Implementing the OECD Anti-Bribery Convention in Luxembourg

PHASE 4 REPORT

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EXECUTIVE SUMMARY

This Phase 4 report by the OECD Working Group on Bribery in International Business Transactions (the Working Group) evaluates and makes recommendations on Luxembourg's implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The report details Luxembourg's particular achievements and challenges in this regard, including in relation to the enforcement of its foreign bribery offence, as well as the progress Luxembourg has made since its Phase 3 evaluation in 2011.

Since Phase 3, Luxembourg has introduced significant legislative and institutional changes. An ambitious new law, which establishes a general protection regime for whistleblowers, has drawn extensively from international standards and incorporated a number of best practices in this field into Luxembourg law. The Working Group also notes the significant and ambitious constitutional reform that came into force on 1 July 2023, aimed at strengthening and modernising the status of judges and prosecutors. The Working Group also welcomes the adoption of a "plea bargaining" in the form of a judgment upon agreement. This mechanism, if properly regulated, should facilitate the resolution of complex financial cases that are currently overwhelming the investigation and prosecution services. Its implementation in foreign bribery cases will have to be followed up. The Working Group commends Luxembourg on its efforts and the resources deployed in relation to mutual legal assistance, and on recently strengthening their legislative framework for mutual legal assistance. It believes that Luxembourg is an efficient and attentive partner in executing mutual legal assistance requests from countries that are signatories to the Convention. The Working Group also notes a number of legislative amendments aimed at extending the confiscation regime and implementing it more effectively. Finally, the Working Group welcomes the introduction of a legal provision establishing the liability of legal persons where a lack of supervision or control has enabled an offence to be committed.

Luxembourg must now consolidate its recent achievements, which are undermined by structural resource issues that impact the entire criminal justice system. In this respect, the Working Group calls on Luxembourg to find lasting, structural solutions, backed by genuine political will. It also appears essential that Luxembourg commits to better identifying the foreign bribery risks facing its companies. Another topic of concern is the very weak enforcement of the foreign bribery offence since the Convention entered into force in the Grand Duchy, including the low level of investigations and lack of prosecutions of legal persons for bribery of foreign public officials. The Working Group is also concerned that the level of fines for natural and legal persons is insufficiently dissuasive, particularly given the seriousness of the foreign bribery offence. The application of mitigating circumstances, particularly as part of the "reclassification" ("*correctionnalisation*") of offences, is a cause for concern. Furthermore, while the Working Group welcomes Luxembourg's strengthened legislative and institutional framework for combating money laundering, it regrets that insufficient attention is being paid to detecting the bribery of foreign public officials and money laundering predicated on the foreign bribery offence. A review of other recognised sources for detecting foreign bribery reveals that only a marginal number of them are used in Luxembourg. Finally, despite tangible efforts and results in providing mutual legal assistance, Luxembourg is not yet making sufficient and appropriate use of the available range of international co-operation instruments, particularly in terms of participating in the resolution of multi-jurisdictional foreign bribery cases.

The report and its recommendations reflect the conclusions of lead examiners from Italy and Switzerland and were adopted by the Working Group on 7 March 2024. The report is based on legislation, data, and other documents provided by Luxembourg and research conducted by the evaluation team. It also draws on information obtained by the evaluation team during its on-site visit in May 2023, when the evaluation team met with representatives from the public and private sectors, the media and civil society, as well as parliamentarians and academics. In two years' time (March 2026), Luxembourg will submit a written report to the Working Group on the implementation of all recommendations and on its enforcement efforts.

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INTRODUCTION

Previous evaluations of Luxembourg

1. In March 2024, the OECD Working Group on Bribery in International Business Transactions (the Working Group) finalised the fourth evaluation of the Grand Duchy of Luxembourg's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention), the 2021 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (the 2021 Recommendation), and related instruments.

2. Monitoring of Working Group members' implementation and enforcement of the Convention and related instruments takes place in successive phases through a rigorous peer-review system. The monitoring process is subject to specific, agreed-upon principles. The process is compulsory for all Parties and provides for on-site visits (from Phase 2 onwards), including meetings with non-government actors.

3. The evaluated country has no right to veto the final report or recommendations. All of the Working Group's evaluation reports and recommendations are systematically published on the OECD website. The last full evaluation of Luxembourg – in Phase 3 – dates back to June 2011. The Working Group evaluated the implementation of its Phase 3 recommendations in 2013. During that evaluation, the Working Group concluded that 7 recommendations had been implemented, 9 were partially implemented and 8 were not implemented (Figure 1).

Previous evaluations of Luxembourg by the Working Group

- 2001: Phase 1 Report
- 2004: Phase 2 Report
- 2006: Follow-up on Phase 2 Report
- 2008: Phase 2bis Report
- 2009: Follow-up on Phase 2bis Report
- 2011: Phase 3 Report
- 2013: Follow-up on Phase 3 Report

Figure 1. Luxembourg's implementation of Phase 3 recommendations (as of the 2013 written follow-up report)

Fully implemented	Partially implemented	Not implemented
7	9	8

Phase 4 process and on-site visit

4. Phase 4 evaluations focus on three key cross-cutting issues: enforcement, detection and corporate liability. They also address progress made in implementing outstanding recommendations from previous phases, as well as any issues raised by changes to domestic legislation or the institutional framework. Phase 4 takes a tailor-made approach, considering each country's unique situation and challenges, and

reflecting positive achievements and good practices. For this reason, issues that were not deemed problematic in previous phases or that have not arisen in the course of this evaluation may not have been fully re-assessed during the visit and may thus not be reflected in this report.

5. The evaluation team for Luxembourg's Phase 4 evaluation was composed of lead examiners from Italy and Switzerland, as well as members of the OECD Anti-Corruption Division.[1] Pursuant to the Working Group's Phase 4 evaluation procedures, after receiving the Luxembourg authorities' responses to the Phase 4 questionnaire and supplementary questions, the evaluation team conducted an on-site visit from 1 to 5 May 2023. The evaluation team met with relevant public authorities, including law enforcement authorities, parliamentarians and representatives from the media, civil society and the private sector (see Annex 5). The evaluation team notes that the Luxembourg government representatives decided, as permitted under the Working Group's procedures, not to observe the panels organised with the non-government representatives. The evaluation team is grateful to the Luxembourg authorities for their level of engagement during the visit and throughout the evaluation, including for the additional information shared following the visit and up to the adoption of this report. Lastly, it welcomes the contributions made to this report by experts from the Financial Action Task Force (FATF) and other OECD directorates.

Luxembourg's foreign bribery risks in light of its economic situation and trade profile

An economy open to international trade and investment

6. In 2021, Luxembourg ranked 36th among the 44 Working Group members in terms of gross domestic product (GDP), with a GDP of USD 68.97 billion. However, the Grand Duchy has the highest GDP per capita in the world.[2] Luxembourg actively invests abroad and ranked tenth among Working Group members for outward foreign direct investment (FDI) stock in 2021. In 2020, Europe was the main destination for investments from Luxembourg, accounting for 76.1% of its outward FDI stock. The top five destinations were the United Kingdom (17.1%), the Netherlands (13.7%), the United States (13.3%), Ireland (8.4%) and Germany (5.4%). Luxembourg also attracts considerable foreign investment, ranking eighth among Working Group member countries for inward FDI stock. This stock accounted for 1193% of its GDP in 2021. The financial sector is a significant element of Luxembourg's economy, accounting for 26% of its GDP.[3]

7. In terms of exports, Luxembourg ranked 42nd among Working Group members in 2021, exporting USD 16.8 billion worth of products.[4] Given the country's small size and compact domestic market, international trade and foreign investment are vital to Luxembourg companies, which increases their

[1] Italy was represented by Ms Daniela Arcarese, Financial Intelligence Unit; Mr Lorenzo Salazar, Deputy Prosecutor General to the Court of Appeal of Naples, Contact Point for the European Judicial Network and national correspondent for the European Union Agency for Criminal Justice Cooperation (Eurojust); and Mr Pierfrancesco Sanzi, Colonel, Italian Guardia di Finanza. Switzerland was represented by Mr Olivier Bovet, Economist, State Secretariat for Economic Affairs, Federal Department of Economic Affairs, Education and Research; Ms Maria Schnebli, Federal Prosecutor for Economic Crime, Office of the Attorney General of Switzerland; and Ms Anastasia Zacharatos, Lawyer, Federal Office of Justice. The OECD was represented by Ms Catherine Marty, Coordinator of Luxembourg's Phase 4 evaluation and Legal Analyst; Ms Amel Cheikhi-Derradj, Ms Lucia Ondoli and Mr Noël Merillet, all Legal Analysts of the Anti-Corruption Division, Directorate for Financial and Enterprise Affairs.

