Implementing the OECD Anti-Bribery Convention

REPORT ON LUXEMBOURG

Foreword

This report surveys the legal provisions in place in Luxembourg to combat bribery of foreign public officials and evaluates their effectiveness. The assessment is made by international experts from 35 countries against the highest international standards set by the OECD Anti-Bribery Convention and related instruments. This report is published as part of a series of country reviews that will cover all 35 countries party to the Convention.

In an increasingly global economy where international trade and investment play a major role, it is essential that governments, business and industry, practitioners, civil society, academics and journalists, be aware of the new regulatory and institutional environment to:

- enhance the competitive playing field for companies operating world-wide;
- establish high standards for global governance; and,
- reduce the flow of corrupt payments in international business.

This regulatory and institutional environment is mainly based on two groundbreaking instruments adopted in 1997 by OECD Members and associated countries: the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* ("the Convention") and, the Revised *Recommendation on Combating Bribery in International Business in International Business Transactions (*the "Revised Recommendation"). The Convention was the first binding international instrument imposing criminal penalties on those bribing foreign public officials in order to obtain business deals and providing for surveillance through monitoring and evaluation by peers. The Revised Recommendation complements the Convention by its focus on deterrence and prevention of foreign bribery.

The OECD Working Group on Bribery in International Business Transactions (the "Working Group") is entrusted with the monitoring and follow-up of these instruments. The Working Group, chaired by Professor Mark Pieth, is composed of experts (government officials), from the 35 countries Parties to the Convention. These government experts developed a monitoring mechanism which requires all Parties to be examined according to a formal, systematic and detailed procedure including self-evaluation and mutual review. Its aim is to provide a tool for assessing the implementation and enforcement of the Convention and Recommendation.

In designing the monitoring mechanism, the Working Group was eager to respect the Convention's core principle of 'functional equivalence' under which the Parties seek to achieve a common goal while respecting the legal traditions and fundamental concepts of each country. Consequently, the Working Group examines each Party's anti-bribery provisions in light of its individual legal system.

Immediately after the Convention's entry into force in February 1999, the Working Group began conducting the first phase of monitoring to determine whether countries had adequately transposed the Convention in national law and what steps it has taken to implement the Revised Recommendation.

As the Working Group neared completion of this first phase, it moved progressively into a new and broadened monitoring phase. The second phase examines compliance and whether structures are in place to provide effective enforcement of the laws and rules necessary for implementing the Convention. The second phase also encompasses an extensive examination of the non-criminal law aspects of the 1997 Revised Recommendation.

The monitoring procedures developed for the Phase 1 and Phase 2 examinations are similar. For each country reviewed, a draft report is prepared which is submitted to a Working Group consultation. This report is based on information provided by the country under examination as well as information collected by the OECD Secretariat and two other countries who act as "lead examiners" either through independent research or, under Phase 2, through expert consultations during an on-site visit to the country examined. Consultations during on-site visits include discussions with representatives from various governmental departments as well as from regulatory authorities, the private sector, trade unions, civil society, academics, accounting and auditing bodies and law practitioners.

The outcome of the Working Group consultation is the adoption of the final country report, which contains an evaluation of the country's laws and practices to combat foreign bribery. Prior to issuing the final country report, the country under review has an opportunity to review the report and to comment on it. The country under review may express a dissenting opinion, which is then reflected in the final report, but cannot prevent adoption of the evaluation by the Working Group.

This Phase Two monitoring report of Luxembourg describes the structures and the institutional mechanisms in place to enforce national legislation implementing the Convention and assesses the effectiveness of the measures to prevent, detect, investigate and criminalise the bribing of foreign public officials in international business transactions. Appendix 1 contains the evaluation made by the Working Group under the Phase 1. In Appendix 2, the reader will find extracts of the most relevant implementation laws and Appendix 3 contains suggestions for further reading. The *(i)* Convention, *(ii)* the Revised Recommendation, *(iii)* the Recommendation on the Tax Deductibility of Bribes and *(iv)* a list of Parties to the Convention are in Appendix 4.

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The Foreign Bribery Offence: Application and Practice by Luxembourg

Introduction[1]

Luxembourg as a business and financial centre

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]

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]

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

1 This report was examined by the Working Group on Bribery in April 2004.

team by the Luxembourg Chamber of Commerce, nearly 90% of the country's GNP is exported.

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]

The exposure of the Grand Duchy to bribery

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.

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]

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.

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

Methodology and structure of the report

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.

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.

Notes

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.

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*.

Measures for Preventing and Detecting the Bribery of Foreign Public Officials

Preventing the bribery of foreign public officials

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

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). 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.

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.

Private self-regulation

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.

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.

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.

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.

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

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.

Detection based on third-party disclosures

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.

Revelation by persons implicated in bribery, employees and the media

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.

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.[1] 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.[2] 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.[3]

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.

Detection and reporting by accountants and auditors

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.

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.

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.

Bribery detection by government departments and other agencies

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.

Disclosure by government departments

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.

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.

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.

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.

Detection and disclosure by the tax authorities

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.

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.[4] 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 subject in 1997 to the local government income tax, only 43 had had on-site inspections.[5] By all indications, the situation has not improved since then.

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.

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.[6]

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.[7] 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 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.

Obtaining data from third parties is also restricted, in the view of the lead examiners, especially for ACD agents.[8] 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.[9] 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.[10]

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.[11] 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. 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.

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.

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.

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

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.

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.[12] 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.[13]

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.

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"[14], 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.

Discovery of bribery by the police and judicial bodies

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.

Detection by the police and judicial bodies

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.

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 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).

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.[15] 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.

Detecting foreign bribes through anti-money laundering mechanisms

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 involved[16], 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.

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.[17] 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 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.[18]

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).[19]

Money laundering provisions in practice

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.[20] Representatives of the financial unit interviewed by the examining team offered several explanations for this situation.

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.[21] 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.

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%) 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.[22]

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.[23] 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.[24] In the opinion of the prosecutor's office, this reluctance imposes a further constraint on the effectiveness of the obligation to report suspect transactions.

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 profession[25], 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.

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 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.

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

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.

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.

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.

Notes

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

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

3 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.

4 Annual Report 2002, Direct Contributions Administration.

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

6 "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.

7 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.

8 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".

9 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".

10 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".

11 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."

12 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".

13 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".

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

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

16 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.

17 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.

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

19 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.

20 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.).

21 Financial Investigation Unit, Activities Report for 2001 and 2002.

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

23 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

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

25 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.

Mechanisms for the Prosecution of Foreign Bribery Offences

Initiating public action

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.

The role of the prosecuting authorities in initiating prosecution

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.[1] 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 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.

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).

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.[2]

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.

The role of the prosecuting authorities in criminal proceedings

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 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.[3] 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.

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.

Prosecution of offences

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.

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

As indicated above, Luxembourg has two public prosecution offices, placed under the authority of State prosecutors: one is attached to the district court of Luxemburg, 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.

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 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.

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 inventory[4] 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.

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.[5] 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.

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.

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).

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.

