Directorate for Financial and Enterprise Affairs

LUXEMBOURG: PHASE 2*bis*

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

This phase 2 bis report was approved and adopted by the Working Group on Bribery in International Business Transactions on 20 March 2008.

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EXECUTIVE SUMMARY

The Phase 2bis report on Luxembourg assesses the measures taken by Luxembourg to meet those recommendations from Phase 2 that the OECD Working Group on Bribery had deemed inadequately implemented in its Phase 2 written follow-up report. While the Working Group notes that the Luxembourg authorities have taken steps to satisfy those recommendations, the Group is seriously concerned that Luxembourg has still not responded to key Phases 1 and 2 recommendations; these recommendations relate to the establishment of a clear, effective and dissuasive system of liability of legal persons and efforts to raise awareness of the foreign bribery offence among the private sector. Considering the seriousness of the situation, the Working Group has decided that, within one year, Luxembourg will report, in writing, on measures taken to fulfil the recommendations of the Group, and reserves the right, in the event of continued failure to implement the Convention, to take further steps.

The Working Group is particularly concerned about the continuing absence of liability for legal persons that engage in bribery. While a bill has been placed before Parliament dealing with the criminal liability of legal persons, the report highlights gaps in the bill which, if adopted in its current state, would fall short of the requirements of the Convention. Luxembourg should establish a rule for attributing acts of bribery to legal persons that is sufficiently broad to give full effectiveness to the liability of legal persons: the criterion of an act committed "by one of the legal bodies or by one or more members of its legal bodies", as included in the bill before Parliament, seems too restrictive, as it excludes most operational organs or structures. It is also essential that the liability of legal persons be subject to effective sanctions: the fine imposed must be severe enough to be dissuasive. Furthermore, the bill should expressly recognise the jurisdiction of the Luxembourg courts over offences committed outside the national territory by legal persons of the Grand Duchy.

It is also important for Luxembourg to take a more proactive approach in encouraging SMEs to comply with stricter ethical standards when they are looking for business abroad. A system for protecting whistleblowers should also be introduced. Furthermore, the report asks Luxembourg to take whatever steps are needed to facilitate the work of the judicial authorities in obtaining information from Luxembourg financial institutions.

The report highlights the efforts that Luxembourg has made since the Phase 2 evaluation, and in particular the creation of a Corruption Prevention Committee, which is expected to do much in raising awareness among the public and private players concerned about the phenomenon of bribery, and to improve interagency and interdisciplinary coordination; and the introduction of anti-bribery mechanisms in agencies responsible for export credit insurance and development cooperation. The report also welcomes the measures included in the draft law on interagency and judicial cooperation. That bill, which the Working Group hopes will be voted as it stands, should enhance the capacity of the Luxembourg tax authorities to detect payments that involve the bribery of foreign public officials, and should allow them, by waiving bank secrecy, to provide the judicial authorities, at all stages of criminal proceedings, with the information needed to establish the offence of bribery.

This report, which presents the conclusions of the Belgian and French experts as well as the recommendations of the Working Group, was adopted in March 2008 by the Working Group. It is based on the existing and proposed laws, regulations and other documents supplied by Luxembourg, as well as information that the examining team gathered from representatives of government departments and agencies and of the Luxembourg private sector during the on-site mission to Luxembourg, conducted between 16 and 18 October 2007. In the year following approval of the Working Group's report, Luxembourg will submit to the Group a written report on measures taken to fulfil the Phase 2bis recommendations. Luxembourg's implementation of these recommendations will be evaluated by the Group and made public.

INTRODUCTION

1. The on-site visit

1. An examining team from the OECD Working Group on Bribery in International Business Transactions ("the Working Group") made an on-site visit to Luxembourg from 16 to 18 October 2007, as part of the Phase 2bis examination of Luxembourg. The visit was conducted in accordance with the procedures for self-evaluation and mutual evaluation of implementation of the Convention on Combating Bribery of Foreign Public Officials ("the Convention") and the Revised Recommendation of 1997 ("the Revised Recommendation").

2. The on-site visit was designed to examine the measures taken by Luxembourg to comply with the Phase 2 Recommendations on the detection of bribery of foreign public officials (Recommendations 1, 2, 3, 4, 5, 6 and 8), cooperation and coordination among the various bodies concerned in the control, detection and punishment of the offence (Recommendation 9), and the responsibility of legal persons (Recommendation 14).[1] In its written follow-up report to Phase 2, the Working Group had judged Luxembourg's implementation of these Recommendations inadequate, and it consequently agreed to conduct a new on-site evaluation of Luxembourg in 2007, dealing specifically with these Recommendations.[2]

3. The OECD team was composed of lead examiners from Belgium and France as well as representatives of the OECD Secretariat (see Annex 1 for the makeup of the examining team). During the on-site visit, the team interviewed some 50 government experts, business representatives, lawyers, chartered accountants, financial intermediaries, and representatives of civil society (see Annex 2 for the list of institutions met).

4. To prepare the on-site visit, the Luxembourg authorities provided the Working Group with answers to a questionnaire dealing specifically with Phase 2bis. The Luxembourg authorities also submitted relevant legislation and draft laws, regulations, regulations, circulars and other documentation, official or otherwise, useful for this purpose. The examining team studied these documents and also performed independent research.

5. The Luxembourg authorities made very commendable efforts to ensure the smooth running of the on-site visit through the preparation of a detailed visit program and by making substantial efforts to ensure that all the participants invited for consultation were available. Before and after the on-site visit, the authorities responded to all requests for information and documentation. This cooperative spirit did much to ensure constructive discussion on the efforts that Luxembourg has made, and on those aspects, as identified by the lead examiners, that still pose problems for implementing the Convention and the Revised Recommendation.

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1 The Phase 2 examination took place in June 2004. It looked at the structures established in the country for enforcing the laws and regulations applicable to the Convention, and assessed their implementation in practice, while reviewing the country's conformity in practice with the provisions of the 1997 revised Recommendation.

2 The follow-up exercise took place in June 2006, and resulted in a report that was formally approved by the Working Group on 2 August 2006.

2. Methodology and structure of the report

6. This report consists of four parts. Part A looks at prevention and detection of transnational bribery in Luxembourg, and at efforts to raise domestic awareness of this offence (Recommendations 1, 2, 3, 4, 5, 6 and 8). Part B examines the measures Luxembourg has taken to reinforce interdisciplinary cooperation and coordination (Recommendation 9). Part C addresses the responsibility of legal persons (Recommendation 14). Finally, part D. presents the Working Group's recommendations and identifies issues for follow-up.

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

1. Raising awareness of transnational bribery among business circles and professional organisations concerned

7. During its Phase 2 evaluation of Luxembourg, the Working Group observed that “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.” The Working Group also found that "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”.

8. During Phase 2, the Working Group consequently recommended that Luxembourg “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” (Recommendation I). In its follow-up report on the implementation of the Phase 2 recommendations, the Working Group noted that "steps were taken to a greater or lesser extent to raise awareness in the private sector and to encourage the latter to develop internal prevention mechanisms", and concluded that Recommendation 1 from Phase 2 had been only partially implemented.

a) Public initiatives at awareness raising and training for the private sector

9. At the time of the Phase 2bis on-site visit, the Luxembourg authorities had as yet played only a very limited role in making businesses aware of the offence of bribing foreign public officials in international business transactions.[3] Neither the Chamber of Commerce nor the Chamber of Trade (*Chambre des Métiers*), the two public institutions representing Luxembourg business, had made any real

[3] Awareness raising activities were conducted primarily through the Office du Ducroire, Luxembourg’s public institution responsible for export credit insurance. See further details in this report.

effort at sensitising their members.[4] The on-site discussions revealed that while a portion of the private sector – comprising large industrial and commercial groups – had already recognised the risks of bribery in international contracts and had put in place more or less sophisticated systems to prevent acts of bribery by their agents and employees, this awareness was due to their own actions, and was not the result of any government initiative.

10. The lead examiners heard from various participants from the public and private sectors that the meagre action of the authorities was justified by the particular features of the Luxembourg economic fabric: Luxembourg was presented as a country composed essentially of small and medium-scale enterprises (26,000 in total) engaged, in nearly all cases, in domestic activities, and that they had consequently little or no interest in problems of transnational bribery.[5] Within that economic fabric, only a dozen or so large enterprises would be concerned by legal provisions on foreign bribery. Those enterprises are already alert to their obligations in this field and they already have ethical practices in place because they belong to large foreign groups that are publicly traded in the United States, or are affiliates of American concerns, and consequently they had no need for an awareness raising effort by the authorities.