[2] The figures included in this paragraph were generated from a number of different databases: OECD, ECO ADB database, International Monetary Fund (IMF), World Outlook Economic Database, United Nations Conference on Trade and Development (UNCTAD), Gross Domestic Product constant (2015) prices, OECD Data, Trade in Goods and Services, UNCTAD, Outward Foreign Direct Investment Stocks.

[3] OECD (2023), "Country statistical profiles: Key tables from OECD".

[4] WTO Stats, "Merchandise exports by product group – annual, 2021" (accessed July 2023).

exposure to foreign bribery risks. Around 65% of the goods and services produced in Luxembourg are exported. Service exports are particularly significant, largely due to exports of financial services.[5] Luxembourg's main trading partners are European Union (EU) countries, which received around 80% of the country's product exports in 2021. The three neighbouring countries (Germany, Belgium and France) are particularly important partners in this regard. However, Luxembourg, like other Working Group countries, is gradually expanding its international trade relations. Its export destinations include countries associated with higher foreign bribery risks, such as mainland People's Republic of China (1.6%), some Middle Eastern and Central Asian countries (1.4%) and the Russian Federation (1%).[6]

8. Luxembourg remains a preferred destination among multinational corporations for creating holdings and other companies for the purpose of strategies relating to investment and corporate group structuring. Almost 90% of companies registered in the country are controlled by non-Luxembourgers, and around 40% of Luxembourg companies were created solely to hold assets.[7] This sector presents proven bribery and money laundering risks, as revealed by the OpenLux investigation.[8] In 2023, six companies with their registered offices in Luxembourg appeared on the Forbes Global 2000 list of the largest companies in the world. Their operations include sectors at risk from foreign bribery, such as oil services, steel and real estate.[9] Other large companies with their registered offices in Luxembourg operate in sensitive sectors (such as telecommunications and transport) and have been the subject of foreign bribery allegations (see Annex 1). Small and medium-sized enterprises (SMEs), which account for 99.5% of companies in Luxembourg,[10] are also exposed to foreign bribery risks. In 2021, almost 3 000 Luxembourg companies were exporters and at least 77% of these (i.e. 2 270) were SMEs.[11] Luxembourg's authorities emphasise the efforts made to respond to these risks, particularly in terms of corporate transparency (see Section B.3.2).

A major financial centre with a high risk of money laundering, including the proceeds of bribery

9. The financial sector is the cornerstone of Luxembourg's economy: in 2018 it accounted for 26.5% of the value added to the national economy and 10.9% of total employment.[12] Luxembourg has positioned itself as a major international financial centre, ranking 21st in the Global Financial Centres Index[13] in 2022. In particular, the banking sector – which is essentially made up of international banks with cross-border

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[5] The Grand Duchy of Luxembourg Government Portal (2023), "Foreign trade: An open and internationalised economy" (accessed July 2023).

[6] IMF (2013), "Exports and Imports by Areas and Countries – Exports, FOB to Partner Countries" (accessed July 2023).

[7] Baquero, A., M. Vaudano and C. Anesi (2021), "Shedding light on big secrets in tiny Luxembourg". In this investigation, Luxembourg is defined as an "offshore hub in the heart of Europe".

[8] Baruch, J. et al. (2021), "OpenLux: the secrets of Luxembourg, a tax haven at the heart of Europe". Investigative journalists have created an unprecedented database, listing the real owners of the 140 000 companies registered in Luxembourg and details of their financial assets. The investigation revealed that almost half of the country's registered commercial enterprises are purely financial holding companies. At the time of the investigation, offshore companies held at least EUR 6.5 billion in assets. Behind these arrangements, *Le Monde* newspaper was able to identify not only major European companies and wealthy individuals, but also dozens of people involved in bribery, tax evasion and money laundering, as well as individuals linked to organised crime or subject to international sanctions.

[9] Murphy, A. and H. Tucker (eds.) (2023), The Global 2000.

[10] European Commission (2023), "2023 SME country fact sheet: Luxembourg".

[11] Eurostat (2023), "Trade by partner country and enterprise size class", optional table (consulted July 2023).

[12] Chamber of Commerce of Luxembourg (2019), Luxembourg Economy: Open, Dynamic, Reliable.

[13] Wardle, M. and M. Mainelli (2022), The Global Financial Centres Index 32.

activities[14] (including within the European single market) – plays a key role in Luxembourg's economic dynamism. There were around 118 banks in 2023,[15] and the sector remains a major employer in the country (26 211 employees in 2022). Furthermore, Luxembourg is Europe's leading centre for investment funds (with EUR 4.72 billion in net assets under management in Luxembourg funds as of December 2019).[16] Investment fund activities therefore occupy a central place in the national economy: Luxembourg boasts 298 authorised investment fund management establishments, employing around 7 716 people in 2023.[17] As a result, the country is exposed to major incoming and outgoing financial flows to and from different geographical areas, and holds a very significant share of international financial services.

10. The scale and diversity of these financial flows through Luxembourg increases the country's risk of exposure to laundering of the proceeds of criminal activities perpetrated abroad, including laundering of foreign bribery proceeds. Luxembourg conducted a National Risk Assessment of Money Laundering and Terrorist Financing (National Risk Assessment) in 2020. This assessment found that bribery (in a broad sense) as a predicate offence poses a very high external threat to Luxembourg in terms of money laundering and terrorist financing.[18] Exposure to so-called "domestic" money laundering, derived from the proceeds of predicate offences committed in Luxembourg, is much lower.

11. Certain business sectors and professions are particularly exposed to money laundering risks, including laundering of foreign bribery proceeds. Private banking and corporate and trust services (see below) are foremost among these, with their international, wealthy clientele and highly complex financial products. In addition to financial institutions and professions, designated non-financial professions also play a key role in Luxembourg's economy, and are a major source of money laundering risks.[19] In particular, certain non-financial professions, such as lawyers, certified accountants, auditors, accountants and tax advisors, are exposed to increased risks of money laundering (or may be behind such schemes), especially due to their access to financial services and their major role as intermediaries. The activities of trusts and company service providers further expose these professionals to money laundering risks, which are high in this business sector in Luxembourg, as highlighted in the National Risk Assessment. Real estate and construction activities are another high-risk sector for money laundering in Luxembourg. In 2019, this sector had a total production value of over EUR 14 billion.[20] As the sector offers criminals a certain level of anonymity, it is easier to conceal the beneficial owners of transactions.[21]

[14] OECD (2019), OECD Economic Surveys: Luxembourg 2019.

[15] Financial Sector Supervisory Commission (Commission de Surveillance du Secteur Financier) (2023), "Main updated figures regarding the financial centre", January 2024.

[16] Government of the Grand Duchy of Luxembourg, Ministry of Finance (2020), National Risk Assessment of Money Laundering and Terrorist Financing.

[17] Financial Sector Supervisory Commission (2023), "Main updated figures regarding the financial centre", January 2024.

[18] Government of the Grand Duchy of Luxembourg, Ministry of Finance (2020), National Risk Assessment of Money Laundering and Terrorist Financing.

[19] Government of the Grand Duchy of Luxembourg, Ministry of Finance (2020), "*Résumé de l'évaluation nationale des risques de blanchiment de capitaux et de financement du terrorisme*" [Summary of the National Risk Assessment of Money Laundering and Terrorist Financing].

[20] Ibid.

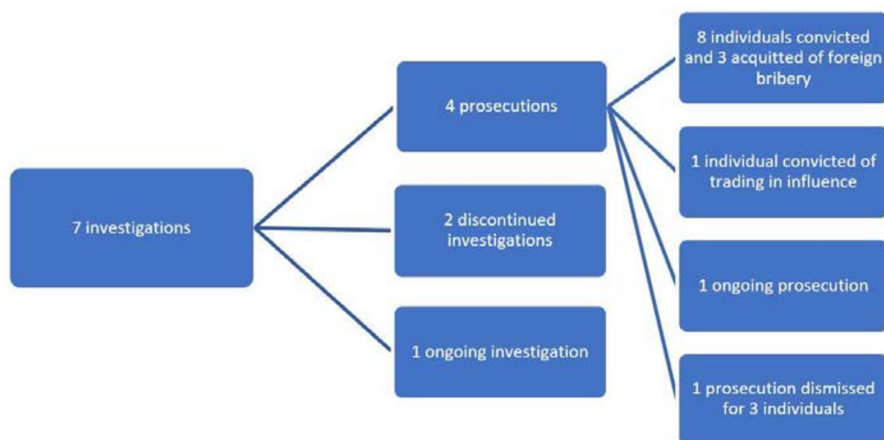
[21] In light of these observations on Luxembourg's anti-money laundering risks, Luxembourg authorities note that the FATF recognised the quality of Luxembourg's framework for anti-money laundering and countering the financing of terrorism (AML/CFT) in its mutual evaluation of Luxembourg, published on the 27 September 2023.