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.

The support structures for the prosecuting authorities and investigating magistrates

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.

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.

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.

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.

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.

Means of investigation

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.

General and specialised means

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.

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), such specific investigation techniques remain admissible.

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.

Obstacles to investigation

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.

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.[6] 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.

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 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.

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

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.[7] 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 community[8], 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.

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.

The magistrates interviewed were not aware of any IRC having been refused on grounds of the discretionary prosecution principle or of proportionality. [9] 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 Justice objected to execution of more than 20 IRCs.[10] 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.

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.

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.

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.[11] 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.

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

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.

Establishing the offence of bribery

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.

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.

Elements of the offence

The "corruption pact"

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.

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.

The notion of "without right"

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.

Territorial application of Luxembourg criminal law

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".[12] 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.

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 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 7*ter* 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.

Notes

1 A principle confirmed by the *Chambre des Mises (Indictments division), January 24, 1972.*

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

3 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*)".

4 Ministry of Justice, Activity Report 2002-2003.

5 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.

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

7 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).

8 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).

9 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.

10 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).

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

12 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".

Sanctioning the Offence of Active Bribery of Foreign Public Officials and Related Offences

Impunity of legal persons

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.

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.

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.[1] 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."* [2] 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.

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.

Convictions and sentences handed down by the Luxembourg criminal courtsfor acts of bribery committed by individuals

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.

Applicable sanctions and their determination by the judges

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.

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 that 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.

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 cases.[3] 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.

Sentences handed down by the courts

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.

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 of10 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.

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 force[4] 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 "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).

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.

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.

Sanctions for laundering the proceeds of bribery of foreign public officials

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.

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 bribery.[5] Moreover, no case involving the complicity of a Luxembourg financial institution in laundering had come to light.

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".[6] 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).

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 prosecution.[7] In these circumstances, it is up to the prosecution not only to 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.

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.

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 countries.[8] 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.

Persons found guilty of accounting and fiscal offences

Prosecution of accounting offences

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.

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.

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 assets.[9] 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.

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 €13,000[10], to permanent disbarment from practising the profession. Chartered 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.

Enforcement of the non tax deductibility of bribes

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.

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 years.[11] 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".[12] 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".

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 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.

Notes

1 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.

2 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.

3 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.

4 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".

5 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).

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

7 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.

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

9 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).

10 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.

11 "Strengthened fiscal controls for resident companies", *Agefi Luxembourg*, February edition, 1999.

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

Recommendations

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.

Recommendations

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

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]

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

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]

15. With respect to sanctions, the Working Group recommends that Luxembourg:

16. 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]

17. 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]

Follow-up by the Working Group

The Working Group will follow-up in the issues below, as case law and practice develop, in order to assess:

18. 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]

19. 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]

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

APPENDIX 1

Evaluation of Luxembourg by the OECD Working Group (February 2001)

Legal Framework

Evaluation of Luxembourg[1]

General Comments

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

In order to meet the requirements of the Convention and the Recommendation, the Luxembourg Parliament adopted the Law of 15 January 2001.[2] This law amends the Criminal Code, the Code of criminal Procedure and the law of 4 December 1967 on income tax.

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

Specific Issues

Liability of legal persons

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

1 This evaluation was completed by the Working group on Bribery in February 2001.

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

Moreover, this may limit the possibilities of confiscation, as well as mutual legal assistance where investigations are against the legal person only.

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

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

Confiscation

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

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

Rules for instituting prosecutions

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

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

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

APPENDIX 2

Principal Legal Provisions

Law of 15 January 2001

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

Chapitre 1: Approbation de la Convention
Article II

Le ministre ayant la Justice dans ses attributions et le procureur général d'Etat, agissant dans le cadre de leurs attributions légales respectives, sont désignés comme autorités responsables pour les missions visées à l'article 11 de la Convention.

Chapitre 2: Modifications apportées au Code pénal et au Code d'instruction criminelle
Article IV

Les articles 243 à 253 du Code pénal sont abrogés et remplacés par les dispositions suivantes:

De la concussion

Art. 243. Toute personne, dépositaire ou agent de l'autorité ou de la force publiques, toute personne chargée d'une mission de service public, qui se sera rendue coupable de concussion, en ordonnant de percevoir, en exigeant ou recevant ce qu'elle savait n'être pas dû ou excéder ce qui était dû pour droits, taxes, impôts, contributions, deniers, revenus ou intérêts, pour salaires ou traitements, sera punie d'un emprisonnement de six mois à cinq ans, et pourra être condamnée en outre, à l'interdiction du droit de remplir des fonctions, emplois ou offices publics.

La peine sera la réclusion de cinq à dix ans, si la concussion a été commise à l'aide de violence ou menaces.

Sera punie des mêmes peines, toute personne, dépositaire ou agent de l'autorité ou de la force publiques, ou chargée d'une mission de service public, qui aura accordé sous une forme quelconque et pour quelque motif que ce soit une exonération ou franchise des droits, contributions, impôts ou taxes publics, en violation des textes légaux ou réglementaires.

La tentative des délits prévus aux alinéas 1er et 3ième du présent article est punie des mêmes peines.

Art. 244. Les infractions prévues par le présent chapitre seront punies, en outre, d'une amende de 20.000 francs à 5.000.000 francs.

Ces peines seront appliquées aux préposés ou commis des personnes, dépositaires ou agents de l'autorité ou de la force publiques, ou chargées d'une mission de service public, d'après les distinctions établies ci-dessus.

De la prise illégale d'intérêts

Art. 245. Toute personne, dépositaire ou agent de l'autorité ou de la force publiques, toute personne chargée d'une mission de service public ou investie d'un mandat électif public, qui, soit directement, soit par interposition de personnes ou par actes simulés, aura pris, reçu ou conservé quelque intérêt que ce soit dans les actes, adjudications, entreprises ou régies dont elle avait, au temps de l'acte, en tout ou en partie, l'administration ou la surveillance ou qui, ayant mission d'ordonnancer le paiement ou de faire la liquidation d'une affaire, y aura pris un intérêt quelconque, sera punie d'un emprisonnement de six mois à cinq ans, et d'une amende de 20.000 francs à 5.000.000 francs, et pourra, en outre, être condamnée à l'interdiction du droit de remplir des fonctions, des emplois ou offices publics.

La disposition qui précède ne sera pas applicable à celui qui ne pouvait, en raison des circonstances, favoriser par sa position ses intérêts privés et qui aura agi ouvertement.

De la corruption et du trafic d'influence

Art. 246. Sera puni de la réclusion de cinq à dix ans et d'une amende de 20.000 francs à 7.500.000, le fait, par une personne, dépositaire ou agent de l'autorité ou de la force publiques, ou chargée d'une mission de service public, ou investie d'un mandat électif public, de solliciter ou d'agréer, sans droit, directement ou indirectement, pour elle-même ou pour autrui, des offres, des promesses, des dons, des présents ou des avantages quelconques:

1° Soit pour accomplir ou s'abstenir d'accomplir un acte de sa fonction, de sa mission ou de son mandat ou facilité par sa fonction, sa mission ou son mandat;

2° Soit pour abuser de son influence réelle ou supposée en vue de faire obtenir d'une autorité ou d'une administration publique des distinctions, des emplois, des marchés ou toute autre décision favorable.