11. While recognising that Luxembourg's large industrial and commercial concerns are actively engaged in combating bribery, the lead examiners felt that it could be risky to ignore application of the OECD Convention to SMEs, in particular those striving to move beyond the domestic market: like other parties to the OECD Convention, Luxembourg must encourage its businesses to comply with the most rigorous ethical standards when they go looking for business abroad. Aware of the need for greater effort with respect to firms that may decide not to confine their activities to the Luxembourg market alone and are interested in seeking new markets abroad, the Chamber of Commerce announced during the on-site visit that the firms participating in its economic missions would henceforth be systematically alerted to the risks involved in bribing foreign public officials. With respect to banking and financial institutions, the Luxembourg authorities, conscious of the fact that awareness-raising is an ongoing task, believe that this sector's awareness is already sufficient, and that action by the authorities would not further enhance it. The lead examiners would encourage Luxembourg to monitor the effectiveness of awareness-raising efforts in this sector.

12. For its part, the Corruption Prevention Committee ("*Comité de prevention de la corruption*"), an interagency body established in 2007 embracing all Luxembourg stakeholders in the anti-bribery campaign,[6] was working on a brochure targeted at Luxembourg businesses and public officials, advising them of the risks and consequences of bribery, including in its transnational dimension. At the time of the visit, the Committee had already devoted several meetings to preparing such a brochure. The ministries participating in the Committee were also planning to make their Committee representatives available to the

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4 At the time of the Phase 2bis on-site visit, the Chamber of Commerce's efforts were limited to a one-day training module on the legal responsibilities of business managers, including foreign bribery, and to publication in the July/August 2005 edition of its magazine *Merkur* of a two page legal Article about the 23 May 2005 law adopted by Luxembourg to transpose into domestic legislation the provisions of the European Union and the Council of Europe's instruments making corruption a crime. The paper included a brief reference to the OECD Convention.

5 For example, the Chamber of Trade explained to the examining team that, since the 4,500 SMEs that are members of the chamber were not active on foreign markets, there was no need for the chamber to make any specific awareness raising efforts on their behalf.

6 On the mission and the composition of the committee, see below, section B of this report.

Chamber of Commerce and the Chamber of Trades, or business clubs seeking to sponsor training on the issue of transnational bribery.[7]

b) Private sector initiatives

13. The on-site discussions with representatives of Luxembourg's most important business firms and industrial groups as well as with the Federation of Luxembourg Industrialists (FEDIL, the private business association representing the industrial, construction and services sectors) showed that the sector was committed to the campaign against foreign bribery. Two of the three large groups and companies interviewed by the examining team had adopted codes of conduct that referred specifically to bribery of foreign public officials, they had instituted internal control systems (audit committees), they had developed whistleblower protection mechanisms, and they had prepared training programmes for their employees.[8] Discussions with the representatives of these firms suggested that the remaining four or five of Luxembourg's most important enterprises had also put in place systems to prevent their employees from bribing foreign public officials.

14. This momentum will shortly be reinforced by the actions that FEDIL is undertaking with other large and medium-sized Luxembourg companies. This action of FEDIL focuses on establishing a forum to institutionalise contacts between businesses for sharing information (including about bribery), preparing or reviewing codes of conduct and whistleblower protection mechanisms, and addressing current legal issues such as determining the criminal liability of legal persons incorporated under Luxembourg law. This initiative, in which the large Luxembourg industrial groups that have already established bribery prevention systems are participating, is still very new, and a thorough evaluation of its role and its real effectiveness in terms of corporate accountability will have to wait for the future. Nevertheless, it is expected that a wider range of Luxembourg firms should be adopting its methods for establishing internal prevention mechanisms.

Commentary

The lead examiners are concerned about the lack of public-sector initiative to raise awareness of foreign bribery among the private sector, apart from the establishment of the Corruption Prevention Committee. They recognise the solid efforts of the handful of large Luxembourg firms active in international markets and of the Federation of Luxembourg Industrialists to develop preventive organisational measures but they are disappointed that more has not been done to raise awareness about the offence of bribing foreign public officials among other companies capable of operating abroad.

To ensure thorough implementation of Recommendation 1 from Phase 2, the examiners recommend that the Luxembourg authorities, in the context of the new Corruption Prevention Committee, step up their efforts, striving in particular, in co-operation with the business circles concerned, to raise awareness of the anti-bribery provisions of Luxembourg law among small and medium-sized enterprises engaged in international trade. The examiners also recommend that the Luxembourg authorities monitor the awareness-raising activities conducted by banking and financial institutions.

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7 Plan d'action du Comité de Prévention de la Corruption (Corruption Prevention Committee's Action Plan) (version of 14 June 2007).

8 At the time of the visit, the third large group present at the discussion panel on the private sector had established an internal audit committee and was about to adopt a code of conduct dealing specifically with bribery.

2. Detecting and reporting transnational bribery in the public sector

a) Reporting by officials of agencies that have contractual relations with businesses: development assistance and export credit agencies

15. The Phase 2 report noted that two Luxembourg agencies were particularly likely to have dealings with individuals or businesses that could be involved in transactions tainted by foreign bribery, namely the Office du Ducroire, a public agency responsible for export credit insurance in the Grand Duchy, and Lux Développement SA, the Luxembourg government's agency for development co-operation. In the opinion of the Working Group, it was therefore incumbent upon officials of these two agencies to detect any acts of transnational bribery and report them to the competent authorities.

16. During the Phase 2 evaluation, the Working Group found that the reporting of bribery by officials of these two agencies was constrained by the private legal status of a portion of their personnel. The group consequently recommended that Luxembourg "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)" (Recommendation 4). In its follow-up report, the group noted that "some problems still persist in the chain of detection: as outlined in the Phase 2 Report, these problems could prevent private-law personnel of export credit agencies – particularly personnel of the Office du Ducroire -- from passing on evidence of bribery of foreign public officials, if not to the prosecuting authority, at least to staff of such agencies who are subject to the provisions of Article 23 (2) of the Code of Criminal Procedure". It concluded that this Recommendation had not been implemented.

17. Since that time, Luxembourg has taken several measures to reinforce the capacity of Ducroire staff to detect acts of bribery of foreign public officials and to report those acts. Since 1 January 2007, pursuant to the OECD Council Recommendation of 2006 on bribery and officially supported export credits, to which Luxembourg has subscribed, exporters applying for credit insurance must declare not only that they are aware of the law of 15 January 2001 approving the OECD Convention and that they understand that any offence will expose them to sanctions, but also that they are not included in the official debarment lists of international financial institutions, and that there is no element of corruption in the transactions to be covered by the guarantee, involving either the exporter or persons acting on his/her behalf. Moreover, exporters are required to advise the Office of any administrative or judicial action against them (or against a person acting on their behalf).

18. Enhanced due diligence is required in cases where the insured party is included in the debarment lists of international financial institutions or has been convicted of violating the laws against the bribery of public officials, or where the Office has reason to believe that bribery is involved in the transaction for which the guarantee has been requested or granted. In these cases, the Belgian National Office du Ducroire (ONDB) systematically conducts an in-depth audit, under the terms of two cooperation agreements amended on 1 January 2006 whereby the ONDB examines and analyzes all files of the Luxembourg Ducroire. The ONDB has a staff of around 200 to perform this work.

19. This arrangement is supplemented by a mechanism for reporting cases of suspected bribery: any fact detected by ONDB staff is brought to the attention of the Luxembourg Ducroire committee, which has eight members including five Luxembourg public officials. Depending on the outcome of the ONDB's audit, if there is "credible evidence" of bribery (within the meaning of the 2006 OECD Council Recommendation), the Ducroire Committee must promptly report this to the prosecutors. Because this provision was introduced only recently, at the time of the Phase 2bis on-site visit no suspected act of bribery had been reported to the committee.

20. In the case of Lux Développement, measures have been in place since the end of 2004 to ensure that bilateral programmes financed by the Luxembourg government and managed by the agency are not tainted by corruption. This mechanism contains three elements:[9] (i) Lux Développement may suspend or cancel financing of the contract if corrupt practices are discovered at any stage of the award process and if the Contracting Authority fails to take all appropriate measures to remedy the situation[10]; (ii) calls for tenders and contacts for services, supplies and works contain a clause to the effect that tenders will be rejected or contracts terminated if it emerges that the award or execution of a contract has given rise to unusual commercial expenses, and that on-site and off-site controls may be performed to gather evidence for a presumption of unusual commercial expenses[11]; and (iii) contractors found to have paid unusual commercial expenses are liable, depending on the seriousness of the facts observed, to have their contracts terminated, to be permanently disqualified from receiving Lux Développement funds, or to be excluded from other contracts financed by the government of the Grand Duchy of Luxembourg.

