to fear the addition of a new element to the definition of corruption under Luxembourg law.

b) *Territorial application of Luxembourg criminal law*

100. Luxembourg criminal law has significant jurisdictional scope. 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”.⁴⁷ As was confirmed in a ruling of the Conseil d’État of February 2000, 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 territory. Prosecutors and investigating magistrates may thus “net” a fair number of corrupt acts committed beyond the territory of the Grand Duchy.

101. In the opinion of the Luxembourg magistrates interviewed by the team, the transit of a bribe or kickback payment through a Luxembourg banking account is sufficient to establish territorial jurisdiction. Similarly, acts committed abroad by a foreign employee of a Luxembourg company, involving a bribe to a

⁴⁷ Luxembourg law is also applicable to acts committed abroad by a Luxembourg national, under the terms of article 5 of the Code of Criminal Procedure, which provides that “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”.

foreign public official, would also suffice to initiate prosecution, to the extent that such actions are undertaken on behalf of a Luxembourg company (the effect of the act of bribery). Accomplices of Luxembourg nationality may also be prosecuted, even if the elements constituting the offence occurred abroad, and the person committing the offence is a foreigner or has not been identified. In the absence of case law on bribery or peripheral offences reported to the examining team during the on-site visit, it is difficult to predict the practical scope of article 7ter of the Code of Criminal Procedure as it applies to cases of transnational bribery or money laundering linked to this type of offence. In the opinion of the lead examiners, given the scarce resources of the judicial authorities and the prosecutors' apparently strict appreciation of the level of indications gathered during the preliminary enquiry stage before initiating further proceedings and prosecution, there is a risk that the extended territorial jurisdiction of Luxembourg law will be little used in practice.

Commentary

The lead examiners consider that Luxembourg law is on the whole consistent with the requirements of the Convention. Given the absence of case law relating to bribery of foreign public officials, it is nevertheless difficult to predict how certain elements of the offence will be interpreted in practice, particularly as concerns demonstration of the "corruption pact" and the notion of "without right", and whether the extended territorial jurisdiction of Luxembourg criminal law will be widely used. Consequently, the lead examiners invite the Working Group to monitor the development of Luxembourg jurisprudence in this area, and to re-evaluate these questions in that light.

C. SANCTIONING THE OFFENCE OF ACTIVE BRIBERY OF FOREIGN PUBLIC OFFICIALS AND RELATED OFFENCES

1. Impunity of legal persons

102. A major weakness of Luxembourg law is that it still does not provide "effective, proportionate and dissuasive" (Article 2, OECD Convention) criminal or other penalties for legal persons who commit an offence of bribery of foreign public officials or laundering of assets related to a predicate offence of bribery, even though Luxembourg had indicated to the OECD Working Group during its examination of the country in Phase 1 that a draft law introducing the principle of criminal liability of legal persons would be placed before Parliament by the end of 2001. At the time of the lead examiners' on-site visit, only a preliminary draft law envisaging such responsibility was being prepared in the Ministry of Justice which the lead examiners were unable to examine, as the draft law was not in sufficiently final form to be communicated to the examining team or to the OECD Working Group.

103. Several explanations were put forward by the representatives of the Ministry of Justice interviewed by the examining team to explain this delay by Luxembourg, in contravention of its international obligations. Firstly, the elaboration of such a text requires its integration in a coherent manner into the criminal laws in force in Luxembourg. Furthermore, the shortage of staff in the unit responsible for preparing the preliminary draft was also an issue, since it had only a few officials charged with transposing all the European Directives and international conventions to which Luxembourg is a party, and with representing the country in international bodies. The explanations offered did not seem entirely convincing in the opinion of the lead examiners. The excessive workload of the officials responsible for this matter in the Ministry of Justice carries little weight when Belgian and French law, which traditionally serve as a model for Luxembourg legislators, constitute a precedent which could, in the view of the lead examiners, easily be transposed in a short period of time.

104. As was pointed out by the Luxembourg authorities in Phase 1, an indirect sanction exists, because commercial companies which carry on activities contrary to the criminal law can be wound up and placed in liquidation. Furthermore, the legal entity may be held civilly liable.⁴⁸ Nonetheless, in the opinion of the Luxembourg Conseil d'État itself, “while it is true that under the terms of Article 203 of the law of 15 August 1915, as amended, on commercial companies, the District Court may wind up, and order the liquidation of, any company which carries on activities contrary to the criminal law, that provision is still far from being a measure which might be considered as fully transposing the Convention. Article 18 of the law of 21 April 1928, as amended, on associations and non-profit making foundations does indeed contain a similar provision, but it does not appear to show how the entity should act with regard to other legal entities, such as public institutions or other associations. The fact is, moreover, that the sanction provided, ie. the winding up of the legal entity in question, might, depending on the case, be considered inappropriate and disproportionate to the act committed.”⁴⁹ The Conseil d'État thus considered that the text of the draft law submitted to it, intended to transpose the OECD Convention into domestic law, did not provide for sanctions which fulfilled the requirements of Article 3, paragraphs 2 and 4 of the Convention, and made proposals both as to the introduction of criminal liability of legal persons into Luxembourg law, and as to the different sanctions which might be envisaged in the case of corruption of foreign public officials.