Art. 247. Sera puni de la réclusion de cinq à dix ans et d'une amende de 20.000 francs à 7.500.000 francs, le fait de proposer ou d'octroyer, sans droit, directement ou indirectement, à une personne, dépositaire ou agent de l'autorité ou de la force publiques, ou chargée d'une mission de service public, ou investie d'un mandat électif public, pour elle-même ou pour un tiers, des offres, des promesses, des dons, des présents ou des avantages quelconques pour obtenir d'elle:

1. Soit qu'elle accomplisse ou s'abstienne d'accomplir un acte de sa fonction, de sa mission ou de son mandat ou facilité par sa fonction, sa mission ou son mandat;
2. Soit qu'elle abuse de son influence réelle ou supposée en vue de faire obtenir d'une autorité ou d'une administration publique des distinctions, des emplois, des marchés, ou toute autre décision favorable.

Art. 248. Sera punie d'un emprisonnement de six mois à cinq ans et d'une amende de 20.000 francs à 5.000.000 francs, toute personne qui sollicite ou agrée, directement ou

indirectement, des offres, des promesses, des dons, des présents ou des avantages quelconques, pour elle-même ou pour un tiers, pour abuser de son influence réelle ou supposée en vue de faire obtenir d'une autorité ou d'une administration publique des distinctions, des emplois, des marchés ou tout autre décision favorable.

Sera punie des mêmes peines toute personne qui cède aux sollicitations prévues à l'alinéa précédent, ou qui propose à une personne, sans droit, directement ou indirectement, des offres, des promesses, des dons, des présents ou des avantages quelconques, pour elle-même ou pour un tiers, pour qu'elle abuse de son influence réelle ou supposée en vue de faire obtenir d'une autorité ou d'une administration publique des distinctions, des emplois, des marchés ou toute autre décision favorable.

Art. 249. Sera punie de la réclusion de cinq à dix ans et d'une amende de 20.000 francs à 7.500.000 francs toute personne, dépositaire ou agent de l'autorité ou de la force publiques, toute personne chargée d'une mission de service public ou investie d'un mandat électif public, qui sollicite ou agrée, sans droit, directement ou indirectement, pour elle même ou pour autrui, des offres, des promesses, des dons, des présents ou des avantages quelconques en raison de l'accomplissement ou de l'abstention d'accomplir un acte de sa fonction, de sa mission ou de son mandat ou facilité par sa fonction, sa mission ou son mandat, de quiconque ayant bénéficié de cet acte ou de l'abstention d'accomplir cet acte.

Sera punie des mêmes peines, quiconque, dans les conditions de l'alinéa 1, cède aux sollicitations d'une personne, dépositaire ou agent de l'autorité ou de la force publiques, ou chargée d'une mission de service public ou investie d'un mandat électif public, ou lui propose des offres, des promesses, des dons, des présents ou des avantages quelconques pour soi-même ou pour autrui.

De la corruption de magistrats

Art. 250. Sera puni de la réclusion de dix à quinze ans et d'une amende de 100.000 francs à 10.000.000 francs, tout magistrat ou toute autre personne siégeant dans une formation juridictionnelle, tout arbitre ou expert nommé soit par une juridiction, soit par les parties, qui aura sollicité ou agréé, sans droit, directement ou indirectement, des offres, des promesses, des dons, des présents ou des avantages quelconques, pour lui-même ou pour un tiers, pour l'accomplissement ou l'abstention d'accomplir un acte de sa fonction.

Quiconque cède aux sollicitations d'une personne visée à l'alinéa précédent, ou lui propose des offres, des promesses, des dons, des présents ou des avantages quelconques, pour elle-même ou pour un tiers, afin d'obtenir d'elle l'accomplissement ou l'abstention d'accomplir un acte de sa fonction, est puni des mêmes peines.

Des actes d'intimidation commis contre les personnes exerçant une fonction publique

Art. 251 Sera punie de la réclusion de cinq à dix ans et d'une amende de 20.000 francs à 7.500.000 francs, toute personne qui utilise des menaces ou des violences ou qui commet tout autre acte d'intimidation pour obtenir d'une personne, dépositaire ou agent de l'autorité ou de la force publiques, ou chargée d'une mission de service public ou investie d'un mandat électif public, soit qu'elle accomplisse ou s'abstienne d'accomplir un acte de sa fonction, de sa mission ou de son mandat, ou facilité par sa fonction, sa mission ou son mandat, soit qu'elle abuse de son autorité vraie ou supposée en vue de

faire obtenir d'une autorité ou d'une administration publique des distinctions, des emplois, des marchés ou toute autre décision favorable.

Art. 252.

1. Les dispositions des articles 246 à 251 du présent code s'appliquent aussi aux infractions impliquant

   – des personnes, dépositaires ou agents de l'autorité ou de la force publiques, ou investies d'un mandat électif public ou chargées d'une mission de service public d'un autre État;

   – des fonctionnaires communautaires et des membres de la Commission des Communautés européennes, du Parlement européen, de la Cour de Justice et de la Cour des comptes des Communautés européennes, dans le plein respect des dispositions pertinentes des traités instituant les Communautés européennes, du protocole sur les privilèges et immunités des Communautés européennes, des statuts de la Cour de Justice, ainsi que des textes pris pour leur application, en ce qui concerne la levée des immunités;

   – des fonctionnaires ou agents d'une autre organisation internationale publique.

2. L'expression «fonctionnaire communautaire» employée au paragraphe précédent désigne:

   – toute personne qui a la qualité de fonctionnaire ou d'agent engagé par contrat au sens du Statut des fonctionnaires des Communautés européennes ou du régime applicable aux autres agents des Communautés européennes;

   – toute personne mise à la disposition des Communautés européennes par les États membres ou par tout organisme public ou privé, qui exerce des fonctions équivalentes à celles qu'exercent les fonctionnaires ou autres agents des Communautés européennes.

Les membres des organismes créés en application des traités instituant les Communautés européennes et le personnel de ces organismes sont assimilés aux fonctionnaires communautaires lorsque le Statut des fonctionnaires des Communautés européennes ou le régime applicable aux autres agents des Communautés européennes ne leur sont pas applicables.

Article V

Il est inséré au Code d'instruction criminelle un article 640-1 qui dispose:

Art. 640-1. Si un fait qualifié crime est, par application de circonstances atténuantes, reconnu de nature à être puni de peines correctionnelles, la prescription de l'action publique est celle applicable à un crime.

Si un fait qualifié délit est, par application de circonstances atténuantes, reconnu de nature à être puni de peines de police, alors la prescription de l'action publique est celle applicable à un délit.

Article VI

Les infractions commises avant l'entrée en vigueur de la présente loi restent régies par les dispositions légales en vigueur au moment de la commission des faits.