21. To give greater effect to this provision, a "code of integrity" was issued in October 2007 to guide Lux Développement staff in implementing the principles of integrity and quality inherent in their professional duties[12]. That code spells out the risks associated with bribery in the context of bilateral development assistance, and provides for a mechanism, with promise of confidentiality, to report suspicions of corruption to senior management: agency staff can report directly to the Lux Développement management committee, through a specially created e-mail address. The committee includes government representatives who, like any public official in Luxembourg, are required to report suspicions to the prosecuting authorities.

Commentary

The lead examiners welcome the introduction of measures to prevent and detect foreign bribery within the Ducroire, the Luxembourg agency responsible for export credit insurance, and Lux Développement, the Luxembourg agency for development cooperation.

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9 "General regulations for service, supply and works contracts financed by contributions from the Government of the Grand Duchy of Luxembourg and implemented by the Luxembourg Agency for Development Cooperation (Lux Développement)": http://www.lux-development.lu/docs/tr_rg_fr.pdf. This Regulation is based on the General Regulations for service, supply and works contracts financed by the European Development Fund (EDF), published in the *EC Official Journal* L320 of 23 November 2002.

10 For the purposes of this provision, "corrupt practices" are “the offer of a bribe, gift, gratuity or commission to any person as an inducement or reward for performing or refraining from any act relating to the award of a contract or implementation of a contract already concluded with the Contracting Authority”.

10 For the purposes of this provision, "corrupt practices" are “the offer of a bribe, gift, gratuity or commission to any person as an inducement or reward for performing or refraining from any act relating to the award of a contract or implementation of a contract already concluded with the Contracting Authority”.

11 Such unusual commercial expenses are commissions not mentioned in the main contract or not stemming from a properly concluded contract referring to the main contract, commissions not paid in return for any actual and legitimate service, commissions remitted to a tax haven, commissions paid to a payee who is not clearly identified or commissions paid to a company which has every appearance of being a front company.

12 Lux Développement, *Code d’intégrité* (Integrity Code) (October 2007 version).

b) Reporting by officials of agencies that do not have a contractual relationship with businesses

22. With respect to the general reporting obligations of Luxembourg public officials, the Phase 2 report found that while staff of all government departments, including the Ministry of Foreign Affairs, seemed to be aware of their obligation to report any suspected criminal offence (which would include transnational bribery) pursuant to Article 23 (2) of the Code of Criminal Procedure (hereinafter "CCP"), there was, in practice almost no reporting of information to the prosecuting authorities. The group consequently recommended that Luxembourg take two types of action: on one hand it should "take necessary measures to raise awareness of the offence among the administration, notably among those officials that may play a role in detecting and reporting acts of bribery and those in contact with Luxembourg enterprises exporting or investing abroad (in particular diplomatic missions of Luxembourg abroad)..." (Recommendation 2) and, on the other hand, it should "issue regular reminders to public officials of their obligation under CCP Article 23 (2) 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." (Recommendation 3).

23. In the written Follow-Up Report on the Implementation of the Phase 2 Recommendations on the Application of the Convention, the Working Group noted that Luxembourg had taken steps to raise the administration's overall awareness of bribery and the duty to report to the State prosecutor, in the context of initial and in-service training for civil servants, but it also noted that "no specific steps were taken concerning staff of Grand Duchy diplomatic missions abroad or other staff in contact with national firms exporting or investing abroad". The Working Group concluded that Phase 2 recommendations 2 and 3 had been only partially implemented.

24. Since then, the Luxembourg authorities have made it a priority to step up the awareness campaign for these sectors of the administration. Complementing the measures directed at officials of the Office du Ducroire and Lux Développement described above, a circular was issued in November 2007 (and has since then been available at the ministry's website), drawing the attention of Foreign Ministry staff posted abroad (diplomats, economic counsellors and consuls) to the legal provisions concerning the bribery of foreign public officials, and their obligation to report immediately any suspicion of foreign bribery to the Luxembourg prosecution authorities. In order to keep its staff alert to the crime of bribing foreign public officials, the Foreign Ministry, at the time of the on-site visit, was considering other types of action such as introducing a specific module on transnational bribery into the in-service training courses offered to Luxembourg diplomatic personnel.

25. The actions taken by Luxembourg in the framework of the newly-established Corruption Prevention Committee, in particular the preparation of a brochure targeted at businesses and at government officials, should quickly reinforce awareness of foreign bribery among other sectors of the administration, in particular officials of the Ministry of Economy and Foreign Trade posted in Luxembourg and abroad (in China, India, Japan, South Korea, the United Arab Emirates and the United States) with foreign trade promotion responsibilities.

Commentary

The lead examiners take note of the measures taken by the Luxembourg authorities to sensitise personnel who could play a role in reporting acts of transnational bribery and those in contact with Luxembourg enterprises exporting or investing abroad to ensure that they are aware of legal provisions relating to the bribery of foreign public officials and the obligation to report any suspected violation of the law to the prosecution authorities. They recommend that Luxembourg continue its efforts, using brochures, circulars, in-service training for public

employees, or any other means, to ensure that government officials not only maintain but increase their vigilance against the bribery of foreign public officials.

c) Detection and reporting by tax administration officials

26. During the Phase 2 evaluation of Luxembourg, the Working Group found that the Luxembourg tax administration had so far played no role in detecting irregularities relating to bribery in foreign markets during the time the Convention had been in force, despite the fact that tax officials, like other public servants, are required by CCP Article 23 to report any crime to the prosecuting authorities, including bribery of foreign public officials. The Working Group consequently recommended that Luxembourg "develop clear instructions for the Tax Administration prescribing verifications to be carried out in order to detect possible offences of bribery of foreign public officials, and 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" (Recommendation 5).

27. In the follow-up exercise, Luxembourg reported measures taken to satisfy some of the questions raised by the Recommendation, in particular the introduction of a code of conduct for staff of the *Administration de l'Enregistrement et des Domaines* (AED, the VAT and property registration office), which makes reference to the legal provisions on bribery and the obligation to report to the prosecutor in accordance with CCP Article 23 (2), as well as distribution of a handbook for staff of the income tax administration, the *Administration des Contributions Directes (ACD),* on detecting bribes, drawing on the model drafted by the OECD's Committee on Fiscal Affairs[13]. While taking note of these developments, the Working Group observed that "ACD officials were however not given a clear reminder of their obligation to report to the prosecutor, nor were they made aware of the importance of making rigorous use of all the sanctions available under Luxembourg's tax legislation in order to deter any attempt on the part of tax payers to pass off bribes paid to foreign officials as deductible charges, nor were the measures accompanied by any increase in human and financial resources available to staff of the ACD responsible for inspections". It concluded that Recommendation 5 had been only partially implemented.

28. In response to Phase 2 Recommendation 5, a draft law was laid before Parliament in the summer of 2007, dealing with administrative and judicial cooperation and strengthening the resources of the ACD, the AED and the Customs and Excise Administration (ADA). This draft law was part of a broader set of measures for gradually improving the tax authorities' capacity to combat tax evasion and fraud, and it had two principal objectives: on one hand, to strengthen cooperation between the tax administration and the justice authorities by reminding officials of the obligation of ACD and AED officials to report any crime to the prosecutors, and on the other hand to establish a legal framework for sharing information between the tax administration and other public administrations in possession of information that could allow taxes to be recovered.[14]

29. Under the terms of the draft law, the ACD and the AED will now be able to share "all information that could allow them to establish correctly and recover taxes, duties, levies and contributions for which they are responsible" (Article 1). It also enshrines the principle of close cooperation and creates a legal framework for exchanging data between the tax administration and other public administrations

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13 Note de service du directeur des contributions L.I.R./N.S. no. 12/1 of 1 March 2005

14 In its Phase 2 report, the Working Group noted that "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 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".

holding information that could be useful for tax collection (Articles 7 to 14). The ACD and the AED will now have access to certain data held by the Central Statistics and Economic Studies Office (STATEC), the Office of the General Inspector of Social Security (IGSS) and the Social Security Common Centre (CCSS), as well as by the Ministry of Transport (vehicle registration files). The ACD will also be able to obtain information from the National Family Allowances Fund (CNPF) and the National Solidarity Fund (files on employees and retirees). Apart from these provisions, the draft law includes other measures giving new powers to the administration, including the possibility of joint ACD-AED inspections (Article 5) and the secondment of ACD and AED officials to the judicial police (Articles 17 and 19).