Overview of foreign bribery investigations and prosecutions

12. Since Phase 3, Luxembourg has made progress in investigating and prosecuting bribery of foreign public officials (foreign bribery), although its enforcement remains unquestionably marginal given the risks of foreign bribery to which companies in the country are exposed (see above).[22] Enforcement was non-existent in Phase 2, whereas Luxembourg reported three foreign bribery cases at the time of the written follow-up to Phase 3 in 2013 (one at the preliminary investigation stage, a second at the judicial investigation stage and a third on trial).[23]

13. Since Phase 3, only one foreign bribery case has received a final judgment (*False Certificates Case*), resulting in the first foreign bribery convictions since the Convention came into force in Luxembourg. Another case began with an initial prosecution for foreign bribery but resulted in a conviction for trading in influence (*European Official Case I*). In this case, it is unclear whether the facts in question fell within the scope of article 1 of the Convention (see Annex 1). The two cases that have received a final judgment since Phase 3 can be described as atypical, as the facts differ from the foreign bribery patterns that the Working Group is accustomed to analysing in its monitoring work on the implementation of article 1 of the Convention. At the time of writing, only one foreign bribery case had reached the prosecution stage (*Case I*). The Luxembourg authorities have only opened two other foreign bribery investigations, ten and twelve years ago respectively. One of these cases was dismissed due to lack of territorial jurisdiction. The other case was closed due to insufficient evidence.

Figure 2. Foreign bribery cases in Luxembourg 1999-2023



14. Besides these cases, at least ten foreign bribery allegations that potentially involve Luxembourg companies have surfaced over the last ten years, based on information gathered by the Working Group. However, the Luxembourg authorities have not opened any formal investigations into these cases, even though several of them have been the subject of investigations – and in some cases sanctions – by foreign authorities for foreign bribery or related offences (see Annex 1), notably on the basis of information communicated by Luxembourg when providing mutual legal assistance. Luxembourg authorities do not appear to have examined their jurisdiction in these cases, including with the view to opening investigations in Luxembourg. However, representatives of the Public Prosecutor's Office emphasise that the detection

[22] Annex 1 contains an inventory of the foreign bribery cases and other relevant cases mentioned in this report.

[23] OECD Working Group on Bribery (2013), Luxembourg: Follow-up to the Phase 3 Report & Recommendations, paragraph 1.

and prosecution policy in force within the Economic and Financial Prosecutor's Office has evolved and is now more proactive, particularly since 2019.

15. More generally, the only case at the prosecution stage was opened several years ago (*Case I*) and no new foreign bribery investigations have been opened since. In other foreign bribery cases, Luxembourg companies are suspected of being involved in offences related to bribery of foreign public officials, notably the laundering of bribes or proceeds from active bribery. The Luxembourg authorities have opened at least two investigations into related offences in the past three years (of which one, *Case II*, may also relate to complicity to commit foreign bribery within the meaning of the Convention). One of these investigations, concerning the receipt of funds suspected of being bribes, was closed without further action due to insufficient evidence of an offence. In this case, Luxembourg carried out a European Investigation Order issued for foreign bribery cases prosecuted abroad.

Commentary

The lead examiners regret that enforcement of the foreign bribery offence has been very weak since the Convention came into force in the Grand Duchy. Since 2011, when Phase 3 took place, only one foreign bribery case (both unconventional in nature and related to very old facts) has received a final judgment, resulting in the convictions of eight natural persons. Several Luxembourg companies suspected of foreign bribery, or even convicted of this offence abroad, have not been investigated in Luxembourg. The authorities report the prosecution of a foreign bribery case, but on other charges. They have also closed two foreign bribery investigations since Phase 3.

The lead examiners are particularly concerned by the low level of investigations and lack of prosecutions of legal persons for foreign bribery since the criminal liability of legal persons regime came into force in Luxembourg in 2010, despite the risks to which Luxembourg companies are exposed.

The lead examiners believe there are several reasons for this existing situation. As developed further on in this report, they therefore encourage Luxembourg to develop a strategic approach for combatting foreign bribery based on (i) understanding the specific foreign bribery risks faced by the Grand Duchy; (ii) developing an ambitious, cross-sectoral plan to raise awareness of the foreign bribery offence; (iii) providing resources to investigation and prosecution authorities in line with the seriousness and risks of this offence; (iv) optimising the use of information derived from mutual legal assistance; and (v) providing positive support to the private sector, combining incentives with the implementation of compliance programmes. The lead examiners believe that, with the appropriate resources, the Corruption Prevention Committee (COPRECO) could guide the development of an ambitious and more strategic approach to detecting foreign bribery based on the recommendations of this report.

The lead examiners therefore recommend that Luxembourg take a proactive approach to the investigation and prosecution of bribery of foreign public officials, with respect to both natural and legal persons.

A. DETECTION AND REPORTING OF THE FOREIGN BRIBERY OFFENCE

Introduction

16. A review of the recognised detection sources of foreign bribery reveals that a only very small number of them were used in Luxembourg compared with the other Parties to the Convention, particularly in relation to international mutual legal assistance and reports to the financial intelligence unit (FIU). The three foreign bribery cases that led to investigations being opened were detected by reports from the public official receiving the bribe (a Luxembourg public official and a European civil servant) and another by a company self-reporting. In the *Supply of Arms Case*, a now-closed investigation into *inter alia* forgery and money laundering had been opened following a declaration (at the time of Phase 3) by the bank through which the disputed funds had circulated.

17. The lack of effective, proven detection of foreign bribery raises the question of how to raise awareness among relevant public and private actors. The lead examiners believe that Luxembourg should mobilise greater resources to create more favourable conditions for identifying foreign bribery indicators, in particular by relying on COPRECO. This inter-ministerial body, established in 2007, has a mandate to research and propose appropriate and necessary anti-bribery measures to the government, and to co-ordinate the application of the measures adopted within the public administration. The examiners believe that, with the appropriate resources, COPRECO could guide the development of an ambitious and more strategic approach to detecting foreign bribery based on the recommendations of this report.

Commentary

The lead examiners recommend that Luxembourg develop a strategic approach involving the Corruption Prevention Committee (COPRECO) to tackling foreign bribery based on (i) understanding the specific foreign bribery risks faced by Luxembourg and (ii) drawing up an ambitious, cross-cutting and cross-sectoral plan to raise awareness of foreign bribery.

A1. The potential of an ambitious new whistleblower protection framework

18. The 2021 Recommendation acknowledges the essential role that whistleblowers can play as a source of detection of foreign bribery cases. During Phase 3, the Working Group congratulated Luxembourg on introducing whistleblower protection measures in both the private and public sectors

(following the adoption of the Act of 13 February 2011),[24] but recommended additional awareness-raising measures (Recommendation 5(a)),[25] due, in particular, to the negative perception of whistleblowing in Luxembourg. The law transposing Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law[26] was passed on 16 May 2023, i.e. at the time of the on-site visit and almost a year and a half later than the EU deadline. The new law establishes a general regime for whistleblower protection in both the public and private sectors for all violations of national law.[27] Luxembourg plans to conduct a qualitative evaluation of the new law within two years of its adoption. The Luxembourg authorities have indicated that they intend to publish the results of this evaluation.

19. It should be highlighted that Luxembourg has chosen to allow the measures introduced by the new law to apply in parallel with pre-existing special regimes (regarding anti-money laundering[28] and the financial sector[29]). As a result, the new law provides for the continuation of these regimes, except in cases where its provisions offer better protection to whistleblowers. Representatives of the relevant sectors have indicated that they anticipate few changes as a result of the new legislative framework. Representatives of the legal professions have nevertheless insisted on the need to clarify the relationship between these regimes and the new law. Increasing the number of different whistleblower protection regimes could well undermine the clarity of Luxembourg's current framework. The competent authorities will need to provide special support in this area (see below).

20. While many of the Luxembourg actors consulted during the on-site visit welcomed the adoption of the new whistleblower protection law, it is being implemented in the context of almost unanimous mistrust of whistleblowers in the Grand Duchy. Civil society representatives consulted during the on-site visit expressed their concerns that the law risks remaining hollow if the Luxembourg authorities do not deploy specific awareness-raising measures in favour of implementing the new legal obligations in this area. The Luxembourg authorities indicate that they have, since the on-site visit, initiated these activities, particularly among the general public, companies and competent authorities. The evaluators encourage the authorities to increase and sustain their efforts in this area.