105. In the opinion of the lead examiners, given that bribing foreign public officials in international commercial transactions frequently involves legal entities with complex structures within which it is sometimes difficult to identify a particular individual responsible for the decision-making process, failure to take proper account of the role of legal persons in foreign bribery could undermine the effectiveness of prosecution and punishment of acts of bribery committed in foreign markets, or of the laundering of assets or proceeds of such bribery. Apart from questions concerning the identification of individuals within a company who have committed an offence of bribery or participated in a scheme to launder assets or the proceeds of bribery, the absence of responsibility of legal persons could also constitute an obstacle to the effective fulfilment of Luxembourg's obligations under the terms of the Convention, notably in matters of mutual judicial assistance and confiscation.

Commentary

The lead examiners are concerned at Luxembourg's persistent contravention of article 22 of the Convention and by the potential obstacles that could arise from the absence of responsibility of legal persons relating to which bribery of foreign public officials. They recommend that the Luxembourg authorities introduce the liability of legal persons for the offence of bribery of foreign public officials into Luxembourg law within the year following this evaluation of Luxembourg under the Phase 2.

48 Although legal persons do not have any criminal responsibility, they can, on the other hand, be ordered on the basis of civil liability to pay damages and interest to persons who have suffered loss due to an offence committed at their request. It is also theoretically possible to dissolve commercial companies which engage in illegal activities under the amended law of 10 August 1915 on commercial companies. Under article 18 of the Law of 21 April 1928 on associations and non-profit foundations, the Attorney-General may also seek the dissolution of an association, notably when it uses its assets for purposes other than those for which it was formed or which are contrary to the law or public order.

49 Opinion 43.633 of the Conseil d'État, 15 February 2000 on the draft law 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.

2. *Convictions and sentences handed down by the Luxembourg criminal courts for acts of bribery committed by individuals*

106. In the absence of adequate statistical tools, identifying patterns on which to formulate conclusions on the sentences actually applied to individuals convicted of bribery or related offences, the profile of convicted persons, and the nature of the illegal conduct sanctioned, and thus to predict practice in criminal proceedings relating to bribery of foreign public officials, is a difficult exercise. The criminal records and prosecuting authorities' case files do not allow searches by offence, while the quarterly statistical reports submitted by the Luxembourg and Diekirch prosecutor's offices to the Prosecutor General are very general: accounting offences are not identified at all, the presentation of company law offences is very superficial and offences relating to public procurement, domestic bribery or unlawful interference are not mentioned. Neither does the fact that, in Luxembourg, access to a court decision depends on an "appraisal of the public interest" by the court facilitate examination of decisions handed down in cases of economic and financial crime.

a) Applicable sanctions and their determination by the judges

107. Under articles 247 and 249 of the criminal code, a natural person who contravenes the anti-bribery provisions of the law is liable to a term of imprisonment of five to ten years and a fine of 500 to 187,500 euros. The law does, however, make a distinction (article 250 of the Criminal Code) depending on whether or not the public official (national or foreign) who took the bribe was exercising judicial functions at the time of the offence. In other words, when the offence concerns a "*judge or any other person sitting in a judicial body, any arbitrator or expert appointed by a court or by the parties*", the term of imprisonment is raised to ten to fifteen years and the fine to between 2,500 and 250,000 euros.

108. In practice, under Luxembourg criminal law, sentences are fixed by judges on their own authority, depending on the circumstances of the case. The principle of extenuating circumstances set out in articles 73 to 79 of the Criminal Code allows the judge to reduce the applicable prison terms and fines. The Criminal Code does not give a list of extenuating circumstances, the application of which is left to the sole discretion of the judge. A judge on the merits met during the on-site visit indicated that the Luxembourg judiciary was developing its own guidelines on the subject based on sentences delivered, in order to maintain consistency in the application of sanctions. In specific cases of bribery of foreign public officials, this judge thought that the criteria to be taken into account in applying extenuating circumstances could include the previous record of the accused persons, premeditation of the acts, the amount and frequency of the bribes paid, the level of the resulting benefit and, more worrying in the opinion of the lead examiners, the motives of the briber (a bribe paid on behalf of a legal person in economic difficulties would be considered less serious than a bribe paid in the personal interests of an individual). On the other hand, the fact that bribery is commonplace in the market in question would not be regarded by the judge as an extenuating circumstance.

109. The impact of downgrading bribery to a lesser offence on the deterrent character of the sanctions raised some concerns. Indeed, prosecutors and judges met during the on-site visit indicated that bribery, which is classified as a crime in Luxembourg law, is sometimes dealt with – on a case by case basis, depending on what is in the file -- as a lesser offence, for reasons of efficiency, as are other offences which are classified as crimes. This practice, while understandable, nevertheless raises the question of the imbalance between concerns about criminal administration (not overburdening the criminal courts, making savings) and the symbolic and thus deterrent nature of the appearance of gravity of the offence which the legislator decided to classify as a crime. This appearance of gravity is diminished because its

characterisation as a crime will not automatically appear in the records of bribery cases⁵⁰. The impact on sentences applied to bribery cases which are treated as lesser offences of the preliminary draft law, which introduces into Luxembourg law a system of settlement in criminal proceedings, also raised doubts. In the wording of the text being prepared at the time of the examination of Luxembourg in Phase 2, settlement would only apply to lesser offences, thus excluding bribery, which is classified as a crime. Yet acts of bribery treated as lesser offences could, in theory, be subject to such a system. However, when asked about the scope of this text and its potential impact on sentencing of individuals convicted of bribery, the representatives of the prosecuting authorities indicated that they would be disinclined to resort to a system of settlement in criminal proceedings in such cases.