30. Another aspect of the draft law concerns cooperation between ACD, AED and the judicial authorities. Article 15.2 of the bill reminds officials of both tax administrations who become aware of a crime or offence in the performance of their duties, that they must immediately advise the state prosecutor, and submit all relevant information and records to this magistrate. In principle, the new law merely confirms what was already a legal obligation, pursuant to CCP Article 23.2, but one that the ACD and AED staff did not perhaps always observe, because of an apparent inconsistency between that Article 23.2 and the tax secrecy required by Article 22 of the General Taxation Law. The Phase 2 report noted that discussions with ACD staff during the on-site visit gave no clear indication that the tax officials would comply with the CCP Article 22.3 reporting obligation if they discovered facts or evidence of bribery of foreign public officials. In this regard, the commentary to Article 15.2 of the draft also reminds officials of the two administrations that "all crimes and other serious acts that affect the public interest, and in particular all facts or indications discovered during the tax assessment procedure that relate to the crimes of money laundering, bribery (...) are to be reported to the public prosecutor".

31. Once these measures come into force, they should usefully reinforce other measures already taken by the Luxembourg authorities to enhance the supervisory capacities of the tax administration, in particular the repeal, by a law of 22 December 2006, of the tax regime for holding companies; the gradual increase, since September 2007, in the staff of the ACD office responsible for enhanced inspection of enterprises, and the introduction of special training on bribery for ACD officers, as 1 January 2008.[15]

Commentary

The lead examiners welcome the steps that Luxembourg has taken to raise awareness among tax officials concerning the non-deductibility of bribes, detection techniques, and the obligation to report to the public prosecutor any information relating to facts or indications of bribery, including foreign bribery, as a supplement to other measures taken with a view to reinforcing tax supervisory capacities. The examiners are very hopeful that the draft law on interagency and judicial cooperation will be voted and adopted in the near future.

3. Detection and reporting of transnational bribery during the external audit of companies

32. The Phase 2 report observed that, while Luxembourg law requires chartered accountants and external auditors to report to the prosecutor's office of the Luxembourg court any fact that could indicate money laundering in connection with bribery, in practice very few cases had been reported, and none of

15 The Phase 2 report observed that the AED unit responsible for supervising holding companies was inadequately staffed to detect illegal activities. It was anticipated that this problem would be resolved with the progressive disappearance, by 2010, of companies eligible for the holdings regime. The Phase 2 report also noted that at the time of the on-site visit there were only six or seven inspectors working in the ACD audit office, a number deemed inadequate in light of the complexity of corporate transactions and the importance of the Grand Duchy's financial industry.

them involved laundering in connection with bribery. The Phase 2 report suggested that the procedures followed by companies' external auditors, together with the lack of awareness of foreign bribery among members of the profession, meant that few such reports were likely to be filed. To ensure respect for the reporting obligations of chartered accountants and external auditors, the Working Group invited Luxembourg 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" (Recommendation 8).

33. For the Phase 2 follow-up exercise, Luxembourg reported measures taken to raise awareness among the accounting profession of the crime of transnational bribery, as part of a general information campaign on the new legislative provisions covering money laundering that came into effect at the end of 2004[16]. On the other hand, work on new rules governing corporate external audits was in abeyance pending entry into force of the Eighth European Directive of 17 May 2006 (2006/43/EC) on statutory audits of annual accounts. The Working Group concluded that Recommendation 8 from Phase 2 had been only partially implemented.

34. Since that time, a task force to prepare legislation transposing that directive into Luxembourg law has been set up within the Ministry of Justice, and legislation is to be adopted by June 2008, the deadline set for member states to transpose the directive into domestic law. While the directive gives member states some flexibility in implementing legal controls, it is expected that its transposition into Luxembourg law will enhance the objectivity and independence of Luxembourg's 320 or so statutory auditors[17], even if it is unlikely, given professional reluctance on this point, that the transposition law will go beyond the requirement of normal due diligence in auditing.[18]

Commentary

The lead examiners take note of the work that Luxembourg has launched to transpose the eighth European directive on statutory audits by June 2008.

4. Reporting of transnational bribery by private sector employees and individuals

35. During the Phase 2 evaluation of Luxembourg, the Working Group observed that the lack of programmes to protect whistleblowers, coupled with the low level of awareness among the main players with respect to transnational bribery, made it very unlikely that suspicions of bribery would be reported by the Luxembourg public in general. The Working Group consequently recommended that Luxembourg take the necessary measures to raise public awareness of this offence (Recommendation 2) and that it "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". In its follow-up report, the Working Group, noting that the overall detection and prevention framework continued "to be hampered by the lack of measures to guarantee effective protection of private sector whistle blowers", concluded that Recommendation 6 had not been implemented.

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16 Law of 12 November 2004 on money laundering and the financing of terrorism, transposing the second European Directive on preventing use of the financial system for purposes of money laundering.

17 The directive clarifies the duties of statutory auditors, defines the principles of independence applicable to them, reinforces their independence by requiring publicly traded companies to institute an audit committee (or similar body), and also calls for the application of international audit standards for all statutory audits.

18 On this point, see the speech delivered by the President of the Institute of Corporate Auditors (IRE) at the 2007 Annual General Assembly of the Institute, reported in *Agefi Luxembourg* (July 2007).

36. Since that time, the Luxembourg authorities have given further thought to the issue of whistleblowers as a priority. The Bribery Prevention Committee began work in the fall of 2007 on a warning device, supplementary to action that the National Data Protection Commission (CNPD) has been pursuing since 2006[19]. The Committee has identified three broad principles for designing the contours of the system. The first calls for declaration of a general principle whereby any person living or working in Luxembourg would be entitled and able to report illegal activities, including acts of bribery. The second would see the establishment of a "confidential contact" unit to which whistleblowers could turn, with promise of confidentiality, and which would examine reports for transmission, if necessary, to the appropriate authorities (a substantiated warning would lead to a criminal investigation). The last principle involves protecting whistleblowers from disciplinary action or dismissal when they act in good faith.

37. While the introduction of a whistleblower protection mechanism opens the way to reinforcing Luxembourg's system for detecting foreign bribery, the eventual impact of this measure will depend on the degree of awareness among the sectors concerned by the offence. If public opinion remains oblivious to the question of transnational bribery, it is unlikely that members of the public will report acts involving the bribery of foreign public officials. The Corruption Prevention Committee's role in informing and sensitising the general public about this issue offers some interesting prospects for making the system fully effective.

Commentary

The lead examiners recognise the actions taken by the National Data Protection Commission and, more recently, the Corruption Prevention Committee to develop whistleblower protection systems. They recommend that Luxembourg pursue its efforts to put in place, as quickly as possible, effective systems for protecting whistleblowers, and they invite the Working Group to monitor the progress of work in this field by the Corruption Prevention Committee.

B. INTERDISCIPLINARY COOPERATION AND COORDINATION

38. During the Phase 2 evaluation of Luxembourg, the Working Group noted the lack of any formal arrangements among official agencies for sharing essential information and reporting suspicions of bribery. The group also pointed to the constraints that banking secrecy imposed on information gathering from Luxembourg financial institutions in cases of bribery, and that a simple demand for information from those institutions required the opening of a judicial investigation and the issuance of a search warrant[20]. The group consequently recommended that Luxembourg "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" (Recommendation 9).

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19 The CNDP, an independent authority established by the law of 2 August 2002 (as amended) on the protection of personal data, has been advising Luxembourg-based businesses seeking to institute a professional warning device on the basis of good international practice and the requirements of Luxembourg's data protection legislation. The president of the CNDP told the examining team in October 2007 that a dozen companies, including three or four foreign firms in the financial sector, had notified the commission that they had instituted a professional warning system.

20 See paragraph 85 of the Phase 2 Report and the comment following paragraph 86.

39. For the Phase 2 follow-up exercise, Luxembourg reported an initial series of measures to encourage spontaneous communication of information between the national administrative and judicial authorities: on one hand, the initial and in-service training offered to Luxembourg public officials now included sensitisation to legal provisions relating to bribery and the obligation to report suspicions to the public prosecutor; second, a specific reminder of the same provisions and obligation was issued to staff of the Registration and Properties Administration (AED); and finally, a new paragraph 3 was added to CCP Article 23 requiring public servants to report to the public prosecutor any suspicion of money laundering. Observing that the disclosure and prosecution of foreign bribery was still hamstrung by a lack of formal arrangements for coordination and cooperation among the bodies concerned, the Working Group concluded that Recommendation 9 had yet to be implemented.