Article VII

Les intitulés des chapitres suivants du titre IV du Livre II du Code pénal sont modifiés comme suit:

1. Chapitre III: Du détournement, de la destruction d'actes ou de titres, de la concussion, de la prise illégale d'intérêts, de la corruption, du trafic d'influence, et des actes d'intimidation commis contre les personnes exerçant une fonction publique.
2. L'intitulé du chapitre IV est abrogé.
3. Le chapitre V actuel devient le chapitre IV.
4. Le chapitre VI actuel devient le chapitre V.
5. Le chapitre VII actuel devient le chapitre VI.
6. Le chapitre VIII actuel devient le chapitre VII.

Chapitre 3: Modification apportée à la loi du 4 décembre 1967 concernant l'impôt sur le revenu (L.I.R.)

Article VIII

Il est ajouté un point 5 à l'article 12 de la loi concernant l'impôt sur le revenu qui est libellé comme suit:

«5. les avantages de toute nature accordés et les dépenses y afférentes en vue d'obtenir un avantage pécuniaire ou autre de la part

- de toute personne, dépositaire ou agent de l'autorité ou de la force publiques, ou chargée d'une mission de service public ou investie d'un mandat électif public, soit au Grand-Duché de Luxembourg, soit dans un autre État;
- des fonctionnaires communautaires et des membres de la Commission des Communautés européennes, du Parlement européen, de la Cour de Justice et de la Cour des comptes des Communautés européennes, dans le plein respect des dispositions pertinentes des traités instituant les Communautés européennes, du protocole sur les privilèges et immunités des Communautés européennes, des statuts de la Cour de Justice, ainsi que des textes pris pour leur application, en ce qui concerne la levée des immunités;
- des fonctionnaires ou agents d'une autre organisation internationale publique.»

APPENDIX 3

Suggested Further Reading

(1) Phase 1 Report, Review of Implementation of the OECD Anti-Bribery Convention and 1997 Recommendation:

http://www.oecd.org/dataoecd/39/40/2019732.pdf

(2) Other implementation laws and regulations

http://www.legilux.public.lu (in French)

Law of 11 August 1998 introducing organised criminal activity and money laundering as criminal offences into the Criminal Code and amending various special laws.
In French: http://www.legilux.public.lu/leg/a/archives/1998/0731009/0731009.pdf

Law of 14 June 2001 concerning the approval of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990, and amending other legal provisions.
In French: http://www.legilux.public.lu/leg/a/archives/2001/0811707/0811707.pdf

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.
In French: http://www.legilux.public.lu/leg/a/archives/2002/1493112/1493112.pdf

(3) Other material

GRECO (Group of States against Corruption) Evaluation Report on Luxembourg – First Round
http://www.greco.coe.int/evaluations/cycle1/GrecoEval1Rep(2001)2E-Lux.pdf

GRECO (Group of States against Corruption) Compliance Report on Luxembourg – First Round
http://www.greco.coe.int/evaluations/cycle1/GrecoRC-I(2003)5E-Luxembourg.pdf

GRECO (Group of States against Corruption) Evaluation Report on Luxembourg – Second Round
http://www.greco.coe.int/evaluations/cycle2/GrecoEval2Rep(2003)5E-Lux.pdf

Financial Action Task Force (FATF) Reports:
http://www.fatf-gafi.org/

APPENDIX 4

i) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
(Adopted by the Negotiating Conference on 21 November 1997)

ii) Revised Recommendation of the Council on Combating Bribery in International Business Transactions

Annex
Agreed Common Elements of Criminal Legislation and Related Action

iii) Recommendation of The Council on the Tax Deductibility of Bribes to Foreign Public Officials

iv) Parties to the Convention

Countries Having Ratified/Acceded to the Convention

(i) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Adopted by the Negotiating Conference on 21 November 1997

Preamble

The Parties,

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Having regard to the Revised Recommendation on Combating Bribery in International Business Transactions, adopted by the Council of the Organisation for Economic Co-operation and Development (OECD) on 23 May 1997, C(97)123/FINAL, which, *inter alia*, called for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions, in particular the prompt criminalisation of such bribery in an effective and co-ordinated manner and in conformity with the agreed common elements set out in that Recommendation and with the jurisdictional and other basic legal principles of each country;

Welcoming other recent developments which further advance international understanding and co-operation in combating bribery of public officials, including actions of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organisation, the Organisation of American States, the Council of Europe and the European Union;

Welcoming the efforts of companies, business organisations and trade unions as well as other non-governmental organisations to combat bribery;

Recognising the role of governments in the prevention of solicitation of bribes from individuals and enterprises in international business transactions;

Recognising that achieving progress in this field requires not only efforts on a national level but also multilateral co-operation, monitoring and follow-up;

Recognising that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention, which requires that the Convention be ratified without derogations affecting this equivalence;

Have agreed as follows:

Article 1

The Offence of Bribery of Foreign Public Officials

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as "bribery of a foreign public official".

4. For the purpose of this Convention:

   a) "foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;

   b) "foreign country" includes all levels and subdivisions of government, from national to local;

   c) "act or refrain from acting in relation to the performance of official duties" includes any use of the public official's position, whether or not within the official's authorised competence.

Article 2

Responsibility of Legal Persons

Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

Article 3

Sanctions

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.

2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.

3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.

4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

Article 4

Jurisdiction

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.

2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.

3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

Article 5

Enforcement

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

Article 6

Statute of Limitations

Any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence.

Article 7

Money Laundering

Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.

Article 8

Accounting

1. In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.

2. Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.

Article 9

Mutual Legal Assistance

1. Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.

2. Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention.

3. A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.

Article 10

Extradition

1. Bribery of a foreign public official shall be deemed to be included as an extraditable offence under the laws of the Parties and the extradition treaties between them.

2. If a Party which makes extradition conditional on the existence of an extradition treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official.

3. Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.

4. Extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of this Convention.

Article 11

Responsible Authorities

For the purposes of Article 4, paragraph 3, on consultation, Article 9, on mutual legal assistance and Article 10, on extradition, each Party shall notify to the Secretary-General of the OECD an authority or authorities responsible for making and receiving requests, which shall serve as channel of communication for these matters for that Party, without prejudice to other arrangements between Parties.

Article 12

Monitoring and Follow-up

The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference, or within the framework and terms of reference of any successor to its functions, and Parties shall bear the costs of the programme in accordance with the rules applicable to that body.

Article 13

Signature and Accession

1. Until its entry into force, this Convention shall be open for signature by OECD members and by non-members which have been invited to become full participants in its Working Group on Bribery in International Business Transactions.

2. Subsequent to its entry into force, this Convention shall be open to accession by any non-signatory which is a member of the OECD or has become a full participant in the Working Group on Bribery in International Business Transactions or any successor to its functions. For each such non-signatory, the Convention shall enter into force on the sixtieth day following the date of deposit of its instrument of accession.

Article 14

Ratification and Depositary

1. This Convention is subject to acceptance, approval or ratification by the Signatories, in accordance with their respective laws.