1. The challenge of embedding whistleblowing into everyday practice

21. In the Phase 3 report, the Working Group encouraged Luxembourg to take the necessary steps to encourage whistleblowers to report acts of bribery without fear of reprisal. The report noted that "*informers are historically regarded unfavourably in Luxembourg*". The lead examiners note that this negative perception of reporting persists in Luxembourg, and is accompanied by a singular phenomenon of judicialization of some of these reports. The so-called "Luxleaks"[30] case is emblematic in this respect. It

[24] The Act of 13 February 2011 strengthening the means to combat bribery.

[25] At the time of the written follow-up to Phase 3, the Working Group considered that Luxembourg had implemented this recommendation thanks to significant efforts to raise awareness among private and public actors.

[26] The Act of 16 May 2023 transposing Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law. The law is directly applicable. As a transitional measure, it became mandatory for private sector entities with 50 to 249 employees to establish internal reporting channels from 17 December 2023.

[27] It should be noted that the law does not apply to whistleblowers whose relationships are covered by medical confidentiality, attorney-client privilege, professional secrecy obligations of notaries and bailiffs, secrecy of judicial deliberations, or by the rules governing criminal proceedings.

[28] The Act of 12 November 2004, as amended, on the fight against money laundering and terrorist financing, article 8.3.

[29] The Act of 5 April 1993, as amended, on the financial sector, article 58.1.

[30] Between 2012 and 2014, various media platforms published several hundred tax rulings and tax returns prepared by PricewaterhouseCoopers (PwC). These publications revealed a series of highly advantageous tax agreements between PwC (on behalf of multinational companies) and the Luxembourg tax authorities, covering the 2002 to 2012 period. An initial internal investigation established that an auditor had copied several tens of thousands of confidential

gave rise to numerous legal procedures (one criminal trial, two appeals and one appeal to the Court of Cassation in just two years). In the spring of 2016, the so-called "LuxLeaks" trial resulted in the conviction of the two employees responsible for leaking confidential documents. In March 2017, the Court of appeal upheld their conviction, but their whistleblower status was subsequently recognised by the Luxembourg Court of Cassation in 2018 for one employee and by the European Court of Human Rights (ECHR) in 2023 for the other.[31]

22. Viewpoints gathered during the on-site visit from the authorities, as well as from some parliamentarians and certain private sector professions, point to a persistent mistrust of whistleblowers in Luxembourg. The evaluation team gathered strong opinions on the subject (several of those consulted used the term "denunciation"), reflecting deep-rooted cultural resistance. In a small country characterised by close social relationships, the culture of secrecy remains very strong, and seems to be as much an obstacle to reporting as the duty of loyalty and fidelity expected of employees towards their employers (as emphasised by civil society representatives consulted during the on-site visit). Most panellists also indicated that, for all offences combined, the number of whistleblower reports remains very low, although without providing figures for this to be quantified. In fact, the Luxembourg authorities have never opened an investigation into bribery, including foreign bribery, on the basis of a whistleblower report. The investigating judges and prosecutors met during the on-site visit also expressed reservations about opening a judicial inquiry based solely on stolen information, with reference to the "Luxleaks" case. At the time of finalising this report, these specified that their remarks should be considered in the context of the legal framework for whistleblower protection which existed before the new law of 16 May 2023.

23. The aforementioned developments in case law have helped prioritise the protection of whistleblowers on the legislative agenda, with the ECHR decision (which rejected Luxembourg's case) not only fuelling the drafting of the Act of 16 May 2023, but also raised awareness of this issue in Luxembourg. In addition to implementing the new legislative framework, the major challenge facing the authorities will be to transform the perception of reporting into a more positive one. According to the Ministry of Justice representatives consulted in Luxembourg (see below), this will require major awareness-raising efforts.

2. A new law consolidating the implementation of the 2021 Recommendation

24. The new law introduces ambitious provisions for whistleblower protection. These provisions can be considered good practices as they incorporate several provisions of both the 2021 Recommendation and the Directive (EU) 2019/1937. The law (article 2) provides for a very broad "personal" scope of application ("any person working in the private or public sector who has obtained information about violations in a professional context"). As the 2021 Recommendation stipulates, protection also applies to situations in which the employment relationship has ended or not yet begun (recruitment phase or other pre-contractual negotiations). Protection also applies to third parties linked to the whistleblower and who could be subject to retaliation (colleagues or relatives, trade union or association representatives, journalists in the event of a public disclosure, facilitators or even legal persons belonging to the whistleblower or for which they work). The law guarantees whistleblowers anonymity, even in cases where their identity could be directly or indirectly deduced (article 22). It should only be possible to disclose the

documents and given them to a journalist on 13 October 2010, the day before he resigned. A second internal investigation identified the claimant who, a PwC employee himself, contacted the same journalist offering to provide additional documents other than those already revealed in the press. On 5 and 6 November 2014, the International Consortium of Investigative Journalists published these 16 documents online, an act it called "Luxleaks".

[31] ECHR (2023), Halet v. Luxembourg (Grand Chamber). In this case, the Court found that Luxembourg had violated article 10 of the Convention. After weighing up the various interests at stake (the public interest served by the information disclosed and the harmful effects of disclosure) and taking into account the nature, severity and deterrent effect of the criminal conviction imposed on the claimant, the Court judged that the interference with his right to freedom of expression, in particular his right to communicate information, had not been "necessary in a democratic society". As a result, the Court ordered Luxembourg to pay him damages.

whistleblower's identity if this is a necessary and proportionate obligation imposed by national and EU law in the context of investigations carried out by the authorities or as part of legal proceedings, in particular with a view to safeguarding the rights of defence of the persons involved. Whistleblowers can also report anonymously.

25. The reporting system comprises three reporting channels: internal, external (to a competent authority) or, under certain conditions,[32] public disclosure. Under the law, whistleblowers are encouraged to first use internal reporting channels if it is possible to effectively remedy the breach internally, and where they believe there is no risk of retaliation (article 5). In the private sector, legal persons that have more than 50 employees are required to establish internal reporting channels by 17 December 2023 (articles 6 and 28). With regard to external reporting, the law designates 22 competent authorities responsible for receiving such reports (article 18). The law stipulates that the competent authorities must review their procedures for receiving and monitoring reports regularly, and at least once every three years. When reviewing these procedures, the competent authorities are expected to consider their own experience and that of other competent authorities, and to adapt their procedures accordingly (article 21). At the time of finalising this report, the Luxembourg authorities were examining the possibility of making the results of these reviews public. Whistleblowers should be able to choose the most appropriate channel according to the particular circumstances of the case, as provided for under Luxembourg law. In this context, protecting public disclosures is particularly important. To measure the efficiency and effectiveness of the reporting mechanisms provided for by the new law, it will be necessary to wait for both developments in the practice of reporting and how whistleblowing provisions are interpreted by the Luxembourg courts.

26. During consultations conducted prior to the adoption of the law, some actors, including the Chamber of Commerce, recommended the creation of a one-stop shop for the consistent implementation of the new regime (rather than designating the 22 authorities competent to receive reports).[33] Lawyers, academics and civil society representatives consulted during the on-site visit stressed that this institutional framework could undermine the clarity of the new whistleblower protection regime and complicate its practical implementation. Ministry of Justice representatives have specified that any shortcomings will be corrected following the aforementioned reviews, as well as during the qualitative evaluation of the law's implementation in 2025. Without guidance and awareness-raising on the law's implementation, it is possible that some competent authorities to which the law applies may not be able to meet their obligations.

27. At the time of finalising this report, the Luxembourg authorities underlined that awareness raising efforts have been conducted since the on-site visit, including by the Whistleblowing office. The office, under the authority of the Minister of Justice (article 8), has been operational since 1 September 2023. In particular, it is responsible for guiding and assisting anyone wishing to make an internal report, raising public awareness of whistleblower protection legislation and drawing up recommendations on any matter relating to the implementation of the law (article 9). The Luxembourg authorities also underlined the office's role in providing guidance to competent authorities in setting up reporting channels.

28. Under article 26 of the law, the burden of proof has shifted to the person who retaliated against a whistleblower, who is then required to demonstrate that the action was in no way connected to the report or public disclosure.

[32] Article 24 envisages two scenarios in which whistleblowers may make a public disclosure and receive protection against possible reprisals: (i) if no appropriate action has been taken following a report through internal or external channels; or (ii) if a whistleblower has reasonable grounds to believe that the breach may represent an imminent or manifest danger to the public interest, such as when there is an emergency situation or a risk of irreversible harm; or in the case of external reporting, when there is a risk of retaliation or it is unlikely that the breach will actually be remedied due to the particular circumstances of the case (concealment or destruction of evidence may be concealed, or an authority may be in collusion with the perpetrator of the breach or implicated in the breach).

[33] Chamber of Deputies (2022), *Avis de la Chambre de Commerce du 17 juin 2022* [Notice from the Chamber of Commerce of 17 June 2022].