40. Since then, the authorities have given priority to consolidating cooperation and coordination mechanisms. That consolidation focuses primarily on two themes: promoting cooperation between the public and judicial authorities of Luxembourg, and creating an interagency body involving all players concerned in combating bribery.

1. Cooperation between administrative, financial and judicial bodies

41. The reforms undertaken by Luxembourg since the Phase 2 examination have focused on strengthening cooperation among state authorities. They have involved, on one hand, strengthening mechanisms to facilitate spontaneous communication to the judicial authorities of information held by the public authorities and their agents that could lead to a criminal investigation or prosecution and, on the other hand, the creation of a new legal framework to make it easier for the judicial authorities, in the course of ordinary criminal proceedings, to obtain information held by the tax administration.

42. With respect to measures obliging state agents and public authorities to advise the state prosecutor of a crime or offence of which they become aware in the exercise of their duties, those measures are described in further detail above, and do not need to be repeated here. On the second aspect, a bill has been placed before the Luxembourg Parliament to authorise interagency and judicial cooperation and to strengthen the resources of the Income Tax Administration (ACD) the Registry and Properties Administration (AED) and the Customs and Excise Administration (ADA). That bill contains a provision requiring the Luxembourg tax authorities, as an exception to the tax secrecy enshrined in Article 22 of the General Tax Law, to respond to any request by the national investigation and prosecution authorities for information that might be useful in criminal proceedings.

43. In the opinion of the examiners, this draft law, which the Finance Committee of the Chamber of Deputies began to examine on 2 October 2007, would, if adopted, facilitate greatly the task of the judicial authorities in seeking information to establish evidence of bribery of foreign public officials: not only would it allow information to be obtained from the tax authorities at all stages of a criminal proceeding[21], but it would also obviate the cumbersome and time-consuming procedure of obtaining a judicial order for search and seizure[22]. Despite the considerable progress that this provision would represent if it were finally adopted, members of the judicial police complained, during the on-site visit, that a formal investigation

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21 According to the magistrates, prosecutors and representatives of the judicial police interviewed by the examining team, information required could be supplied to the judicial authorities not only in the case of a judicial investigation (conducted by an investigating magistrate) but also in the preliminary inquiry (conducted by the prosecutor with the assistance of the judicial police, in which case it is up to the prosecutor to request information from the tax administration) as well as at the time of the formal hearing of charges by a judge.

22 As noted in the Phase 2 report, searches and seizures not only require a formal court order, but such orders cannot be issued unless there are already serious indications that a criminal offence has been committed.

order was still required for any simple demand for information from Luxembourg financial institutions by the judicial authorities. As a result, without a formal referral to an investigating judge, investigators cannot assemble all the elements needed to initiate such an investigation, despite working under the authority of the prosecutor.

Commentary

The lead examiners welcome the bill on interagency and judicial cooperation allowing the tax administration, as an exception to the fiscal secrecy enshrined in Article 22 of the General Taxation, to transmit to the judicial authorities any evidence collected in the course of assessing and recovery tax that prosecutors, investigating magistrates and judges deem useful for the prosecution of ordinary crimes and offences, including foreign bribery. The examiners hope that the definitive text of the law will contain this exception to fiscal secrecy, which constitutes an essential element of the draft law. In order to enhance cooperation among all bodies concerned and thereby ensure full implementation of Recommendation 9 from Phase 2, the examiners recommend that Luxembourg take all measures necessary to facilitate the work of the judicial authorities in seeking information from Luxembourg financial institutions, including in cases where there has been no formal referral to an investigating judge.

2. Interdisciplinary coordination: specialised interagency body for preventing bribery

44. In addition to the measures described below for facilitating cooperation between the national administrative and judicial authorities, Luxembourg has considered that the prevention, detection and suppression of bribery, particularly in its transnational dimension, also required more room for interagency work. It was in response to this requirement that the Corruption Prevention Committee was created by the law of 1 August 2007 approving the United Nations Convention against Corruption.

45. This Committee has four responsibilities: (i) to serve as an interdisciplinary roundtable for exchanging views on the phenomenon of corruption; (ii) to help in the preparation, coordination and evaluation of national policies for preventing corruption; (iii) to monitor the international conventions that Luxembourg has signed for combating corruption, including the OECD Convention; and (iv) to disseminate knowledge and expertise regarding prevention. Reporting directly to the Minister of Justice, the Committee comprises representatives of ministries or public institutions, and coordinates their prevention activities: in addition to the police and judicial authorities, these include the Ministry of Economy and Trade, the Ministry of the Middle Classes, the Ministry of the Public Service, the Ministry of Foreign Affairs, the Ministry of Finance, and the Ministry of Labour. Depending on the subject at hand, professionals, private sector representatives or independent experts are also invited to participate in Committee meetings.

46. As the lead examiners were able to confirm during the on-site visit, the Committee serves at once as a "think tank" for designing and proposing policies and legislation to make the fight against corruption more effective, to define strategies, and to prepare analyses and forecasts; a coordination and leadership body, taking advantage of its horizontal and inter-ministerial nature to spark action by the authorities; a monitoring and evaluation body that assembles useful information (especially for prosecution policy purposes) so that the government can define priorities, decide new actions, and assess the relevance and impact of steps already taken; and an information and outreach body for raising awareness among all players concerned, including professionals, the private sector and the general public[23]. On the legal front,

[23] The committee's areas of intervention are detailed in the *Règlement Grand-ducal déterminant la composition et le mode de fonctionnement du Comité de Prévention de la Corruption* adopted by the Government in February 2008.

the Committee coordinates, among other things, enforcement of the Recommendations of the OECD Working Group on Bribery, with respect to Luxembourg's implementation of the OECD Convention.[24]

47. While the Committee's role and its real effectiveness can only be fully appreciated in the course of time, given its very recent creation, its makeup and its areas of responsibility should do much to make the players concerned more aware of the phenomenon of transnational bribery, and to enhance interagency and interdisciplinary coordination. At the time of the on-site visit, the lead examiners were able to confirm that, by the very fact that it had met five times since its establishment in March 2007, the Committee had already considerably expanded knowledge about the OECD Convention among the representatives of ministries and public institutions that sit on the committee, compared to the level of awareness they showed three years earlier at the time of the Phase 2 on-site examination.

Commentary

The lead examiners welcome the creation of the Corruption Prevention Committee, an interagency body that is expected to make all players concerned, public and private, much more aware of the phenomenon of bribery, including its international dimension, and to lead to better interagency and interdisciplinary coordination. The lead examiners invite the Working Group to follow the activity of this committee.

C. THE RESPONSIBILITY OF LEGAL PERSONS

48. During the Phase 1 evaluation of Luxembourg, the Working Group noted that "Luxembourg failed to correctly transpose the requirements of the Convention" with respect to the responsibility of legal persons, and it consequently recommended that Luxembourg "implement articles 2 and 3 of the OECD Convention as soon as possible". At the time of the Phase 2 evaluation, the Working Group found that no measure had been taken to give effect to the Recommendation from the first Phase, and that consequently Luxembourg was in "persistent contravention of Article 2 of the Convention", and it recommended that Luxembourg establish in law "a clear liability of legal persons for bribery of foreign public officials within a year of the Phase 2 evaluation of Luxembourg, and put in place sanctions that are effective, proportionate and dissuasive [Convention, Articles 2 and 3]" (Recommendation 14).

49. In its follow-up report on implementation of the Phase 2 Recommendations, the Working Group observed that "since work on the bill which would introduce clear liability for legal entities into the legislation of Luxembourg in the event of bribery of foreign public officials is still in progress, the Grand Duchy continues to be in non-compliance with Article 2 of the Convention". In its oral follow-up report of June 2007, the Luxembourg delegation informed the Working Group that a draft law, Bill 5718, had been placed before Parliament on 20 April 2007, introducing criminal liability for legal persons in Luxembourg law. The bill would amend the Criminal Code, inserting in it a chapter on "penalties applicable to legal persons", and also the code of criminal procedure, to which would be added a section on "proceedings against legal persons". The wording of that draft law draws on legislation now in force in France, and, to a lesser extent, on Belgian regulations.

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[24] *Projet de Plan d'action du Comité de Prévention de la Corruption* (version of4 June 2007).