2. Instruments of acceptance, approval, ratification or accession shall be deposited with the Secretary-General of the OECD, who shall serve as Depositary of this Convention.

Article 15

Entry into Force

1. This Convention shall enter into force on the sixtieth day following the date upon which five of the ten countries which have the ten largest export shares set out in DAFFE/IME/BR(97)18/FINAL (annexed), and which represent by themselves at least sixty per cent of the combined total exports of those ten countries, have deposited their instruments of acceptance, approval, or ratification. For each signatory depositing its instrument after such entry into force, the Convention shall enter into force on the sixtieth day after deposit of its instrument.

2. If, after 31 December 1998, the Convention has not entered into force under paragraph 1 above, any signatory which has deposited its instrument of acceptance, approval or ratification may declare in writing to the Depositary its readiness to accept entry into force of this Convention under this paragraph 2. The Convention shall enter into force for such a signatory on the sixtieth day following the date upon which such declarations have been deposited by at least two signatories. For each signatory depositing its declaration after such entry into force, the Convention shall enter into force on the sixtieth day following the date of deposit.

Article 16

Amendment

Any Party may propose the amendment of this Convention. A proposed amendment shall be submitted to the Depositary which shall communicate it to the other Parties at least sixty days before convening a meeting of the Parties to consider the proposed amendment. An amendment adopted by consensus of the Parties, or by such other means as the Parties may determine by consensus, shall enter into force sixty days after the deposit of an instrument of ratification, acceptance or approval by all of the Parties, or in such other circumstances as may be specified by the Parties at the time of adoption of the amendment.

Article 17

Withdrawal

A Party may withdraw from this Convention by submitting written notification to the Depositary. Such withdrawal shall be effective one year after the date of the receipt of the notification. After withdrawal, co-operation shall continue between the Parties and the Party which has withdrawn on all requests for assistance or extradition made before the effective date of withdrawal which remain pending.

Annex
Statistics on OECD Exports

	OECD EXPORTS		
	1990-1996	1990-1996	1990-1996
	US$ million	%	%
		of Total OECD	of 10 largest
United States	287 118	15,9%	19,7%
Germany	254 746	14,1%	17,5%
Japan	212 665	11,8%	14,6%
France	138 471	7,7%	9,5%
United Kingdom	121 258	6,7%	8,3%
Italy	112 449	6,2%	7,7%
Canada	91 215	5,1%	6,3%
Korea (1)	81 364	4,5%	5,6%
Netherlands	81 264	4,5%	5,6%
Belgium-Luxembourg	78 598	4,4%	5,4%
Total 10 largest	**1 459 148**	**81,0%**	**100%**
Spain	42 469	2,4%	
Switzerland	40 395	2,2%	
Sweden	36 710	2,0%	
Mexico (1)	34 233	1,9%	
Australia	27 194	1,5%	
Denmark	24 145	1,3%	
Austria*	22 432	1,2%	
Norway	21 666	1,2%	
Ireland	19 217	1,1%	
Finland	17 296	1,0%	
Poland (1) **	12 652	0,7%	
Portugal	10 801	0,6%	
Turkey *	8 027	0,4%	
Hungary **	6 795	0,4%	
New Zealand	6 663	0,4%	
Czech Republic ***	6 263	0,3%	
Greece *	4 606	0,3%	
Iceland	949	0,1%	
Total OECD	**1 801 661**	**100%**	

Notes: * 1990-1995; ** 1991-1996; *** 1993-1996
Source: OECD, (1) IMF

Concerning Belgium-Luxembourg: Trade statistics for Belgium and Luxembourg are available only on a combined basis for the two countries. For purposes of Article 15, paragraph 1 of the Convention, if either Belgium or Luxembourg deposits its instrument of acceptance, approval or ratification, or if both Belgium and Luxembourg deposit their instruments of acceptance, approval or ratification, it shall be considered that one of the countries which have the ten largest exports shares has deposited its instrument and the joint exports of both countries will be counted towards the 60 per cent of combined total exports of those ten countries, which is required for entry into force under this provision.

Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Adopted by the Negotiating Conference on 21 November 1997

General:

1. This Convention deals with what, in the law of some countries, is called "active corruption" or "active bribery", meaning the offence committed by the person who promises or gives the bribe, as contrasted with "passive bribery", the offence committed by the official who receives the bribe. The Convention does not utilise the term "active bribery" simply to avoid it being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is a passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active.

2. This Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system.

Article 1. The Offence of Bribery of Foreign Public Officials:

Re paragraph 1:

3. Article 1 establishes a standard to be met by Parties, but does not require them to utilise its precise terms in defining the offence under their domestic laws. A Party may use various approaches to fulfil its obligations, provided that conviction of a person for the offence does not require proof of elements beyond those which would be required to be proved if the offence were defined as in this paragraph. For example, a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official, and a statute specifically limited to this case, could both comply with this Article. Similarly, a statute which defined the offence in terms of payments "to induce a breach of the official's duty" could meet the standard provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and this was an "autonomous" definition not requiring proof of the law of the particular official's country.

4. It is an offence within the meaning of paragraph 1 to bribe to obtain or retain business or other improper advantage whether or not the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business.

5. "Other improper advantage" refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements.

6. The conduct described in paragraph 1 is an offence whether the offer or promise is made or the pecuniary or other advantage is given on that person's own behalf or on behalf of any other natural person or legal entity.

7. It is also an offence irrespective of, *inter alia*, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage.

8. It is not an offence, however, if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law.

9. Small "facilitation" payments do not constitute payments made "to obtain or retain business or other improper advantage" within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.

10. Under the legal system of some countries, an advantage promised or given to any person, in anticipation of his or her becoming a foreign public official, falls within the scope of the offences described in Article 1, paragraph 1 or 2. Under the legal system of many countries, it is considered technically distinct from the offences covered by the present Convention. However, there is a commonly shared concern and intent to address this phenomenon through further work.

Re paragraph 2:

11. The offences set out in paragraph 2 are understood in terms of their normal content in national legal systems. Accordingly, if authorisation, incitement, or one of the other listed acts, which does not lead to further action, is not itself punishable under a Party's legal system, then the Party would not be required to make it punishable with respect to bribery of a foreign public official.

Re paragraph 4:

12. "Public function" includes any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement.

13. A "public agency" is an entity constituted under public law to carry out specific tasks in the public interest.

14. A "public enterprise" is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, *inter alia*, when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board.

15. An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, *i.e.,*

on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges.

16. In special circumstances, public authority may in fact be held by persons (e.g., political party officials in single party states) not formally designated as public officials. Such persons, through their *de facto* performance of a public function, may, under the legal principles of some countries, be considered to be foreign public officials.

17. "Public international organisation" includes any international organisation formed by states, governments, or other public international organisations, whatever the form of organisation and scope of competence, including, for example, a regional economic integration organisation such as the European Communities.

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

19. One case of bribery which has been contemplated under the definition in paragraph 4.c is where an executive of a company gives a bribe to a senior official of a government, in order that this official use his office – though acting outside his competence – to make another official award a contract to that company.