b) Sentences handed down by the courts

110. Three judgments for bribery of Luxembourg public officials were provided to the examining team during the on-site visit. Based on an examination of these, it was found, in the first place, that, proportionately, the sanctions more often affect the recipients of the bribe than the bribers. In two of the three cases of bribery in which the judgments were provided to the examining team, the bribers were not prosecuted, although it had been established that they had paid bribes to the recipients. This should be seen in the light of a certain inclination on the part of the prosecuting authorities to prosecute only those who take bribes and not those who pay bribes, for reasons which have to do with moral considerations (the importance of taking a firm stand against dubious practices to guard against the risk of reprehensible habits taking hold in Luxembourg's public service) but most of all with efficiency of prosecution: in some cases, where the active briber is the only witness against the public official, the decision not to prosecute the former could, according to the prosecutors interviewed, enable them to secure his cooperation in the proceedings and thus obtain the conviction of the corrupt public official. In the view of the examiners, if such a penal policy were applied to the active bribery of foreign public officials, there might be a danger that the objectives of the Convention would not be achieved.

111. An examination of the three cases cited reveals the minor nature of the transactions punished as bribery: the three cases concern only small-scale bribery of Luxembourg public officials (mayor, public official, government adviser) by company directors or small businessmen to obtain planning permissions (Decision 161/95V of 4 April 1995), vehicle test certificates (Judgement 1057/2002 of 25 April 2002) or transport licences (Judgement 588/2003 of 10 March 2003). The illegal payments in question, when they took the form of money, ranged from €25 to €75 in the case the subject of Judgment 1057/2002 and from €2,000 to €12,500 in the case the subject of Judgment 58/2003 (in some cases, in addition to the payment of sums of money, other benefits were provided, such as settling hotel bills). The case the subject of Decision 161/95V, the only one presented to the lead examiners involving a prosecution for active bribery, concerned the offer of the payment of a "substantial donation" to the mayor's municipality.

112. As to the sanctions applied, it can be seen that the convictions of persons found guilty of bribery on the basis of the old laws then in force⁵¹ resulted in most cases in token penalties. Thus, in the only case where the briber was convicted (Decision 161/95V), the offender was given a suspended prison sentence and fined LUF50,000 (about €1,240). The fine was upheld on appeal, but the Court, taking into account that the accused did not have any previous criminal record, decided to quash the prison sentence. In the two judgements handed down for passive bribery, taking into account their criminal records and that the

50 It should be noted, as indicated during the examination of Luxembourg in phase 1, that treating criminal cases of bribery as summary offences does not have any consequence for the limitations period, which remains ten years as set out in the law of 15 January 2001 approving the OECD Convention.

51 For the offence of corruption properly so called (old Article 246 of the Criminal Code), a prison sentence of between eight days and six months in the case of a "just act", and a sentence of imprisonment of between one month and one year for an "unjust act".

“reasonable time” set out in article 6(1) of the European Convention on Human Rights had been exceeded, the offenders were sentenced to suspended prison terms of six and nine months, and a fine of €1,000 (in the case the subject of Judgment 1057/2002) and €2,500 (in the case the subject of Judgment 588/2003). While the representatives of the prosecuting authorities interviewed by the examining team expressed themselves generally satisfied with the sentences handed down by the courts, the lead examiners had doubts about the deterrent effect of such sentences on acts of bribery, which are nevertheless regarded as “*a serious and grave threat to democracy, because they undermines its very foundations and redound to its discredit*” (Judgement 588/2003).

113. Apart from the modest level of the sanctions in the decided cases (which may explain why those convicted only very rarely appeal, it is further observed that no order was made in the three cases for the confiscation of the bribe or the proceeds of the bribe. According to the judges met during the on-site visit, resort to confiscation was, however, frequent. Such measures essentially involved confiscation of the subject-matter of the offence and sometimes the proceeds. In the absence of any case-law presented to the examining team or sufficiently detailed statistics indicating the categories of sentence delivered by the courts, it is difficult to draw any conclusions as to the use of confiscation measures in economic and financial criminal cases.

114. With respect to confiscation of assets belonging to legal persons, the Luxembourg authorities indicated, citing a case heard by the Court of Appeal on 11 March 2003, that there would be no real difficulty in confiscating such assets. In that case, the accused was prosecuted and convicted as managing director of a company for offences attributable to it in the course of its business. In the lower court, the judge had ordered the confiscation of vehicles belonging to the company which had been used to commit the offences (instrument of the offence). It should nevertheless be noted in the particular case that the legal person was owned by the natural person who was prosecuted and convicted. Moreover, the confiscation was not upheld on appeal. Even though the confiscation was overturned on the grounds that it was a disproportionate sanction and not specifically for reasons related to the fact that the vehicles belonged to a legal person which could not be prosecuted and convicted directly, doubts remain in the absence of case law as to the possibility of confiscation of the assets of a legal person. In the view of a judge met during the on-site visit, confiscation of assets belonging to a legal person and used as the instrument of committing an offence would not be possible.