50. At the time of the on-site visit, the bill had been submitted to the State Council for review, as required by legislative rules. Because the State Council is not subject to any deadline for its review of draft texts, the date of its approval is unknown. According to the rules for adopting legislation, the bill must also be discussed by the legal committee of Parliament before it is put to a vote in the Chamber of Deputies. The Ministry of Justice assured the examiners that this bill was a priority. However, the President of the Legal Committee of the Chamber of Deputies reported difficulties in the work of analyzing bills: the committee faces a long backlog of bills, some of which were deposited several years ago and have not yet been examined by Parliament. For these reasons, at the time of the on-site visit the timing of the bill's adoption was very uncertain.

51. Overall, persons interviewed during the on-site visit were in favour of establishing criminal liability for legal persons in Luxembourg law. Many felt that it was unfair to prosecute only the individual who committed the offence, when the legal person could also have shared responsibility for it. The examiners heard only two opinions against the bill: one prosecuting magistrate felt that criminal liability for legal persons could give rise to procedural complications if joint or parallel proceedings were undertaken against the legal person and the individual(s) involved; and the Association of Luxembourg Banks and Bankers (ABBL) rejected the idea that the lack of criminal liability for legal persons signified impunity, suggesting that the introduction of such liability was unlikely to raise public ethical standards and that there was indeed a risk of placing undue emphasis on the liability of legal as opposed to physical persons.

1. Scope of application of the criminal liability of legal persons

52. The draft law proposes adoption of a new Article 34 of the Criminal Code, which would read as follows: "When a crime or offence is committed in the name of and in the interest of a legal person by one of its legal bodies or by one or more members of its legal bodies, that legal person may be held criminally liable and may be prosecuted under the terms of Articles 35 to 37. The criminal liability of legal persons does not exclude that of physical persons who committed or were accomplices to the same violations. The preceding provisions are not applicable to the State and to the communes (municipalities)".

a) Application ratione materiae and ratione personae

53. The scope of application *ratione materiae* of the criminal liability of legal persons, as set forth in the draft law, is very broad. In effect, it makes a general principle of the criminal liability of legal persons, and extends it to all crimes and offences covered by the Criminal Code and by special laws. The bribery of a foreign public official is a crime in Luxembourg law, and consequently legal persons are criminally liable for such violations.

54. The scope of application *ratione personae* is just as broad: it covers all legal persons, including those incorporated under public law, with the exception of the State and municipalities. In Luxembourg law, a legal person is an entity effectively endowed with legal personality by virtue of a law. On the other hand, criminal liability of legal persons does not extend to entities that have no legal personality, such as *sociétés en formation, groupes de société, associations momentanées,* and *associations en participation* (respectively, companies to be incorporated, corporate families, joint ventures, and undeclared partnerships). As stated in the preamble, it is of little importance for establishing criminal liability whether the legal person is a for-profit undertaking or not, nor whether it is incorporated under Luxembourg law or not (when the offence is committed in the territory of the Grand Duchy).

55. Trading companies and non-trading companies acquire legal personality upon conclusion of their instrument of incorporation, whether or not they are registered in the Registry of Commerce and Corporations and whether their incorporation has been publicly notified. Legal personality is not lost in the

case of statutory amendment (of a trading company) or in the case where a company (trading or non-trading) is transformed in the course of its existence. The situation is different when companies merge or split. In the case of a takeover merger, the legal personality of the acquired company disappears: it can no longer be prosecuted, nor can the acquiring company be held liable for the acquired company's past offences. In the case of a merger whereby a new company is constituted, the new company is again not liable for offences attributable to the former companies, which no longer exist. The same reasoning applies to the split-up of companies.

56. However, to prevent a legal person from arranging for its legal disappearance in order to escape prosecution, the draft law introduces a provision to Article 2 of the *Code d'instruction criminelle* (Code of Criminal Procedure -CCP) whereby public right of action, which is extinguished by loss of legal personality, "may still be exercised subsequently if the legal personality was lost in order to escape prosecution, or if the legal person was indicted before the loss of legal personality". As well, the draft law would amend Article 89 of the Criminal Procedure Code so that the investigating magistrate may issue a provisional restraining order against the dissolution or liquidation of a legal person if that move is designed to escape prosecution. The bill also adds a fourth paragraph to Article 86 of the Criminal Code, specifying that "loss of legal personality does not extinguish the penalty imposed on a convicted legal person". This rule, which is different from the law applicable to physical persons, is intended to prevent a legal person from attempting to escape execution of sentence through dissolution or merger.

b) Geographic scope of application

57. Consistent with the principle of territorial jurisdiction (*ratione loci*), legal persons may be held liable for any offence committed or presumably committed within the territory of the Grand Duchy, whether or not they are incorporated under Luxembourg law.

58. Active personal jurisdiction (*ratione personae*), covered by CCP Article 5, allows the Luxembourg judicial authorities, under certain circumstances, to prosecute physical persons of Luxembourg nationality for crimes committed abroad ("any Luxembourg citizen outside the territory of the Grand Duchy found guilty of a crime punishable under Luxembourg law may be prosecuted in the Grand Duchy"). The draft law on the criminal liability of legal persons does not expressly extend the scope of application of this provision to legal persons. In the absence of such an amendment, it is questionable whether a legal person of Luxembourg nationality could be prosecuted for acts of bribery committed entirely abroad. On this point, in its response to the Phase 2 questionnaire, Luxembourg declared that "it will have jurisdiction over acts of foreign bribery committed by legal persons of Luxembourg nationality under the conditions of Article 5 of the Code of Criminal Procedure" (Question C.2 .1 .b). However, discussions during the on-site visit with lawyers and public prosecutors left some doubts about the applicability of Article 5 to legal persons.

59. While the draft law does not expressly address the conditions under which a parent corporation of Luxembourg nationality could be held liable for acts committed abroad by a subsidiary that has a legal personality different from that of the parent corporation and that is not incorporated under Luxembourg law, the examiners concluded from their discussions with investigating magistrates that, if the parent corporation were a party to the subsidiary's dealings, the conventional rules of joint criminal enterprise would apply.

Commentary

The lead examiners consider that the scope of application of criminal liability for legal persons, as planned in the draft law placed before the Luxembourg Parliament on 20 April 2007, is satisfactory overall. They think it necessary, however, that the law introducing this

liability should expressly expand the application of CCP Article 5 to give the Luxembourg courts jurisdiction over offences committed outside the territory of the Grand Duchy by legal persons of Luxembourg nationality.

2. Enforcing the criminal liability of legal persons

60. According to Article 34 of the Criminal Code, enforcing the liability of legal persons is subject to two material conditions. First, the offence must have been committed by one of the legal bodies or by one or more members of the legal bodies of the legal person. Second, the offence must have been committed in the name of and in the interest of the legal person. When these two conditions are met, the imposition of liability on the legal person may be blocked only if the physical person who committed the offence is exonerated of responsibility. Finally, if the physical person is found criminally liable this does not exclude the liability of the legal person, and vice versa. These conditions for establishing the criminal liability of legal persons are examined below.

a) Condition 1: Offence committed by one of the legal bodies or by one or more members of the legal bodies of the legal person

61. According to Article 34 of the draft law, for a legal person to be held criminally liable, the offence must have been committed by one of its legal bodies or by one or more members of its legal bodies. In the absence of a legal definition, the preamble indicates that the "legal bodies" of a legal prison are normally constituted by "one or more physical or legal persons performing a particular function in the organisation of the legal person, under the law governing legal persons, which may be a function of administration, direction, representation or control". It then specifies that, for corporations for example, the legal bodies are the board of directors, the statutory auditor, and the general assembly of shareholders. For limited liability companies, the legal bodies are the manager(s) and the general assembly.

62. The requirement that the offence must have been committed by a legal body or by one or more members of a legal body places a serious constraint on determining the criminal liability of legal persons when it comes to bribery, and indeed makes this almost impossible. Rarely will the decision to pay a bribe be taken, in the case of a corporation for example, by the board of directors or the general assembly, and still less likely by the statutory auditor. In practice, it is the operational people, such as the commercial director, the general directorate or the office head, who will be directly involved, because these are the people who have the power to commit the company for current operations. The formula used in the draft law is therefore unlikely to make the planned system of liability very effective.

63. This question was discussed at length during the on-site visit. On one hand, Justice Ministry representatives defended the choice of the term "legal body" in light of inherent problems in Luxembourg law, which preclude a broader concept such as that of "representative" of a legal person. On the other hand, magistrates interviewed were concerned that the criminal liability of legal persons might in the end be stripped of all practical applicability, under the terms of the draft law, by the requirement that the offence must have been committed by a "legal body". In their view, the concept of "representative" posed no particular problem. The discussion with lawyers revealed that the term "representative" had been used in the initial draft, but had subsequently disappeared.