Article 2. Responsibility of Legal Persons:

20. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility.

Article 3. Sanctions:

Re paragraph 3:

21. The "proceeds" of bribery are the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery.

22. The term "confiscation" includes forfeiture where applicable and means the permanent deprivation of property by order of a court or other competent authority. This paragraph is without prejudice to rights of victims.

23. Paragraph 3 does not preclude setting appropriate limits to monetary sanctions.

Re paragraph 4:

24. Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.

Article 4. Jurisdiction:

Re paragraph 1:

25. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

Re paragraph 2:

26. Nationality jurisdiction is to be established according to the general principles and conditions in the legal system of each Party. These principles deal with such matters as dual criminality. However, the requirement of dual criminality should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute. For countries which apply nationality jurisdiction only to certain types of offences, the reference to "principles" includes the principles upon which such selection is based.

Article 5. Enforcement:

27. Article 5 recognises the fundamental nature of national regimes of prosecutorial discretion. It recognises as well that, in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature. Article 5 is complemented by paragraph 6 of the Annex to the 1997 OECD Revised Recommendation on Combating Bribery in International Business Transactions, C(97)123/FINAL (hereinafter, "1997 OECD Recommendation"), which recommends, *inter alia*, that complaints of bribery of foreign public officials should be seriously investigated by competent authorities and that adequate resources should be provided by national governments to permit effective prosecution of such bribery. Parties will have accepted this Recommendation, including its monitoring and follow-up arrangements.

Article 7. Money Laundering:

28. In Article 7, "bribery of its own public official" is intended broadly, so that bribery of a foreign public official is to be made a predicate offence for money laundering legislation on the same terms, when a Party has made either active or passive bribery of its own public official such an offence. When a Party has made only passive bribery of its own public officials a predicate offence for money laundering purposes, this article requires that the laundering of the bribe payment be subject to money laundering legislation.

Article 8. Accounting:

29. Article 8 is related to section V of the 1997 OECD Recommendation, which all Parties will have accepted and which is subject to follow-up in the OECD Working Group on Bribery in International Business Transactions. This paragraph contains a series of recommendations concerning accounting requirements, independent external audit and internal company controls the implementation of which will be important to the overall effectiveness of the fight against bribery in international business. However, one immediate consequence of the implementation of this Convention by the Parties will be that companies which are required to issue financial statements disclosing their material contingent liabilities will need to take into account the full potential liabilities under this Convention, in particular its Articles 3 and 8, as well as other losses which might flow from conviction of the company or its agents for bribery. This also has implications for the execution of professional responsibilities of auditors regarding indications of bribery of foreign public officials. In addition, the accounting offences referred to in Article 8 will generally occur in the company's home country, when the bribery offence itself may have been committed in another country, and this can fill gaps in the effective reach of the Convention.

Article 9. Mutual Legal Assistance:

30. Parties will have also accepted, through paragraph 8 of the Agreed Common Elements annexed to the 1997 OECD Recommendation, to explore and undertake means to improve the efficiency of mutual legal assistance.

Re paragraph 1:

31. Within the framework of paragraph 1 of Article 9, Parties should, upon request, facilitate or encourage the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings. Parties should take measures to be able, in appropriate cases, to transfer temporarily such a person in custody to a Party requesting it and to credit time in custody in the requesting Party to the transferred person's sentence in the requested Party. The Parties wishing to use this mechanism should also take measures to be able, as a requesting Party, to keep a transferred person in custody and return this person without necessity of extradition proceedings.

Re paragraph 2:

32. Paragraph 2 addresses the issue of identity of norms in the concept of dual criminality. Parties with statutes as diverse as a statute prohibiting the bribery of agents generally and a statute directed specifically at bribery of foreign public officials should be able to co-operate fully regarding cases whose facts fall within the scope of the offences described in this Convention.

Article 10. Extradition

Re paragraph 2:

33. A Party may consider this Convention to be a legal basis for extradition if, for one or more categories of cases falling within this Convention, it requires an extradition treaty. For example, a country may consider it a basis for extradition of its nationals if it requires an extradition treaty for that category but does not require one for extradition of non-nationals.

Article 12. Monitoring and Follow-up:

34. The current terms of reference of the OECD Working Group on Bribery which are relevant to monitoring and follow-up are set out in Section VIII of the 1997 OECD Recommendation. They provide for:

i) receipt of notifications and other information submitted to it by the [participating] countries;

ii) regular reviews of steps taken by [participating] countries to implement the Recommendation and to make proposals, as appropriate, to assist [participating] countries in its implementation; these reviews will be based on the following complementary systems:

-- a system of self evaluation, where [participating] countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;

-- a system of mutual evaluation, where each [participating] country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the [participating] country in implementing the Recommendation.

iii) examination of specific issues relating to bribery in international business transactions;

...

v) provision of regular information to the public on its work and activities and on implementation of the Recommendation.

35. The costs of monitoring and follow-up will, for OECD Members, be handled through the normal OECD budget process. For non-members of the OECD, the current rules create an equivalent system of cost sharing, which is described in the Resolution of the Council Concerning Fees for Regular Observer Countries and Non-Member Full Participants in OECD Subsidiary Bodies, C(96)223/FINAL.

36. The follow-up of any aspect of the Convention which is not also follow-up of the 1997 OECD Recommendation or any other instrument accepted by all the participants in the OECD Working Group on Bribery will be carried out by the Parties to the Convention and, as appropriate, the participants party to another, corresponding instrument.

Article 13. Signature and Accession:

37. The Convention will be open to non-members which become full participants in the OECD Working Group on Bribery in International Business Transactions. Full participation by non-members in this Working Group is encouraged and arranged under simple procedures. Accordingly, the requirement of full participation in the Working Group, which follows from the relationship of the Convention to other aspects of the fight against bribery in international business, should not be seen as an obstacle by countries wishing to participate in that fight. The Council of the OECD has appealed to non-members to adhere to the 1997 OECD Recommendation and to participate in any institutional follow-up or implementation mechanism, i.e., in the Working Group. The current procedures regarding full participation by non-members in the Working Group may be found in the Resolution of the Council concerning the Participation of Non-Member Economies in the Work of Subsidiary Bodies of the Organisation, C(96)64/REV1/FINAL. In addition to accepting the Revised Recommendation of the Council on Combating Bribery, a full participant also accepts the Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials, adopted on 11 April 1996, C(96)27/FINAL.