Commentary

The lead examiners consider that the sanctions applied to bribery offences seem weak and that the prosecuting authorities’ inclination not to prosecute bribers in the context of cases of bribery of domestic public officials could compromise the objectives of the OECD Convention if such an approach were to be adopted in the context of cases of active bribery of foreign public officials. For this reason, they invite the Luxembourg authorities at the earliest opportunity to enter into discussions with the prosecution authorities on the importance of vigorously prosecuting bribers in relation to bribery offences. Bearing in mind that no case of bribery of foreign public officials has up to now been prosecuted or decided by the courts, they further recommend that the question of the level of sanctions and the use of the penalty of confiscation in cases of bribery of foreign public officials should be followed up by the Working Group. In this regard, they invite the Luxembourg authorities to compile relevant statistical information concerning sentences pronounced by the courts and convicted persons in order to allow evaluation of the criminal policy in question.

3. *Sanctions for laundering the proceeds of bribery of foreign public officials*

115. Since the establishment, by the law of 11 August 1998, of the offence of laundering of the proceeds of bribery, the Luxembourg criminal code provides the possibility for the judge to invoke the criminal responsibility of natural persons involved in the laundering of assets or money derived from bribery. Under article 506-1 of the Criminal Code, any individual who assists in the investment, concealment or conversion of the subject-matter or proceeds directly or indirectly resulting from an offence of bribery or who facilitates, by any means, the false declaration of the origin of assets or money specifically resulting from an offence of bribery, or who has acquired, held or used the direct or indirect proceeds of that offence in the knowledge of their origin, may be found guilty of the offence of money laundering. If found guilty, he shall be liable to a fine from €1,200 to €124,000 and a prison term of 1 to 5 years. This penalty shall be increased to 15 to 20 years if the laundering offences constitute acts of participation in the principal or accessory activities of a criminal association or organization.

116. In practice, there have up to now been no proceedings against an individual for laundering of the proceeds of bribery, despite the fact that several reports of suspected laundering received by the prosecuting authorities in recent years from financial institutions in both Luxembourg and foreign jurisdictions concerned suspect movements of funds with links to bribery. Nor did the ten or so cases under investigation or preliminary inquiry at the time of the on-site visit concern cases of money laundering linked to transnational bribery⁵². Moreover, no case involving the complicity of a Luxembourg financial institution in laundering had come to light.

117. When all is said and done, out of a total of over 2,000 suspicious activity reports received by the anti-money laundering unit since the creation of the offence of laundering in 1993, only three cases, all concerning money laundering transactions linked to drug trafficking, had reached the courts at the date of the examination of Luxembourg in Phase 2, even though the Grand Duchy's politicians state that "the challenge of the fight against money-laundering is crucial (for the country) in that we must preserve its international reputation in general and its good financial standing in particular"⁵³. Two of the cases resulted in convictions, one in 1993 (Court of Appeal of the Grand Duchy of Luxembourg, Order No. 17/93V of 22 January 1993), the other in 1999 (Luxembourg District Court, 9th Chamber, 3 May 1999, upheld on appeal). The third ended with the acquittal of the accused (Court of Appeal of the Grand Duchy of Luxembourg, Order No. 270/01V of 10 July 2001).

118. Several explanations were put forward to justify the absence of prosecutions and convictions of individuals for the offence of money-laundering related to bribery. The first, given by the Luxembourg prosecutor's office, stresses the difficulty of establishing links between the suspect transactions and the predicate offence of bribery. Unlike the other states parties to the OECD Convention which have legislation which contains the general principle that money laundering transactions resulting from any crime or offence may be prosecuted, Luxembourg opted for a list of predicate offences to be taken into consideration in the context of prosecution⁵⁴. In these circumstances, it is up to the prosecution not only to

⁵² Of the 11 cases in progress, half came from reports of suspicious activity and the other from information obtained from foreign rogatory commissions or foreign anti-money laundering services. In 2002, out of a total of 631 reported suspicions, 83 (i.e. 13 per cent of the total) had come from foreign services (FIU).

⁵³ Doc.parl.4657-4, report of the legal committee, 25 April 2001, p.2.

⁵⁴ The list of offences underlying money-laundering should be extended, with the inclusion, following the transposition currently in progress of the second European Directive on money-laundering in 2001, firstly, of all crimes and, secondly, a larger number of specifically listed offences, notably fraud, abuse of trust, misuse of company assets and fraud against community financial interests.

prove the offence of money laundering as such but also to prove the predicate offence (1993 (Court of Appeal of the Grand Duchy of Luxembourg, Order No. 270/01V of 10 July 2001)). However, the practice of paying hidden commissions would make it very difficult to detect the facts constituting the predicate offence of bribery, in particular bribery in foreign procurement.