3. Provisions of the new law in need of clarification

29. The 2021 Recommendation applies to whistleblowers and triggers their protection when they legitimately ("on reasonable grounds") report suspicions (as does Directive (EU) 2019/1937). This differs from the 2009 Recommendation, which additionally required the condition of *good faith* to be met. The recommendation therefore provides that whistleblowers who have disclosed false information that they had reasonable grounds to believe to be true at the time of disclosure should nevertheless be protected against possible reprisals. The whistleblower's motivation or motives at the time of disclosing information should not be taken into consideration in determining whether they are entitled to protection.[34] Protection can also be granted to whistleblowers whose primary motivation is, for example, a grudge against their employer.[35]

30. Under Luxembourg law (and in strict application of the aforementioned Directive), whistleblowers enjoy protection provided that they "*had reasonable grounds to believe that the information reported on violations was true at the time of reporting*" and that they "*made either an internal or external report or a public disclosure in accordance with the law*" (article 4). While the letter of the law regarding the reasonable belief criterion is *a priori* in line with the 2021 Recommendation, its interpretation by legislators and several other representatives met during the on-site visit raises questions. In its report on the law, the Justice Commission stressed that "*this requirement [of reasonable grounds to believe] is an essential safeguard against malicious, fanciful or abusive reporting, since it prevents people who deliberately and knowingly report information they know to be false or misleading from being granted protection*". Nevertheless, the Justice Commission added that "*this requirement ensures that the whistleblower remains protected when they have reported information in good faith that later turns out to be inaccurate*".[36] The same report also refers to the concept of good faith as a condition for reversing the burden of proof in favour of the whistleblower (article 26(4)).[37] The legislator's interpretation of the law seems to imply that an examination of the whistleblower's initial motivations is conceivable and even necessary when applying the law, including on the grounds of good faith. The parliamentarians consulted in Luxembourg confirmed this observation, citing ECHR case law as a point of reference and source of inspiration for Luxembourg law. It should be noted in this respect that, in its decision of 14 February 2023 (and in line with well-established case law), the European Court considers the good faith criterion as one of the prerequisites for granting whistleblower protection. During the on-site visit, the same parliamentarians also noted the need to protect the whistleblower regime against the risk of "denunciation" (i.e. vindictive whistleblowing), which means investigating the whistleblower's motives in order to trigger their protection. The Council of Luxembourg's Bar Association has also expressed concern about the legal uncertainty surrounding the concept of "reasonable grounds" and the way in which Luxembourg courts will be called upon to interpret it. While the letter of Luxembourg law seems to align with the 2021 Recommendation, its interpretation (as regards the requirement of good faith on the part of the whistleblower to trigger protection) is open to debate and requires clarification.

31. The 2021 Recommendation proposes a broad definition of the concept of retaliation against whistleblowers, which is not limited to retaliatory actions in the workplace and may also include reputational, professional, financial, social, psychological or physical harm. Under Luxembourg law, the

[34] In fact, under Directive (EU) 2019/1937, "the motives of the reporting persons in reporting should be irrelevant in deciding whether they should receive protection" (recital 32).

[35] OECD Working Group on Bribery (2022), Phase 4 Report – Portugal, paragraph 41; OECD Working Group on Bribery (2022), Phase 4 Report – Italy, paragraph 30; OECD Working Group on Bribery (2012), Phase 3 Report – France, paragraph 169; OECD Working Group on Bribery (2020), Phase 4 Report – Netherlands, paragraphs 51-53; OECD Working Group on Bribery (2017), Phase 4 Report – United Kingdom, paragraph 29.

[36] Chamber of Deputies (2023), "Commentaire des articles" [Commentary on the articles], *Rapport de la Commission de la Justice du 26 avril 2023* [Report of the Justice Commission of 26 April 2023], article 4, p. 24.

[37] Ibid. article 26, p. 40.

concept of "retaliation" (article 3.11) refers to "*any direct or indirect act or omission which occurs in a professional context, and is prompted by an internal or external report or a public disclosure, and which causes or may cause unjustified harm to the whistleblower*". The law (article 25) provides a non-exhaustive list of examples of harm in a professional context, including suspension of an employment contract, termination of an employment contract and dismissal, but also coercion, intimidation, harassment or ostracism and discrimination. This also includes damage to reputation and financial loss, as well as referral for psychiatric or medical treatment. Although the law covers threats of retaliation, which can cause psychological or financial damage and can harm the whistleblower's reputation, these provisions only cover retaliation in a professional context. The scope of the law does not extend to actions to coerce, intimidate or harass a whistleblower that do not constitute retaliation in the workplace.

32. The 2021 Recommendation calls for effective, proportionate, and dissuasive sanctions for retaliating against whistleblowers. Luxembourg law provides for a fine of between EUR 1 250 and EUR 25 000 to be imposed on those who retaliate or bring abusive proceedings against whistleblowers (article 27(5)).[38] In contrast, persons who knowingly report false information could face a prison sentence of between eight days and three months and be fined between EUR 1 500 and EUR 50 000. In addition, whistleblowers making a false report will incur civil liability (article 27(6)). While it is important to prevent malicious whistleblowing by sanctioning those proven to have knowingly reported or publicly disclosed false information about violations, such sanctions should be proportionate to ensure that they do not deter potential whistleblowers. It is regrettable that this is not balanced in favour of whistleblowers in Luxembourg.

33. The possible imposition of such a sanction could encourage whistleblowers to collect a significant amount of evidence, particularly in the form of documents, to be able to later justify the validity and legitimacy of their report. However, Luxembourg law only provides for the non-liability of whistleblowers under certain conditions, which, if interpreted restrictively, could unduly hinder whistleblowing and whistleblower protection. Firstly, the law grants whistleblowers the right to invoke their reporting or public disclosure to request the discontinuation of judicial proceedings, including for defamation, copyright infringement, breach of secrecy, violation of data protection rules or disclosure of business secrets, provided that the whistleblower had "*reasonable grounds to believe that the reporting or public disclosure was necessary to reveal a breach under the law*" (article 27.4). It is well established that actions taken against whistleblowers outside the professional context, for example action for defamation or for violation of business secrets, can seriously discourage whistleblowing. In this case, the whistleblower will have to prove that they had reasonable grounds to believe that such a report was necessary. Secondly, the question arises of the whistleblower's access to the disclosed information. In this respect, Luxembourg law provides for the non-liability of the whistleblower, provided that obtaining or accessing the information revealed does not constitute an "*autonomous criminal offence*" (article 27.2). One of the questions raised in the "*LuxLeaks*" case concerned the existence and nature of the criminal offences committed by the two persons who made the disclosures. In this context, the Court of Cassation's decision in principle of 11 January 2018 states that "*recognition of the whistleblower status neutralises the illegality of all violations of the law, necessarily committed by disclosing, in good faith, information of general interest, such as the violation of professional secrecy, the theft of a document or the fraudulent maintenance of a computer system*". The ECHR acknowledged that the disclosure in question involved data theft and breach of professional secrecy but considered that the public interest in disclosing the information outweighed any harmful effects. The representatives of the Public Prosecutor's Office met during the on-site visit indicated that they were prepared to take legal action against whistleblowers who, in the course of their reporting, committed offences (of the type committed in the "LuxLeaks" case). After the on-site visit, these specified

[38] According to the Luxembourg authorities, a legal person "that carries out retaliatory measures" can be prosecuted for committing such acts (article 27(5) of the law), provided that the conditions laid down in article 34 of the Criminal Code, governing the criminal liability of legal persons, are met (i.e. the offence is committed on behalf of and in the interest of the legal person).

that their remarks should be considered in the context of the legal framework for whistleblower protection that existed before the adoption of the law of 16 May 2023. In a circular dated October 2023, the State Prosecutor General stressed that whistleblowers who make reports under the law of 16 May 2023 must be covered by the procedural safeguards and non-liability grounds provided for in this law in order to protect them from retaliation. In addition, the judges were keen to clarify that complaints with a claim for damages against a whistleblower would trigger prosecution, as the Public Prosecutor's Office would no longer be able to decide whether or not to prosecute. In such cases, it will also be up to the Luxembourg courts to assess a whistleblowers' liability in the light of all relevant factual information and taking into account the particular circumstances of the case, including the necessity and proportionality of the act or omission in relation to the report or public disclosure. The Working Group should follow up developments in this regard, particularly in case law, given the generalised mistrust of whistleblowers in Luxembourg.

34. With regard to the remedies available to whistleblowers in the event of reprisals, they may invoke the invalidity of the measure, request its cessation and seek compensation for the harm suffered before a competent court within 15 days of notification of the measure (article 26). However, the law makes no provision for interim measures pending the outcome of legal proceedings, in particular interim measures for compensation, legal aid or physical protection for the whistleblower.