(ii) Revised Recommendation of the Council on Combating Bribery in International Business Transactions

Adopted by the Council on 23 May 1997

The Council,

Having regard to Articles 3, 5a) and 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Considering that enterprises should refrain from bribery of public servants and holders of public office, as stated in the OECD Guidelines for Multinational Enterprises;

Considering the progress which has been made in the implementation of the initial Recommendation of the Council on Bribery in International Business Transactions adopted on 27 May 1994, C(94)75/FINAL and the related Recommendation on the tax deductibility of bribes of foreign public officials adopted on 11 April 1996, C(96)27/FINAL; as well as the Recommendation concerning Anti-corruption Proposals for Bilateral Aid Procurement, endorsed by the High Level Meeting of the Development Assistance Committee on 7 May 1996;

Welcoming other recent developments which further advance international understanding and co-operation regarding bribery in business transactions, including actions of the United Nations, the Council of Europe, the European Union and the Organisation of American States;

Having regard to the commitment made at the meeting of the Council at Ministerial level in May 1996, to criminalise the bribery of foreign public officials in an effective and co-ordinated manner;

Noting that an international convention in conformity with the agreed common elements set forth in the Annex, is an appropriate instrument to attain such criminalisation rapidly;

Considering the consensus which has developed on the measures which should be taken to implement the 1994 Recommendation, in particular, with respect to the modalities and international instruments to facilitate criminalisation of bribery of foreign public officials; tax deductibility of bribes to foreign public officials; accounting requirements, external audit and internal company controls; and rules and regulations on public procurement;

Recognising that achieving progress in this field requires not only efforts by individual countries but multilateral co-operation, monitoring and follow-up;

General

I) **RECOMMENDS** that member countries take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions.

II) **RECOMMENDS** that each member country examine the following areas and, in conformity with its jurisdictional and other basic legal principles, take concrete and meaningful steps to meet this goal:

i) criminal laws and their application, in accordance with section III and the Annex to this Recommendation;

ii) tax legislation, regulations and practice, to eliminate any indirect support of bribery, in accordance with section IV;

iii) company and business accounting, external audit and internal control requirements and practices, in accordance with section V;

iv) banking, financial and other relevant provisions, to ensure that adequate records would be kept and made available for inspection and investigation;

v) public subsidies, licences, government procurement contracts or other public advantages, so that advantages could be denied as a sanction for bribery in appropriate cases, and in accordance with section VI for procurement contracts and aid procurement;

vi) civil, commercial, and administrative laws and regulations, so that such bribery would be illegal;

vii) international co-operation in investigations and other legal proceedings, in accordance with section VII.

Criminalisation of Bribery of Foreign Public Officials

III) **RECOMMENDS** that member countries should criminalise the bribery of foreign public officials in an effective and co-ordinated manner by submitting proposals to their legislative bodies by 1 April 1998, in conformity with the agreed common elements set forth in the Annex, and seeking their enactment by the end of 1998.

DECIDES, to this end, to open negotiations promptly on an international convention to criminalise bribery in conformity with the agreed common elements, the treaty to be open for signature by the end of 1997, with a view to its entry into force twelve months thereafter.

Tax Deductibility

IV) **URGES** the prompt implementation by member countries of the 1996 Recommendation which reads as follows: "that those member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign officials as illegal."

Accounting Requirements, External Audit and Internal Company Controls

V) **RECOMMENDS** that member countries take the steps necessary so that laws, rules and practices with respect to accounting requirements, external audit and internal company controls are in line with the following principles and are fully used in order to prevent and detect bribery of foreign public officials in international business.

A) Adequate accounting requirements

i) Member countries should require companies to maintain adequate records of the sums of money received and expended by the company, identifying the matters in respect of which the receipt and expenditure takes place. Companies should be prohibited from making off-the-books transactions or keeping off-the-books accounts.

ii) Member countries should require companies to disclose in their financial statements the full range of material contingent liabilities.

iii) Member countries should adequately sanction accounting omissions, falsifications and fraud.

B) Independent External Audit

i) Member countries should consider whether requirements to submit to external audit are adequate.

ii) Member countries and professional associations should maintain adequate standards to ensure the independence of external auditors which permits them to provide an objective assessment of company accounts, financial statements and internal controls.

iii) Member countries should require the auditor who discovers indications of a possible illegal act of bribery to report this discovery to management and, as appropriate, to corporate monitoring bodies.

iv) Member countries should consider requiring the auditor to report indications of a possible illegal act of bribery to competent authorities.

C) Internal company controls

i) Member countries should encourage the development and adoption of adequate internal company controls, including standards of conduct.

ii) Member countries should encourage company management to make statements in their annual reports about their internal control mechanisms, including those which contribute to preventing bribery.

iii) Member countries should encourage the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards.

iv) Member countries should encourage companies to provide channels for communication by, and protection for, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors.

Public Procurement

VI) **RECOMMENDS:**

i) Member countries should support the efforts in the World Trade Organisation to pursue an agreement on transparency in government procurement;

ii) Member countries' laws and regulations should permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials in contravention of that member's national laws and, to the extent a member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials.[1]

iii) In accordance with the Recommendation of the Development Assistance Committee, member countries should require anti-corruption provisions in bilateral aid-funded procurement, promote the proper implementation of anti-corruption provisions in international development institutions, and work closely with development partners to combat corruption in all development co-operation efforts.[2]

International Co-operation

VII) **RECOMMENDS** that member countries, in order to combat bribery in international business transactions, in conformity with their jurisdictional and other basic legal principles, take the following actions:

i) consult and otherwise co-operate with appropriate authorities in other countries in investigations and other legal proceedings concerning specific cases of such bribery through such means as sharing of information (spontaneously or upon request), provision of evidence and extradition;

ii) make full use of existing agreements and arrangements for mutual international legal assistance and where necessary, enter into new agreements or arrangements for this purpose;

iii) ensure that their national laws afford an adequate basis for this co-operation and, in particular, in accordance with paragraph 8 of the Annex.

Follow-up and Institutional Arrangements

VIII) **INSTRUCTS** the Committee on International Investment and Multinational Enterprises, through its Working Group on Bribery in International Business Transactions, to carry out a programme of systematic follow-up to monitor and

1. Member countries' systems for applying sanctions for bribery of domestic officials differ as to whether the determination of bribery is based on a criminal conviction, indictment or administrative procedure, but in all cases it is based on substantial evidence.

2. This paragraph summarises the DAC recommendation, which is addressed to DAC members only, and addresses it to all OECD members and eventually non-member countries which adhere to the Recommendation.

promote the full implementation of this Recommendation, in co-operation with the Committee for Fiscal Affairs, the Development Assistance Committee and other OECD bodies, as appropriate. This follow-up will include, in particular:

i) receipt of notifications and other information submitted to it by the member countries;

ii) regular reviews of steps taken by member countries to implement the Recommendation and to make proposals, as appropriate, to assist member countries in its implementation; these reviews will be based on the following complementary systems:

- a system of self-evaluation, where member countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;
- a system of mutual evaluation, where each member country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the member country in implementing the Recommendation.

iii) examination of specific issues relating to bribery in international business transactions;

iv) examination of the feasibility of broadening the scope of the work of the OECD to combat international bribery to include private sector bribery and bribery of foreign officials for reasons other than to obtain or retain business;

v) provision of regular information to the public on its work and activities and on implementation of the Recommendation.

IX) **NOTES** the obligation of member countries to co-operate closely in this follow-up programme, pursuant to Article 3 of the OECD Convention.