119. Another explanation offered by the prosecuting authorities seems more specifically to concern the nature of the laundering operations taking place in Luxembourg. As a result of the financial position of Luxembourg, the great majority of cases of suspected money laundering dealt with by the prosecuting authorities concerned laundering not at the level of injection (the money-launderer arriving with a suitcase full of cash) but transit, i.e. integration. The statistics compiled by the anti-money laundering unit show that in 90 per cent of cases, the prosecutor is faced with cases involving foreigners who are not Luxembourg citizens and are not resident in Luxembourg. Out of a total of 2,506 suspects during the period 1998-2002, only 243, or 9.6 per cent were Luxembourg residents. Over half (almost 60 per cent) of the persons suspected of money laundering in 2002 were resident in European Union countries.

120. In the opinion of the members of the financial unit, the fact that the majority of suspects are natural persons living abroad and, moreover, of foreign nationality, would hardly facilitate the task of proving the predicate offence of bribery linked to money laundering operations carried out in Luxembourg. According to them, it would be difficult to require the unit's foreign counterparts to undertake the necessary investigations into the person residing in the foreign country. The hearing of witnesses who might be expected to be abroad would be an additional obstacle. The principle of non-extradition of nationals applied by a good many countries would further complicate the prosecutor's task, making prosecution for laundering in the Grand Duchy ineffective if not illusory. In such circumstances, the prosecuting authorities, considering the difficulties in establishing a direct link with a specific act of the predicate offence of bribery on foreign markets, prefer to let the Luxembourg financial intelligence unit confine itself to exchanging financial information obtained in the form of suspicious activity reports with foreign anti-money laundering units, leaving it to them to decide whether to refer such cases to the prosecuting authorities in their respective countries⁵⁵. As mentioned earlier in the present Report, the Luxembourg authorities prefer to devote part of their material and human resources to mutual legal assistance, so that the states in question have all the material in their possession in order to have the perpetrator of the acts convicted in their courts. On the question of whether the entry into force of the European arrest warrant, which covers financial crime and in application of which the member States of the European Union are obliged to hand over their nationals if the latter are sought for an offence or crime committed in another European Union country, would change that policy, the Luxembourg authorities did not give a clear answer. At most, it was conceded by the prosecuting authorities that the entry into force of the European arrest warrant might lead to a review of the strategy of referring the cases to foreign authorities.

Commentary

The lead examiners invite the Luxembourg authorities to draw the attention of the prosecuting authorities to the importance of vigorously prosecuting offences of money laundering linked to bribery in foreign contracting without regard to the place where the predicate offence of bribery was committed or the residence of the suspected offenders.

⁵⁵ Each case involving Luxembourg residents, however, is investigated by the Criminal Police, according to the representatives of the unit met by the examining team.

4. *Persons found guilty of accounting and fiscal offences*

a) *Prosecution of accounting offences*

121. With respect to offences relating to accounting, such as the establishment of off-the-books accounts, off-the-books or inadequately identified transactions, the recording of non-existent expenses, use of false documents (article 8 of the Convention) the burden of responsibility for maintaining proper and complete company accounts falls first and foremost on “businessmen” and other company directors under the general provisions of the relevant Luxembourg law (article 8 of the Commercial Code and §§162-165 of the General Tax Law). As a rule, in the absence of specific offences in these areas, it is in fact more for complicity or as an accessory to the offence that accountancy professionals will be convicted, when they have knowingly participated in the execution of the offence committed by the principal person.

122. A businessman or company manager who does not fulfil his obligation to maintain proper and complete accounts in theory runs great risks. He may be declared in fraudulent bankruptcy, a crime punishable by imprisonment of 5 to 10 years. Article 577 .1 of the Commercial Code provides that “any insolvent trader who removes his books, or has fraudulently removed, erased or altered the content shall be declared fraudulent bankrupt”. The guilty trader can be convicted under other provisions, for example those of the Criminal Code which prohibit forgery and the use of forgeries in commercial, banking or private documents (punishable by imprisonment of 5 to 10 years) or those of the companies law which sanction the presentation of false accounts (punishable by imprisonment or a fine of €5,000 to €25,000). An accountancy professional, for his part, will be judged an accomplice if he has incited the principal person to commit an offence, i.e. if he has made it possible, through schemes set up by himself, to commit the principal offence. A professional who has only assisted the principal person in the execution of the offence will be regarded as a mere accessory and thus liable to a lighter sentence.

123. A rapid examination of the few available statistics shows that convictions for fraudulent bankruptcy, forgery and use of forgeries, or misuse of company assets are in practice if not almost non-existent, at least very few. By way of illustration, no conviction for fraudulent bankruptcy was pronounced by the Diekirch district court in the judicial years 2000-2001 and 2001-2002. During the same period, only six cases of false accounting and 10 for use of forgeries resulted in convictions. Out of 2,309 judgements pronounced by the Luxembourg and Diekirch district lower courts during the first nine months of 2003, 66 convictions were for forgery and use of forgeries, 19 for embezzlement, 31 for abuse of trust and none for misuse of company assets⁵⁶. If accounting or company law offences come to light, the reason, according to the judges met during the on-site visit, almost always is that they are detected in the course of bankruptcies.