4. The need to provide guidance and raise awareness

35. Despite the rejection of a parliamentary motion to roll out an awareness raising campaign on the new whistleblower protection regime,[39] the Luxembourg authorities launched a large-scale awareness campaign in June 2023. This particularly focused on implementing the obligation to establish internal reporting channels, and the creation of the Whistleblowing office and its duties. The authorities noted that since the new law was adopted, many companies and competent authorities have organised meetings, in partnership with the Whistleblower Office and the Ministry of Justice, to raise awareness of the new law among Luxembourg companies. The Ministry of Justice has also launched an awareness raising campaign on social networks and on the Luxembourg government website.[40]

36. Article 20 of the law stipulates that the competent authorities (in a separate easily identifiable and accessible section of their website) must publish information on the conditions for receiving protection under the law, the necessary contact details for the external reporting channels, and the procedures applicable to reporting violations, among others. Implementing these measures will certainly raise awareness of the issue of reporting among Luxembourg citizens. Representatives met during the on-site visit unanimously agreed that the law introduces major changes into Luxembourg's legal framework for whistleblower protection, and that it will be essential for the authorities to undertake considerable efforts to raise awareness and continue the activities already undertaken in this context in order to ensure that the law is correctly implemented.

Commentary

The lead examiners commend Luxembourg on an ambitious law that establishes a general protection regime for whistleblowers, drawing extensively on international standards and incorporating a number of best practices in this field into Luxembourg law. The lead examiners hope that this new legal framework and the institutional arrangements it puts in place will contribute in creating a more favourable environment in Luxembourg for reporting foreign bribery offences.

The lead examiners also believe that certain elements of the law need to be clarified and revised. They recommend that Luxembourg: (i) clarify that the whistleblowers' personal motivation

[39] Chamber of Deputies (2023), "Motion 4141".

[40] Government of Luxembourg, "Whistleblower".

(including their good faith) is irrelevant for the application of protections under the law, in particular when reversing the burden of proof in the whistleblower's favour in the event of retaliation; (ii) ensure that sanctions against those who retaliate against whistleblowers are effective, proportionate and dissuasive; (iii) ensure that reporting persons are not subject to disciplinary proceedings and liability, including criminal liability, solely on the basis of making reports that qualify for protection; (iv) extend the scope of the law to also cover cases of retaliation outside the workplace; and (v) ensure that regulations and laws prohibiting the transmission of economic or commercial information do not unduly hinder reports and whistleblower protection under the conditions set out by the law. The lead examiners also recommend that Luxembourg ensure that interim measures pending the resolution of legal proceedings are available to whistleblowers as remedial measures.

The lead examiners recommend that Luxembourg: (i) ensure that the whistleblowing office and all other competent authorities responsible for implementing the legal framework for whistleblower protection have sufficient resources and are adequately trained to carry out the tasks set out by the law; (ii) continue and extend its awareness raising efforts to ensure that the law is properly applied, particularly by developing recommendations, guidelines and practical guides on the existence and function of reporting channels, and on whistleblower protection mechanisms in both the public and private sectors; and (iii) consider introducing incentives for making reports that qualify for protection.

Lastly, the lead examiners recommend that the Working Group follow up: (i) the implementation of reporting, including to the 22 competent authorities, given the relatively complex architecture introduced by the new law; (ii) the articulation of the existing protection regimes in practice, namely those introduced by the new law and those already established by pre-existing special regimes; and (iii) any developments in case law regarding the application of non-liability conditions for whistleblowers under article 27 of the new law.

A2. An example of self-reporting in the private sector

37. According to the authorities, one foreign bribery case was detected by a company self-reporting. However, the extent of the company's co-operation is unknown. This case is particularly interesting because Luxembourg does not have measures specifically aimed at encouraging self-reporting by companies. The Luxembourg authorities, and lawyers consulted during the on-site visit, nevertheless stressed that the courts can take the offender's spontaneous co-operation into account when tailoring the sentence, as well as in the context of a judgment upon agreement (see Section B5). In their response to the Phase 4 questionnaires, the Luxembourg authorities also mentioned that: (i) some companies'/professionals' have reporting obligations through suspicious transaction reports (STR); and (ii) the existence of an offence obliging anyone with knowledge of a felony to report it to the judicial authorities when it is still possible to prevent or limit its effects, or when the perpetrators are likely to commit additional felonies (article 140 of the Criminal Code). However, these obligations are not designed to encourage self-reporting by companies that have, in some form, participated in a foreign bribery offence, within the meaning of the 2021 Recommendation.

Commentary

Self-reporting is an important source of detection of foreign bribery cases. The lead examiners recommend that Luxembourg consider measures to encourage voluntary disclosures and reporting by persons who have participated in or been implicated in the commission of this offence to provide relevant information to the competent law enforcement authorities. The country should also ensure that appropriate mechanisms are in place to apply these measures in foreign bribery investigations and prosecutions.

The lead examiners also note that the financial sanctions currently imposed on legal persons for foreign bribery do not comply with article 3 of the Convention (see Section C2). Luxembourg should therefore ensure that a framework governing self-reporting leads to effective, proportionate and dissuasive sanctions.

A3. The detection potential of anti-money laundering measures

38. As previously mentioned, Luxembourg's unique characteristics expose the country to the risk of foreign bribery and money laundering predicated on bribery. This section of the report analyses the various aspects of Luxembourg's anti-money laundering (AML) regime and the preventive measures in place to help detect foreign bribery. This analysis is based, in part, on the main conclusions of the FATF assessment adopted in September 2023.[41] In Phase 3, the Working Group asked Luxembourg to further increase the awareness of the predicate offence of bribing foreign public officials among professionals required to report money laundering suspicions (Recommendation 5(c)).[42] The Working Group also welcomed the strengthening of the legal and institutional framework for combating money laundering, and the increase in suspicious transaction reports.[43]

1. Foreign bribery and its inherent risk of money laundering is not included in Luxembourg's anti-money laundering strategy

39. Luxembourg has a solid legal and regulatory framework to combat money laundering, which has been continually strengthened in recent years.[44] This is the conclusion of the latest FATF assessment report, published in September 2023. This system is also supported by a robust institutional framework involving a wide range of competent authorities responsible for preventing and detecting money laundering and supervising reporting entities. However, despite this generally positive assessment, Luxembourg does not have all the conditions in place to effectively prevent and detect money laundering predicated on foreign bribery. The National Risk Assessment identifies bribery as a predicate offence representing a very high external money laundering threat to Luxembourg (irrespective of whether the suspected perpetrator is in Luxembourg or abroad), has not helped support foreign bribery detection efforts via anti-money laundering mechanisms.

40. From the on-site visit and meetings with the FIU, oversight authorities (supervisory authorities and self-regulatory bodies), prosecutors and regulated professions, it emerged that the Luxembourg authorities and the private sector essentially understand money laundering predicated on foreign bribery as the laundering, in Luxembourg, of passive bribery committed by foreign politically exposed persons (PEP), and not as money laundering predicated on active bribery, such as profits derived from contracts obtained as a result of a Luxembourg natural or legal person paying a bribe abroad. This restrictive understanding of foreign bribery, and the inherent money laundering risks, are likely to significantly harm the prevention and detection of foreign bribery, including by institutional actors who are very active in this area, namely

[41] FATF (2023), "Luxembourg".

[42] This recommendation was deemed to have been implemented in the written follow-up to Phase 3.

[43] It has nevertheless decided to monitor Luxembourg's efforts to detect money laundering linked to foreign bribery.

[44] The Act of 13 February 2018 transposing Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and the Act of 25 March 2020 amending the Act of 12 November 2004, as amended, on the fight against money laundering and terrorist financing in order to transpose certain provisions of Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

the FIU. Without an understanding of the offence's pattern and the risks it poses,[45] there can be no strategic vision, no awareness and therefore no detection. The on-site visit highlighted that the relevant authorities have undertaken a large number of awareness-raising initiatives on bribery targeting regulated professions (in the form of strategic analyses, typologies, guidelines, seminars, initial and ongoing training courses, codes of conduct and dedicated Internet portals), without these initiatives do not actually address the risks of foreign bribery and money laundering predicated on this offence. In just one foreign bribery case, which did not result in an investigation being opened for foreign bribery (*Supply of Arms Case*), the detection source (at the time of Phase 3) was a STR by a banking institution, illustrating the ability of the anti-money laundering system to detect foreign bribery cases.