X) **INSTRUCTS** the Committee on International Investment and Multinational Enterprises to review the implementation of Sections III and, in co-operation with the Committee on Fiscal Affairs, Section IV of this Recommendation and report to Ministers in Spring 1998, to report to the Council after the first regular review and as appropriate there after, and to review this Revised Recommendation within three years after its adoption.

Co-operation with Non-members

XI) **APPEALS** to non-member countries to adhere to the Recommendation and participate in any institutional follow-up or implementation mechanism.

XII) **INSTRUCTS** the Committee on International Investment and Multinational Enterprises through its Working Group on Bribery, to provide a forum for consultations with countries which have not yet adhered, in order to promote wider participation in the Recommendation and its follow-up.

Relations with International Governmental and Non-governmental Organisations

XIII) **INVITES** the Committee on International Investment and Multinational Enterprises through its Working Group on Bribery, to consult and co-operate with the international organisations and international financial institutions active in the combat against bribery in international business transactions and consult regularly with the non-governmental organisations and representatives of the business community active in this field.

ANNEX

Agreed Common Elements of Criminal Legislation and Related Action

1) Elements of the Offence of Active Bribery

i) *Bribery* is understood as the promise or giving of any undue payment or other advantages, whether directly or through intermediaries to a public official, for himself or for a third party, to influence the official to act or refrain from acting in the performance of his or her official duties in order to obtain or retain business.

ii) *Foreign public official* means any person holding a legislative, administrative or judicial office of a foreign country or in an international organisation, whether appointed or elected or, any person exercising a public function or task in a foreign country.

iii) *The offeror* is any person, on his own behalf or on the behalf of any other natural person or legal entity.

2) Ancillary Elements or Offences

The general criminal law concepts of attempt, complicity and/or conspiracy of the law of the prosecuting state are recognised as applicable to the offence of bribery of a foreign public official.

3) Excuses and Defences

Bribery of foreign public officials in order to obtain or retain business is an offence irrespective of the value or the outcome of the bribe, of perceptions of local custom or of the tolerance of bribery by local authorities.

4) Jurisdiction

Jurisdiction over the offence of bribery of foreign public officials should in any case be established when the offence is committed in whole or in part in the prosecuting State's territory. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

States which prosecute their nationals for offences committed abroad should do so in respect of the bribery of foreign public officials according to the same principles.

States which do not prosecute on the basis of the nationality principle should be prepared to extradite their nationals in respect of the bribery of foreign public officials.

All countries should review whether their current basis for jurisdiction is effective in the fight against bribery of foreign public officials and, if not, should take appropriate remedial steps.

5) Sanctions

The offence of bribery of foreign public officials should be sanctioned/punishable by effective, proportionate and dissuasive criminal penalties, sufficient to secure effective mutual legal assistance and extradition, comparable to those applicable to the bribers in cases of corruption of domestic public officials.

Monetary or other civil, administrative or criminal penalties on any legal person involved, should be provided, taking into account the amounts of the bribe and of the profits derived from the transaction obtained through the bribe.

Forfeiture or confiscation of instrumentalities and of the bribe benefits and the profits derived from the transactions obtained through the bribe should be provided, or comparable fines or damages imposed.

6) Enforcement

In view of the seriousness of the offence of bribery of foreign public officials, public prosecutors should exercise their discretion independently, based on professional motives. They should not be influenced by considerations of national economic interest, fostering good political relations or the identity of the victim.

Complaints of victims should be seriously investigated by the competent authorities.

The statute of limitations should allow adequate time to address this complex offence.

National governments should provide adequate resources to prosecuting authorities so as to permit effective prosecution of bribery of foreign public officials.

7) Connected Provisions (Criminal and Non-criminal)

Accounting, recordkeeping and disclosure requirements

In order to combat bribery of foreign public officials effectively, states should also adequately sanction accounting omissions, falsifications and fraud.

Money laundering

The bribery of foreign public officials should be made a predicate offence for purposes of money laundering legislation where bribery of a domestic public official is a money laundering predicate offence, without regard to the place where the bribery occurs.

8) International Co-operation

Effective mutual legal assistance is critical to be able to investigate and obtain evidence in order to prosecute cases of bribery of foreign public officials.

Adoption of laws criminalising the bribery of foreign public officials would remove obstacles to mutual legal assistance created by dual criminality requirements.

Countries should tailor their laws on mutual legal assistance to permit co-operation with countries investigating cases of bribery of foreign public officials even including third countries (country of the offer or; country where the act occurred) and countries applying different types of criminalisation legislation to reach such cases.

Means should be explored and undertaken to improve the efficiency of mutual legal assistance.

(iii) RECOMMENDATION OF THE COUNCIL ON THE TAX DEDUCTIBILITY OF BRIBES TO FOREIGN PUBLIC OFFICIALS

adopted by the Council on 11 April 1996

THE COUNCIL,

Having regard to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

Having regard to the OECD Council Recommendation on Bribery in International Business Transactions [C(94)75/FINAL];

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;

Considering that the Council Recommendation on Bribery called on Member countries to take concrete and meaningful steps to combat bribery in international business transactions, including examining tax measures which may indirectly favour bribery;

On the proposal of the Committee on Fiscal Affairs and the Committee on International Investment and Multinational Enterprises:

I. RECOMMENDS that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign public officials as illegal.

II. INSTRUCTS the Committee on Fiscal Affairs, in cooperation with the Committee on International Investment and Multinational Enterprises, to monitor the implementation of this Recommendation, to promote the Recommendation in the context of contacts with non-Member countries and to report to the Council as appropriate.

(iv) PARTIES TO THE CONVENTION

Countries Having Ratified/Acceded to the Convention*

	Country	Date of Ratification
1.	Iceland	17 August 1998
2.	Japan	13 October 1998
3.	Germany	10 November 1998
4.	Hungary	4 December 1998
5.	United States	8 December 1998
6.	Finland	10 December 1998
7.	United Kingdom	14 December 1998
8.	Canada	17 December 1998
9.	Norway	18 December 1998
10.	Bulgaria	22 December 1998
11.	Korea	4 January 1999
12.	Greece	5 February 1999
13.	Austria	20 May 1999
14.	Mexico	27 May 1999
15.	Sweden	8 June 1999
16.	Belgium	27 July 1999
17.	Slovak Republic	24 September 1999
18.	Australia	18 October 1999
19.	Spain	14 January 2000
20.	Czech Republic	21 January 2000
21	Switzerland	31 May 2000
22.	Turkey	26 July 2000
23.	France	31 July 2000
24.	Brazil	24 August 2000
25.	Denmark	5 September 2000
26.	Poland	8 September 2000
27.	Portugal	23 November 2000
28.	Italy	15 December 2000
29.	Netherlands	12 January 2001
30.	Argentina	8 February 2001
31.	Luxembourg	21 March 2001
32.	Chile	18 April 2001
33.	New Zealand	25 June 2001
34.	Slovenia	6 September 2001
35.	Ireland	22 September 2003
36.	Estonia	23 November 2004

* In order of ratification/accession received by the Secretary General.