124. It must be observed that the private self-regulation exercised by the disciplinary authorities responsible for ensuring the proper application of the law by the professions that they supervise does not make up for the weaknesses in criminal prosecutions. These authorities, whether it be the Association of Chartered Accountants (*Ordre des experts-comptables*) or the Institute of Company Auditors (*Institut des réviseurs d'entreprises*), nevertheless can deploy a broad range of disciplinary sanctions ranging from simple reprimand, through administrative fines which can, in the case of breaches of the law by company auditors, be up to €13,000⁵⁷, to permanent disbarment from practising the profession. Chartered

⁵⁶ General statistics of the Diekirch district court for the judicial years 2000-2001 and 2001-2002 in Ministry of Justice, *Rapport d'activité 2002*, pp.84-85 ; and *Statistiques des décisions en matière pénale pour la période du 1er janvier 2003 au 15 septembre 2003* (Public Prosecutor's office in the Luxembourg District Court)

⁵⁷ Law of 10 June 1999 on organization of the profession of chartered accountant. Law of 28 June 1984 on organization of the profession of company auditor.

accountants and company auditors interviewed by the examining team effectively said that disciplinary sanctions had never been imposed.

Commentary

The lead examiners are of the opinion that the Luxembourg legal system has measures, in particular fraudulent bankruptcy, forgery and use of forged documents, misuse of corporate assets, and disbarment from professional practice, which permit the punishment of the fraudulent acts set out in article 8 of the OECD Convention. They recommend that the authorities ensure that sufficient human and material resources are available to the prosecuting authorities and investigating magistrates in order to guarantee vigorous prosecution of accounting offences which might conceal the payment of a bribe to a foreign public official.

b) Enforcement of the non tax deductibility of bribes

125. Companies and individuals who intentionally try to pass off bribes and commissions paid in respect of exports as deductible charges are liable to administrative and criminal sanctions in addition to rectification of the declaration or its reassessment. In practice, the person will be taxed on the sums evaded, to which may be added an administrative fine fixed by the tax authorities in an amount up to four times the tax, unless that act, because it is based on fraudulent devices and involves significant amounts, is qualified as “tax fraud” in the meaning of paragraph 395.5 of the general law on tax. The act is then itself punishable by imprisonment from one month to 5 years and/or a fine up to ten times the taxes evaded. The criminal offence of tax fraud being a matter for enforcement by the civil courts, it is up to the State Prosecutor alone to prosecute offences against tax law which could amount to this offence. On the other hand, for tax evasion, which simply attracts administrative sanctions, the law allows the administration itself to investigate the situation and, where appropriate, impose an administrative fine.

126. It seems that reassessments of tax are rarely ordered together with administrative fines, even in cases of fraud. The scope of the sanction of reassessment is itself limited in practice. Reassessments by Luxembourg tax officials apparently do not go back further than one to four years according to certain local observers, while the law allows them up to ten years⁵⁸. Such a practice can only encourage the taxpayer to pass off export commissions as deductible charges, since, as the 1997 report on tax evasion noted, “at worst, he will only have to pay the tax actually due”⁵⁹. Criminal sanctions for “tax fraud” are even rarer. Since the introduction of the offence into the Criminal Code in 1993, only one conviction has been handed down, in 2002, in a case concerning an artisan who had defrauded over €500,000 in four years. Two other cases were being investigated at the time of the on-site visit. According to the prosecuting authorities interviewed by the examining team, while several cases in which there were presumptions of fraud had been notified to the prosecutor’s office in recent years, proceedings had had to be dropped in some cases because of problems in interpreting what constituted the offence of tax fraud, in particular the amount defrauded. In the absence of an amount specified in the wording of the text, the question arose, unresolved until the conviction in 2002, as to the point at which an amount could be qualified as “significant, either in absolute terms or in relation to the tax due”. A similar problem of interpretation concerned the evaluation of the “systematic use of fraudulent devices”.

127. Even more than sanctions applied in tax matters, it is in fulfilment by tax officials of their obligation to notify the prosecuting authorities of any crime of active bribery of foreign public officials that the Luxembourg enforcement system seems weakest. Discussions with the representatives of the

⁵⁸ “Strengthened fiscal controls for resident companies”, *Agefi Luxembourg*, February edition, 1999

⁵⁹ *Report on tax fraud in Luxembourg*, page 109.

department responsible for direct taxation interviewed by the examining team gave no clear indication that the tax officials would comply with this obligation. A head of department, on the contrary, indicated that a tax inspection that brought to light the payment of a bribe in foreign procurement would not be followed by a notification to the prosecuting authorities. Only tax adjustment measures and, possibly, administrative fines would be ordered.

Commentary

The lead examiners recommend that the Luxembourg authorities raise awareness among tax authorities regarding the importance of making rigorous use of all sanctions available under the Luxembourg tax legislation in order to deter any attempt on the part of taxpayers to pass bribes paid abroad as deductible charges. Furthermore, they consider that the clear obligation under the law on the tax administration to inform the authorities responsible for enforcement of the criminal law of suspicions concerning criminal offences, including bribery of foreign public officials, is an important measure in combating transnational bribery. They invite the Luxembourg authorities to draw the attention of tax officials to their obligation to promptly notify the prosecuting authorities of any payment of a bribe to a foreign public official which comes to their knowledge in the performance of their duties.