2. The FIU: A major institutional actor in the detection of foreign bribery, in need of adequate resources

41. The FIU holds a central function in Luxembourg's anti-money laundering legal framework, and plays a key role in detecting money laundering and uncovering predicate offences. Since Phase 3, Luxembourg has introduced a new legal framework for the FIU, giving it full autonomy and operational independence in performing its duties, pursuant to the law of 10 August 2018 on the organisation of the FIU. It is no longer attached to the Economic and Financial Prosecutor's Office of the Luxembourg district court but is an autonomous authority under the administrative supervision of the State Prosecutor General.[46] Its competences and powers (particularly processing STRs via the "go AML" digital platform) are unchanged, and the FIU remains the main source of detection for bribery cases handled by the Luxembourg authorities. The FIU has the right to follow-up, meaning it can obtain information needed to analyse suspicious transactions from the reporting party,[47] and can also provide feedback to reporting parties. The Luxembourg authorities and the private-sector representatives met during the on-site visit (in line with the FATF) were unanimous on the pivotal role played by the FIU, noting that the total number of suspicious transaction reports (STRs) has risen steadily since Phase 3. The Luxembourg authorities believe that this is the result of major awareness-raising campaigns, combined with a strengthening of due diligence obligations for regulated professionals.[48] While this increase in the number of reports relating to money laundering and its predicate offences is welcome, the lead examiners did not see any statistics that enabled them to determine the number of STRs relating specifically to foreign bribery and/or money laundering predicated on this offence. The FIU is very proactive in developing and disseminating strategic analyses and financial intelligence to supervisory and prosecuting authorities and regulated professionals, as highlighted by the FATF. It is therefore essential that these efforts take into account the risk of foreign bribery and money laundering predicated on this offence, given the potential detection source they represent.

42. The lead examiners are concerned about the FIU's staffing levels, particularly in view of the ever-increasing number of STRs and the numerous tasks assigned to the unit. The FATF has also made this observation, deploring the FIU's limited resources. At the time of writing, the FIU comprised 23 analysts

[45] While the National Risk Assessment of Money Laundering and Terrorist Financing (2020) broadly covers money laundering predicated on passive bribery, it does not specifically address or analyse the risks relating to foreign bribery and money laundering predicated on this offence.

[46] The Act of 10 August 2018 on the organisation of the FIU.

[47] The FIU now has direct access to the central electronic system (the bank account register) for retrieving data concerning payment accounts and bank accounts identified by an international bank account number (IBAN) and safe-deposit boxes held by credit institutions in Luxembourg. In addition, the FIU has the right to access to two new registers: the register of beneficial owners and the register of trusts.

[48] See in particular the Act of 12 November 2004 on the fight against money laundering and terrorist financing, the Act of 13 February 2018 transposing Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and the Act of 25 March 2020 amending in particular the Act of 12 November 2004, as amended.

(compared with 8 in 2018), 6 prosecutors (compared with 4 in 2018), 6 administrative assistants and 3 computer technicians. The human resources issue remains a recurrent problem in Luxembourg, from detection to sentencing (see Section B2). During the on-site visit, the FIU indicated that it would be allocated additional resources, in particular law clerks (see Section B2). It is important that Luxembourg accelerates its current recruitment plan and ensures that newly recruited staff have the necessary expertise.

3. Anti-money laundering supervisory authorities: Detection of foreign bribery and its inherent money laundering falling short of expectations

43. With regard to money laundering, Luxembourg's supervisory authorities monitor professionals' compliance with their professional obligations, and therefore have the supervisory powers needed to perform their duties. The Financial Sector Supervisory Commission (Commission de Surveillance du Secteur Financier, CSSF) and the Insurance Commission (Commissariat aux Assurances, CAA) are the designated anti-money laundering supervisory authorities for the financial and insurance sectors. Other professional service providers are self-regulated by self-regulatory bodies and are subject to the same anti-money laundering obligations as professions under the prudential supervision of the CSSF and the CAA. These include external auditors, certified accountants, notaries and lawyers.

44. Since Phase 3, no cases of foreign bribery, as defined by the Convention, have been detected by the supervisory authorities or other self-regulatory bodies under their obligations to report suspicious transactions to the FIU and the Public Prosecutor's Office. Despite the increase in the number of reports, only a small proportion of them concern bribery (four from the CSSF in 2022). This figure remains very low given the risks of foreign bribery and money laundering predicated on this offence in Luxembourg's financial and non-financial sectors. However, the supervisory authorities have taken a number of measures designed to better prevent, detect and identify money laundering predicated on bribery, particularly as part of the off-site and on-site checks conducted on the entities they supervise. Supervisory authorities also perform checks and analysis of outgoing and incoming transactions from countries presenting high money-laundering risks. During the on-site visit, the CSSF and the CAA indicated that they pay particular attention to bribery and money laundering predicated on this offence during their inspections. However, these thematic controls, carried out by the CSSF in 2022 and 2023, did not reveal any suspicions of foreign bribery or money laundering predicated on this offence. The risk of money laundering predicated on foreign bribery seems to be insufficiently integrated into prudential supervision. Discussions during the on-site visit highlighted an overly restrictive understanding of bribery of foreign public officials, being essentially understood as the laundering of bribes, particularly by foreign PEPs (hence the existence of robust due diligence measures for PEPs, which the FATF commended in its latest report). Since Phase 3, the supervisory authorities have also demonstrated the existence of numerous initiatives aimed at raising awareness of money laundering risks among regulated professions, which is to be welcomed. However, none of these initiatives appear to address the risks associated with money laundering predicated on foreign bribery. The representatives of the supervisory authorities met during the on-site visit acknowledged that they did not systematically or specifically cover the bribery of foreign public officials in their awareness-raising campaigns.

Commentary

As in Phase 3, the lead examiners welcome the strengthening of Luxembourg's legal and institutional framework to combat money laundering. However, insufficient attention is paid to detecting the bribery of foreign public officials and money laundering predicated on this offence, thus preventing Luxembourg's anti-money laundering system from being an effective and proactive actor in its detection. There is not a clear understanding of schemes for money laundering predicated on bribery and how they differ from foreign bribery. While there seems to be good understanding of the risks the financial centre faces in terms of money laundering predicated

on (passive) bribery committed by foreign public officials receiving bribes, the risks of Luxembourg economic actors committing (active) bribery in their commercial transactions abroad appear to be underestimated. Notwithstanding, the lead examiners welcome the pivotal role of the FIU, but recommend that Luxembourg provide it with sufficient capacity and resources to manage the growing number of incoming STRs.

The lead examiners note with satisfaction the large number of initiatives undertaken by Luxembourg to raise awareness on the prevention of money laundering among the authorities and the private sector. They regret, however, that these actions do not contribute in helping Luxembourg's various actors in the detection of bribery of foreign public officials and money laundering predicated on this offence. The lead examiners therefore recommend that Luxembourg continue and intensify its awareness-raising initiatives (including training, case studies, indicators and other guidelines) on the risks of foreign bribery and money laundering predicated on this offence among the FIU, supervisory authorities and regulated professions.

A4. Other detection sources

45. The otherwise legitimate strategic priority given to combating money laundering adds to the neglect of foreign bribery in the detection and reporting efforts deployed by public authorities and the private sector alike.

1. A regrettable lack of parallel investigations based on information received from foreign authorities, despite a favourable change in policy in this area

46. At the time of Phase 3, the Working Group's main criticism in relation to Luxembourg's mutual legal assistance framework was the insufficient use of incoming mutual assistance requests as a source to detect foreign bribery and to open investigations and prosecutions (particularly against banks used as a means of transferring and concealing bribes) (Recommendation 8). At the time of the follow-up to Phase 3, the Working Group considered that the recommendation had been implemented, as COPRECO had re-examined the issue but decided not to change Luxembourg's approach in this area. Until Phase 3, the authorities took the view that any legal proceedings under way abroad should prompt the Public Prosecutor's Office to refrain from prosecuting, citing the risk of the principle of *non bis in idem* being applied. The Working Group regretted that, as a matter of principle, the Grand Duchy limited its role in the fight against bribery to simply providing mutual legal assistance to other Parties to the Convention, to the detriment, in particular, of article 4(3) of the Convention. It considered that a proactive rather than a reactive approach, while still respecting the principle of *non bis in idem*, could help reveal a wider spectrum of facts and persons involved in the often complex foreign bribery schemes.

47. The State Prosecutor's memorandum of 30 October 2019 on its policy on prosecuting money laundering and the circular of October 2023 mark a change in policy that could help open parallel investigations into foreign bribery in Luxembourg. Prosecutors are now encouraged to analyse incoming mutual assistance requests, not only for indications of money laundering committed within Luxembourg, but also of bribery, which could be used to trigger national investigations where appropriate. Prosecutors are encouraged to investigate the possible involvement of Luxembourg entities. In the memorandum, prosecutors are asked to assess the risk that such investigations could pose to the mutual assistance request. The prosecutor must contact the foreign authorities to obtain confirmation of their agreement to the use the information they provided as part of the mutual assistance request and to the re-use of the information gathered in Luxembourg while executing the request, in their own domestic case in Luxembourg. If the chances of obtaining a conviction are greater in the foreign jurisdiction, the prosecutor may consider reporting the facts to the prosecuting authorities in another state. The representatives of Public Prosecutors' Offices and investigating judges met during the on-site visit confirmed this change in

policy. They stressed that incoming mutual assistance requests are now a significant source of detection of offences such as foreign bribery offences, and that practice has evolved considerably in this area.