64. According to several opinions received, in particular that of the Luxembourg Bar Association, the Chamber of Commerce, and the Association and Luxembourg Banks and Bankers, the term "representative", as used in the initial draft, would have made it too easy to find legal persons criminally

liable. In particular, the Bar Association feared that Luxembourg's jurisprudence might come to resemble that of France, which interprets "representative" in its broad sense. Nevertheless, the Bar Association had come out in favour of a formulation somewhat less restrictive than that in the bill, proposing that legal persons could be held criminally liable for the actions of "their legal or statutory bodies or their agents (*mandataires*)". The lawyers interviewed during the visit were clearly of the opinion, as were the magistrates, that the wording of the draft law was too restrictive.

65. Moreover, the notion of legal body, as used in the draft law, applies only to *de jure* and not to *de facto* bodies. As one magistrate remarked to the examining team, it is quite plausible that a business established in Luxembourg may have its legally appointed head in the Bahamas, while the de facto manager works in Luxembourg. Similarly, in practice, a bankrupt firm can sometimes continue to do business through a "dummy" manager or "front man". Managers and lawyers interviewed during the visit were of the opinion that to exclude the possibility of holding a legal person criminally liable for the actions of a de facto manager might well undermine the effectiveness of the law when it comes to transnational bribery and economic and financial crimes.

66. According to Article 34 of the Criminal Code, for a legal person to be found criminally liable, the immediate perpetrator of the offence must also be identified and proven. The immediate perpetrator must have committed the offence not only in all its material aspects but must also have planned it. By contrast, as set forth in the preamble to the draft law, it is not necessary to establish a separate violation attributable to the legal person, for "no culpability of the legal prison itself, distinct from that of its legal bodies, is required".

67. The preamble, however, is inconsistent on the question of whether the individual who is the immediate perpetrator must be prosecuted and found guilty in order to hold the legal person criminally liable. In particular, the following passage poses difficulties of interpretation: "While it is not necessary for the immediate perpetrator of the offence to be actually tried and convicted, his guilt must be established by a court, which must find that the alleged offence was effectively committed in all its material and intellectual elements by the legal body or by one of its members. Consequently, if the immediate perpetrator of the offence is found not guilty by the court, the offence can no longer be held against the legal person". It is difficult to see how the guilt of the immediate perpetrator could be "established by a court" without a trial.

68. Finally, the draft law does not settle the question of whether the personal identity of the individual exercising a function of administration, direction, representation or control of the legal person must be established for the legal person to be held liable. In the opinion of the ABBL, the individual who committed the violation should be identified in order for the legal person to be held criminally liable. If that position were upheld by the courts, it would be impossible to prosecute the legal person in cases where the individual responsible could not be identified.

Commentary

The lead examiners are disappointed that the question of the liability of legal persons is still at the draft stage. They are concerned over the lack of a time frame for the final vote on the law. Moreover, they consider that the draft of Article 34 of the Criminal Code does not fulfil the requirements of the Convention, in that the liability of the legal person can be engaged only by offences committed by its legal bodies. This solution appears too restrictive, for in practice it is extremely rare for these bodies to take the decision to pay a bribe. Furthermore, the bill does not allow the legal person to be held liable when the decision to bribe is taken by an operational entity or a de facto manager. Finally, the conditions for holding the legal person liable appear unclear in light of the preamble to the bill, which seems to make it a condition

that the individual be found guilty before the legal person can be held liable. The lead examiners would remind the Luxembourg authorities that it is imperative that clear, effective and dissuasive provisions for liability be adopted as soon as possible.

b) Condition 2: Violation committed "in the name of and in the interest of" the legal person

69. The violation must have been committed "in the name of and in the interest of" the legal person. In order to hold a legal person criminally liable, there must be a real link between the violation and the legal person, and the violation must have been committed in pursuit of the legal person's interests. According to the authors of the draft law, a violation may be considered as having been committed "in the interest of" the legal person if it was "knowingly committed by the manager(s) of a legal person in order to obtain a gain or financial profit for the legal person, or in order to realise economies in its favour, or to save it from losses".

70. This means that the scope of application of liability will exclude (i) offences committed by the legal body or its members acting in their personal interest, even in the exercise of their functions; (ii)violations committed in the interest of a simple minority of members of the legal body, when that minority has acted in its personal interest; and (iii) offences committed against the interests of the legal person, which in most cases will itself be a victim of the violation. On the other hand, the question remains open as to whether the legal person can be held criminally liable if it has realised no profit from bribing a foreign public official.

c) Exemption from liability

71. If the immediate perpetrator is found not guilty, or if his criminal liability is set aside for one of the grounds (objective or subjective) stipulated in the Criminal Code (Articles 70-72), the offence cannot be laid to the legal person. In this context, the fact that the immediate perpetrator may have been "coerced" by a foreign public official to pay a bribe in order to obtain or retain a contract could be argued as grounds for exempting the legal person from liability. During the on-site visit, the lawyers interviewed did not deny that they might resort to such arguments in defending their clients. However, the magistrates interviewed insisted that, in principle, the excuse of coercion or duress would not be accepted in such circumstances.

d) Concurrent liability of legal and physical persons

72. The draft Article 34 of the Criminal Code, in stipulating that "the criminal liability of legal persons does not exclude that of physical persons who committed or were accomplices to the same violations" implies that the criminal liability of legal persons does not replace that of the individuals who are members of the legal body. As indicated in the bill, the principle of concurrent liability prevents individuals from using the cover of a legal person to conceal their personal responsibility.

3. Applicable sanctions

73. Under the terms of the draft law, companies and other legal persons convicted of bribing foreign public officials are liable to a fine of up to €375,000, and up to €750,000 for a repeat offence. Punishment is not limited to a fine, and may also entail dissolution and supplementary penalties.

a) Principal sanctions

74. The first principal criminal sanction is a fine. In principle, this sanction is mandatory for the bribery of foreign public officials. Article 38 of the draft law provides that, when the legal person incurs a sanction other than a fine, that sanction may be imposed only as the main sanction, but this Article applies

only to summary offences or misdemeanours (*délits*), whereas bribery is a crime (*crime*) under Luxembourg law. However, given the common practice of prosecutors to downgrade the offence of bribery from a *crime* to a *délit* (a practice known as *correctionalisation*), the provision of Article 38 could call into question the mandatory nature of the fine.

75. The draft law sets the minimum fine at €500, which is twice the minimum fine for individuals. The maximum is also twice that set for individuals in the bribery law[25]. For the bribery of foreign public officials, which Article 247 of the Criminal Code makes a crime, the maximum fine for legal persons would thus be €375,000 (or twice €187,500), if the bill is adopted.

76. The lead examiners wonder whether the amount of the fine that can be imposed on businesses convicted of foreign bribery will be a real deterrent. During the on-site visit, representatives of the unit of the Justice Ministry that prepared the draft law explained that they chose to double the penalty provided for individuals for fear that the State Council might reject a higher rate as breaching the principle of equality with physical persons. These fears could not be confirmed in discussions with other governmental and non-governmental experts at the on-site visit. On the other hand, lawyers and private sector representatives considered the fine of €375,000 so low as to be trivial. They pointed out, by way of example, that the penalties for drug trafficking and criminal conspiracy could be much higher even for individuals.

77. The other principal sanction is dissolution, which may be ordered under the terms of Article 37 of the Criminal Code when the legal person was intentionally created to commit the crime in question, or when its business purpose has been intentionally diverted into systematic commission of the crime[26].

b) Supplementary penalties

78. The draft Article 35 of the Criminal Code spells out other penalties applicable to legal persons: confiscation, disqualification from government procurement, and exclusion from entitlement to public benefits or aid. The preamble specifies these as "accessory" penalties. Discussion during the on-site visit revealed that such penalties do not necessarily follow upon the principal sanctions, in the sense that they do not have to be imposed in conjunction with those sanction. It is up to the discretion of the judge to impose them, case by case, as a supplement to the principal sanctions.

c) Enforcement of penalties

79. Under the general provisions of Luxembourg criminal law, penalties are fixed by the trial court in light of the circumstances surrounding the violation and the identity of the perpetrator. The draft Luxembourg law makes fully applicable to legal persons the rules in the Criminal Code governing extenuating circumstances for determining the penalty. The examining team asked one judge whether the fact that a company had in place internal compliance programmes and other preventive measures might be admitted as an extenuating circumstance if it were convicted of bribing a foreign public official: the judge did not rule out entirely the possibility that such measures might be taken into account in determining the penalty. On this point, the legal person has the same right as a physical person to apply for reduction or suspension of the sentence, or for a pardon.