RECOMMENDATIONS

128. In conclusion, based on the findings of the Working Group with respect to Luxembourg's application of the Convention and Revised Recommendation, the Working Group makes the following recommendations to Luxembourg. In addition, the Working Group recommends that certain issues be revisited as case law evolves.

a) Recommendations

Recommendations for ensuring effective measures for preventing and detecting bribery of foreign public officials

129. With respect to awareness raising activities to promote the implementation of the Law of 15 January 2001 relating to corruption and amending the Criminal Code, the Code of Criminal Procedure and the Act of 4 December 1967 on Income Tax, the Working Group recommends that Luxembourg:

1. Take necessary measures, in cooperation with the professional organisations and the business circles concerned, to raise awareness among the private sector regarding the offence of bribery of foreign public officials, and promote the implementation within enterprises of preventive organisational measures – internal control mechanisms, ethics committees, and warning systems for employees –, as well as the adoption of codes of conduct specifically addressing the issue of foreign bribery. [Revised Recommendation, Articles I and V.C.(i)]
2. Take necessary measures to raise awareness of the offence among the administration, notably among those officials that may play a role in detecting and reporting acts of bribery and those in contact with Luxembourg enterprises exporting or investing abroad (in particular diplomatic missions of Luxembourg abroad), the Luxembourg public and professional bodies. [Revised Recommendation, Article I]

130. With respect to detection, the Working Group recommends that Luxembourg:

3. Issue regular reminders to public officials of their obligation under article 23 (2) of the Code of Criminal Procedure to inform prosecuting authorities of any offence of bribery of a foreign public

official that they may become aware of in the exercise of their duties, and of disciplinary sanctions applicable in the event of non-compliance with this obligation, and ensure effective application of such sanctions. [Revised Recommendation, Article I]

4. Encourage the implementation of a similar reporting procedure to the prosecuting authorities for officials not subject to the provisions of article 23 (2) of the Code of Criminal Procedure working for bodies vested with supervisory powers with regard to corruption in the attribution of public subsidies (notably certain officials of the Ducroire and Lux Développement). [Revised Recommendation, Articles I and II.(v)]
5. Develop clear instructions for the Tax Administration prescribing verifications to be carried out in order to detect possible offences of bribery of foreign public officials, and remind these officials of their obligation to alert the prosecuting authorities of any offence that they may become aware of in this regard, and ensure that sufficient human and financial resources are made available to the tax authorities for effective controls. [Revised Recommendation, Articles II.(ii) and IV]
6. Adopt measures to ensure effective protection of any person collaborating with the law enforcement authorities, notably employees who report in good faith suspected cases of bribery. [Revised Recommendation, Article I]
7. Given the particular importance of the Luxembourg financial centre, continue ongoing efforts in the context of the Action Plan against Money Laundering in order to ensure rigorous implementation by the entire banking and financial sector of legislative and regulatory measures aimed at preventing and detecting money laundering of funds that may be related to the bribery of foreign public officials on international markets, and ensure that non-compliance with the legal obligation to report be sanctioned in a dissuasive manner. [Convention, Article 7; Revised Recommendation, Article II.(iv)]
8. Bearing in mind the important role of accounts auditing in the detection of suspicious operations related to bribery of foreign public officials, and in the context of ongoing efforts by Luxembourg aimed at ensuring greater transparency in corporate accounting, ensure compliance by accountants and external and internal auditors with their obligation to inform prosecuting authorities of any suspected money laundering related to corruption. In this regard, Luxembourg authorities are invited to further raise awareness of such professionals to the provisions of the anti-bribery legislation, notably by introducing stricter auditing procedures, and to ensure that non-compliance with the reporting obligation be effectively sanctioned. [Convention, Article 8; Revised Recommendation, Articles I et V]
9. Establish effective interdisciplinary cooperation and coordination among the bodies concerned (administrative, financial and law enforcement) with regard to supervisory, detection and sanctioning powers, and, in this regard, ensure that professional secrecy does not constitute an impediment. [Revised Recommendation, Article I]

Recommendations for ensuring adequate mechanisms for the effective prosecution of offences of bribery of foreign public officials and related offences

131. With respect to prosecution, the Working Group recommends that Luxembourg:

10. Grant determined financial support with a view to ensuring sufficient human and financial resources as well as specific training to law enforcement professionals (police, prosecution, investigating magistrates and judges) to guarantee effective prosecution of the foreign bribery

offence and related offences, notably those related to accounting, without prejudice to the execution of request for mutual legal assistance [Convention, Articles 5 and 9; Revised Recommendation, Article I; Annex to the Revised Recommendation, Paragraphs 6 and 8]