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25 In case of a repeat offence, the draft law provides that the maximum fine is four times that set for individuals in the bribery law (or twice the penalty for legal persons, which is already twice the penalty for individuals).

26 It should be noted that the sanction of dissolution is not applicable to legal persons incorporated under public law.

d) Other sanctions: civil and administrative sanctions

80. The draft law does not provide for supplementary civil or administrative sanctions. On the contrary, it adapts articles 203 and 203-1 of the law of 10 August 1915, which provide for the dissolution or closure of companies, and excludes their application for cases that involve activities contrary to the criminal law (now covered by the new criminal liability of legal persons), so as to avoid a plurality of penalties for the same offence. The sanctions of dissolution and closure specified in the 1915 law will continue to apply to cases that have not been the subject of criminal prosecution.

Commentary

The lead examiners consider that the maximum amount of the fine stipulated in the draft law on the criminal liability of legal persons, submitted to the Luxembourg Parliament on 20 April 2007, does not give that law the dissuasive force required by the Convention. They are pleased to note that supplementary penalties may be imposed, but they doubt that such penalties will make up for the low level of the fine, particularly since the draft law leaves it to the discretion of the trial judge to impose supplementary penalties. The lead examiners are concerned moreover by the fact that the fine is no longer mandatory when the violation is downgraded from a crime to a summary offence or misdemeanour.

D. RECOMMENDATIONS

81. The Phase 2bis report on Luxembourg assesses the measures taken by Luxembourg to meet those recommendations from Phase 2 that the OECD Working Group on Bribery had deemed inadequately implemented in its Phase 2 written follow-up report. The Working Group is particularly concerned about the fact that Luxembourg has still not responded to some key Phase 1 and Phase 2 recommendations. While the Working Group notes that Luxembourg has recently engaged in efforts to implement the Convention, it is seriously concerned that Luxembourg has not responded to some key recommendations issued by the Working Group since 2001.

82. On the basis of the Working Group's observations on Luxembourg's application of recommendations 1, 2, 3, 4, 5, 6, 8, 9 and 14 from Phase 2, the Working Group has concluded that recommendations 2, 4 and 8 have been implemented or handled satisfactorily. The Working Group notes, however, that five other recommendations (recommendations 1, 3, 5, 6 and 9) from the Phase 2 examination have not been fully implemented. The Working Group notes further that Luxembourg has still not implemented the Phase 1 and Phase 2 recommendations related to the liability of legal persons for foreign bribery (Phase 2 recommendation 14).

83. The Working Group is particularly concerned about the continuing absence of liability for legal persons that engage in bribery. While a bill has been placed before Parliament dealing with the criminal liability of legal persons, the report highlights gaps in the bill which, if adopted in its current state, would fall short of the requirements of the Convention. Considering the seriousness of the situation, the Working Group has decided that, within one year, Luxembourg will report, in writing, on measures taken to fulfil the recommendations of the Group, and reserves the right, in the event of continued failure to implement the Convention, to take further steps.

84. On the basis of the Working Group's observations on Luxembourg's application of recommendations 1, 3, 5, 6, 9 and 14 from Phase 2, the Working Group, in the context of Phase 2bis, makes the following recommendations to Luxembourg:

Recommendations to ensure effective prevention and detection of the bribery of foreign public officials

85. With respect to raising awareness of transnational bribery among the economic circles and professional organizations concerned (Recommendation 1 from Phase 2), the Working Group recommends that Luxembourg:

a) conduct activities, in association with business circles concerned, to raise awareness of the anti-bribery provisions of Luxembourg law among small and medium-sized enterprises that may engage in international trade, and monitor the awareness-raising activities conducted by banking and financial institutions (revised 1997 Recommendation, Section I and V.C(i)).

86. With respect to the detection and reporting of the offence of bribing foreign public officials and related offences (recommendations 3, 5 and 6 from Phase 2), the Working Group recommends that Luxembourg:

a) continue its awareness-raising efforts, using brochures, circulars, in-service training for public employees, or any other means, to ensure that government employees who are in a position to detect bribery, or who are in contact with Luxembourg enterprises exporting or investing abroad, will not only maintain but increase their vigilance against the bribery of foreign public officials (revised 1997 Recommendation, Section I);

b) adopt as soon as possible the present version of the draft law on interagency and judicial cooperation that was laid before the Luxembourg Parliament in the summer of 2007, in order to enhance the means available to the Luxembourg tax authorities for detecting irregularities relating to the payment of bribes to foreign public officials (revised 1997 Recommendation, Section I);

c) adopt measures promptly for protecting whistleblowers, in order to encourage private sector employees to report acts of transnational bribery without fear of reprisals or dismissal (revised 1997 Recommendation, Section V.C (iv)).

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery and related offences

87. With respect to cooperation among administrative, financial and judicial bodies (Recommendation 9 from Phase 2), the Working Group recommends that Luxembourg:

a) adopt promptly the provisions of the bill on interagency and judicial cooperation that will allow the tax administration, as an exception to fiscal secrecy, to transmit to the judicial authorities any evidence useful for the prosecution and punishment of foreign bribery and related offences;

b) take all steps that could facilitate the work of the judicial authorities in seeking information from Luxembourg financial and banking institutions, including in cases where there has been no formal referral to an investigating judge.

88. With respect to the responsibility of legal persons (Recommendation 14 from Phase 2) the Working Group recommends that Luxembourg:

a) establish promptly a clear and operational system for making legal persons liable for the bribery of foreign public officials, together with effective, proportionate and dissuasive penalties, recognizing that legislation consistent with the requirements of articles 2 and 3 of the Convention is still lacking (Convention, Articles 2 and 3)

b) expand the scope of application of Article 5 of the Code of Criminal Procedure to give the Luxembourg courts jurisdiction over offences committed outside the territory of the Grand Duchy by legal persons of Luxembourg nationality (Convention, Articles 2 and 4).

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ANNEX 1

COMPOSITION OF THE EXAMINING TEAM

Belgium

Mrs Michelle MONS DELLE ROCHE
Procureur du roi
Parquet de Marche-en-Famenne

Mr. Jean-Marie LEQUESNE
Commissaire divisionnaire
Police judiciaire fédérale
Direction Criminalité ECOFIN

Mr. Pierre TIMMERMANS
Inspecteur
Administration des Affaires fiscales
Service Public Fédéral Finances

France

Mr. Guillaume VANDERHEYDEN
Adjoint au Chef du Bureau Système financier international et Préparation des Sommets (Multifin4)
Direction générale du Trésor et de la politique économique
Ministère de l'Economie, des Finances et de l'Emploi

Mr. Armand RIBEROLLES
conseiller juridique à la mission permanente de la France auprès de l'ONU à Genève
Ministère des Affaires Étrangères

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Mr. Frédéric WEHRLE
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Anti-Corruption Division
Directorate for Financial and Enterprises Affairs

Mrs. Juliette LELIEUR-FISCHER
Senior research fellow
OECD Working Group On Bribery

ANNEX 2

LIST OF INSTITUTIONS MET DURING THE ON-SITE VISIT FROM 16 TO 18 OCTOBER 2007

Government and public services institutions

Ministries

Ministère de la justice

Comité de Prévention de la Corruption

Ministère de la fonction publique

Ministère des classes moyennes

Ministère de l'économie

Ministère des affaires étrangères

Ministère des finances

Administration de l'enregistrement et des domaines

Administration des contributions directes

Other public institutions

Commissariat aux assurances

Commission de surveillance du secteur financier

Inspection du travail et des mines

Office du Ducroire

Lux Développement

Other public bodies

Police judiciaire

Parquet Général

Tribunal d'arrondissement de Diekirch

Parquet

Tribunal d'arrondissement de Luxembourg

Cabinet d'instruction

Juridiction de fond

Parquet

Commission Nationale pour la Protection des Données

Private sector

Professional organisations

Institut des réviseurs d'entreprise

Ordre des avocats du Barreau de Luxembourg

Ordre des experts comptables

Trade unions and private sector organizations

Association des banques et banquiers du Luxembourg

Chambre de commerce du Grand-duché de Luxembourg

Chambre des métiers

Chambre des employés privés

Fédération des Industriels du Luxembourg (FEDIL)

Enterprises

Plusieurs entreprises de transport international, un groupe sidérurgique

Others

Commission juridique de la Chambre des députés