11. Compile relevant statistical information regarding the number, source and treatment of bribery offences (prosecution, judgment and sanction) in order to facilitate evaluation, and, if necessary, develop criminal policy in this regard. [Revised Recommendation, Article I]
 12. In order to ensure effective prosecution of offences of active bribery of foreign public officials, and given the currently limited investigative powers at the preliminary enquiry stage, firstly, consider extending such powers, and, secondly, ensure that, at the stage where investigation is initiated, the threshold taken into account by the prosecuting authorities is not too high concerning the level of proof gathered in the course of the enquiry. [Convention, Article 5; Revised Recommendation, Article I]
 13. Formally remind prosecuting authorities (via circulars or directives, or any other official channel) of the importance of prosecuting bribers, as an essential condition for the effective application of the foreign bribery offence, and, similarly, draw their attention to the importance of prosecuting money laundering offences related to bribery on foreign markets, without referring to the place of occurrence of the predicate offence or to the place of residence of the alleged offender. [Convention, Articles 1, 3 and 5; Revised Recommendation, Article I; Convention, Articles 8 and 9; Revised Recommendation, Articles I, II.(iii), and V.A.(iii)]
 14. Taking note of Luxembourg's continued non-compliance with Article 2 of the Convention, establish in Luxembourg law a clear liability of legal persons for bribery of foreign public officials within a year of the Phase 2 evaluation of Luxembourg, and put in place sanctions that are effective, proportionate and dissuasive. [Convention, Articles 2 and 3]
132. With respect to sanctions, the Working Group recommends that Luxembourg:
15. Raise awareness among prosecuting authorities on the importance of rigorously applying the range of sanctions provided for in criminal law which may be effective and dissuasive with respect to corruption, including confiscation measures, and encourage prosecuting authorities to lodge the range of appeals provided for under the law, should the decisions handed down be too lenient. [Convention, Article 3; Revised Recommendation, Article I]
 16. Raise awareness among tax authorities regarding the importance of making rigorous use of all sanctions available under the Luxembourg tax legislation in order to deter any attempt on the part of taxpayers to pass bribes paid abroad as deductible charges. [Revised Recommendation, Article IV]

b) *Follow-up by the Working Group*

133. The Working Group will follow-up in the issues below, as case law and practice develop, in order to assess:
17. Whether the current terms – “without right” and case law concept of “corruption pact” – are sufficiently clear to allow for effective prosecution of the foreign bribery offence. [Convention, Article 1]
 18. To what extent bribers are being prosecuted and the application of sanctions handed down, notably with regard to confiscation, in order to determine whether these sanctions are sufficiently

effective, proportionate and dissuasive to prevent and combat the offence of bribery of foreign public officials. [Convention, Articles 1 and 3]

134. The Working Group requests the Luxembourg authorities to report, in accordance with the Phase 2 Guidelines, on measures taken to fulfil the recommendations by the Group, and reserves the right to conduct a second on-site evaluation of Luxembourg, in view of the reports by Luxembourg authorities.

ANNEX 1
List of institutions met during the on-site visit from 17 to 20 November 2003

Government and public service institutions

Ministries

- Ministry of the Civil Service
- Ministry of Justice
- Ministry of Foreign Affairs
 - Department of cooperation and humanitarian aid
 - Department of international economic relations
- Ministry of Finance
 - Public Records and Land Registry
 - Department of Direct Taxation
- Ministry of Public Works

Other public institutions

- Insurance Commission
- Financial Services Supervisory Commission
- Court of Auditors
- High Court of Justice
 - Prosecutor General's Office
- Inspectorate of Labour and Mines
- Guarantees Office

- Grand-Ducal Police
 - Organized Crime Division
 - Economic and Financial Division
 - Anti-money laundering Section
- Register of Commerce and Companies
- Luxembourg District Court
 - Investigations Section
 - Financial Information Section
 - Prosecutor's Office

Private sector

Professional organizations

- Institute of Internal Auditors
- Institute of Company Auditors
- Luxembourg Bar Association
- Association of certified accountants

Trade unions and private sector representative organizations

- Association of Luxembourg Banks and Bankers
- Association of Insurance Companies of the Grand Duchy of Luxembourg
- Luxembourg Association of Bank and Insurance Employees
- Chamber of Commerce of the Grand Duchy of Luxembourg
- Chamber of private sector employees
- General Civil Service Confederation
- Onoofhängege Gewerkschaftsbond Lëtzebuerg (trade union)

Companies

- An international transport company

Civil society

- Press Council
- Luxemburger Wort
- Radio 100.7
- Tageblatt

ANNEX 2
Composition of the examining team

Belgium

Monsieur Jean-Marie LEQUESNE
Councillor
Federal Police Criminal Police
DJF-ECOFIN Department

Monsieur Pierre TIMMERMANS
Inspector
Administration of Taxation
Ministry of Finance

France

Monsieur Noël CLAUDON
Department Director
Department of Fiscal Service of the Rhone
Ministry of the Economy and Finance

Monsieur Philippe LAGAUCHE
Deputy-director of special criminal justice
Department of Criminal Affairs
Ministry of Justice

Madame Anne MUXART
Deputy Chief of Bureau
International monetary and financial system -
Preparation of summits
Treasury Department
Ministry of the Economy and Finance

OECD Secretariat

Monsieur Frédéric WEHRLE
Evaluation coordinator for Luxembourg
Principal Administrator
Anti-corruption Division
Directorate for Financial, Fiscal and Enterprise
Affairs

Madame France CHAIN
Legal adviser
Administrator
Anti-corruption Division
Directorate for Financial, Fiscal and Enterprise
Affairs