48. The Luxembourg authorities have provided just one example of an investigation into possible complicity to commit foreign bribery, opened following the receipt of a foreign mutual assistance request (*Case II*). Conversely, two other cases of bribery of foreign public officials involving a Luxembourg company (which were prosecuted, with one case resulting in the payment of fines in another Convention member country), were not prosecuted in Luxembourg (*Iron and Steel Industry Group Cases I* and *III*, see Annex 1). Another Luxembourg company (*Telecommunications Group Case*) spontaneously disclosed suspicions of foreign bribery to the law enforcement authorities in two Parties to the Convention, who subsequently closed their investigations without further action. No investigation has been opened in Luxembourg. In all three cases, Luxembourg had actively responded to mutual assistance requests from Parties to the Convention. The representatives of Public Prosecutors' Offices met during the on-site visit indicated that pre-2019 cases did not benefit from the current policy changes.

49. The lead examiners are encouraged by the measures taken since Phase 3 to encourage Public Prosecutors' Offices to open money laundering investigations for suspected acts likely to fall within the jurisdiction of Luxembourg courts, based on information transmitted through mutual assistance requests.. Nevertheless, they believe that these new changes in criminal policy should benefit the detection and prosecution of foreign bribery, in a context of strained resources for prosecuting authorities.

Commentary

The lead examiners note with satisfaction the Luxembourg authorities' recent awareness of the need for a more proactive approach in using foreign mutual legal assistance requests as a source for detecting bribery and money laundering in Luxembourg, which is now reflected in the criminal policy promoted by the Public Prosecutor's Office. Nevertheless, they recommend that the Working Group follow up how this new policy affects the detection of foreign bribery in practice.

2. The role of national authorities must be improved within a broader legislative framework

50. At the time of Phase 3, the Working Group welcomed the adoption of the law of 13 February 2011 strengthening the means to combat bribery because it extended the requirement to report criminal offences to the Public Prosecutor's Office (in accordance with article 23(2) CCP) to public officials who do not have the status of civil servant, such as employees of the Luxembourg Development Co-operation Agency (see Section A4). The Phase 2 and Phase 3 reports showed that the level of reporting of suspicions to the law enforcement authorities by public officials was generally low. One of the reasons given was the lack of effective protection for whistleblowers. In addition, in Phase 3, the Working Group asked Luxembourg to take steps to raise awareness among public-sector employees of the importance of reporting suspicions of bribery of foreign public officials (Recommendation 5(a)).[49]

51. All public officials, civil servants and those entrusted with a public function, whether employed or mandated under the provisions of public or private law, are obliged to report to the Public Prosecutor's Office acts, which they become aware of in the course of their duties, that likely constitute a felony or misdemeanour ("*crime*" or "*délit*"), in line with article 23(2) CCP. In their response to the Phase 4 questionnaires, the authorities state that the Government Commission for Disciplinary Investigation (*Commissariat du gouvernement chargé de l'instruction disciplinaire*, CGID), an independent authority, is responsible for implementing these obligations on civil servants in Luxembourg (including their duty of good conduct, their obligation to behave in a manner befitting their office, etc.), including those under article

[49] At the time of the written follow-up to Phase 3, the Working Group considered that Luxembourg had implemented this recommendation thanks to significant awareness-raising efforts brought about by the 2011 Act.

23(2) CCP.[50] In their response, the authorities specify that since Phase 3, the CGID has imposed disciplinary sanctions in four cases, in relation, among other things, to non-compliance with the obligation of article 23(2) CCP in relation to bribery (but not foreign bribery).

52. Discussions during the visit, particularly with tax authority representatives, focused on the question of the threshold (mere suspicion or reasonable suspicion) for filing a report with the Public Prosecutor's Office under article 23(2) CCP. Opinions varied, with some stating that a threshold does not exist, and others citing the need to establish, with sufficient probability and precision, the existence of one or more facts likely to be classified as criminal. According to a representative from the Income Tax Administration (Administration des Contributions Directes, ACD), in cases of mere suspicion, reporting to the FIU is preferred over reporting to the Public Prosecutor's Office. The practice of double reporting (to the Public Prosecutor's Office and the FIU) was mentioned, with the ACD systematically reporting all facts likely to be qualified as criminal to the Public Prosecutor's Office.

53. At the time of Phase 3, the Working Group was unable to assess whether the number of reports of foreign bribery under article 23(2) CCP had increased, or whether steps were actually being taken to investigate these reports. It was made clear during the on-site visit that the public authorities are obliged to investigate reported violations under article 23(2) CCP. Since Phase 3, only one report has been sent to the Public Prosecutor's Office under article 23(2) CCP, relating to suspicions of foreign bribery (*False Certificates Case*).

54. In practice, according to the authorities, reports under article 23(2) are first sent to line managers, who then decide whether to refer the matter to the Public Prosecutor's Office. This could change with the adoption of the law of 16 May 2023 on whistleblower protection (see Section A1), which gives civil servants access to internal reporting channels (under the law, legal persons in the public sector must establish channels and procedures for internal reporting and follow-up). The lead examiners believe that these new reporting mechanisms, which are optional and not obligatory as under article 23(2) CCP, could enable Luxembourg to align itself with the approach of other Parties to the Convention, which have strengthened their foreign bribery reporting mechanisms for whistleblowers, including in the public sector. However, it would be worth clarifying how these internal channels will be articulated with those available in the various administrations for reports under article 23(2) CCP, which overlap or even merge. The lack of clarity in the current system, as well as the increased number of reporting channels (see Section A1), raises practical questions regarding their implementation and the level of protection afforded to the whistleblower.

55. The on-site visit revealed that Luxembourg public officials have insufficient awareness of the foreign bribery offence. The public authority representatives consulted by the lead examiners view foreign bribery primarily through the prism of their efforts to combat anti-money laundering. They do not integrate (neither specifically nor systematically) the risks of bribery of foreign public officials by Luxembourg economic actors into their approach to prevention and detection. During the visit, the Luxembourg authorities indicated that the National Institute of Public Administration offers compulsory and optional training courses for civil servants on the general rules of ethics and anti-bribery, at the time of recruitment or as part of ongoing training. While it has been made clear that these training courses deal explicitly with the reporting obligation set out in article 23(2) CCP, they do not specifically address the foreign bribery offence or its detection. The CSSF and the CAA also carry out awareness raising activities for public officials on their duty to report, including via their websites, the CSSF and CAA code of conduct, initial and ad hoc training courses and conferences. However, the CSSF and CAA representatives consulted during the visit indicated that these training courses do not specifically target the foreign bribery offence.

Commentary

[50] Government Commission for Disciplinary Investigation (2020), "Historique" [History]. The CGID is headed by a government commissioner in charge of disciplinary investigation, who exercises their powers of investigation in favour of and against the individual being prosecuted.

The lead examiners note the adoption of a whistleblower protection regime that could benefit Luxembourg public officials in detecting foreign bribery. However, they are concerned about the differing interpretations of the threshold for suspicious acts that would trigger a report to the Public Prosecutor's Office under article 23(2) CCP, and about the articulation of different reporting channels available to civil servants, making the system difficult to understand. The lead examiners recommend that Luxembourg: (i) ensure that the threshold for reporting credible allegations of foreign bribery to the Public Prosecutor's Office is understood in a uniform and harmonised manner by all the administrations concerned; and to (ii) clarify the relationship between public officials' reporting obligations under article 23(2) CCP and the possibility to report open to them under the law of 16 May 2023 on the protection of whistleblowers, in particular with regard to reporting channels, the criteria applicable to using either of these mechanisms, and their related protections.

Noting that only one foreign bribery case has been detected through article 23(2) CCP since the Convention entered into force in the Grand Duchy, the lead examiners believe that Luxembourg does not sufficiently utilize public officials for the purpose of detecting this offence. They therefore recommend that Luxembourg reinforce its efforts to raise awareness among its public officials of their obligation to detect foreign bribery offences, including through training campaigns and practical guides.

In addition, the lead examiners recommend that the Working Group follow up the implementation of internal reporting channels within public authorities as tools for detecting foreign bribery offences.

3. Tax authorities: An underestimated actor in foreign bribery detection

56. In Luxembourg, tax legislation is enforced by three tax authorities: the ACD (responsible for setting and collecting direct taxes); the Registration, Property and VAT Administration (Administration de l'Enregistrement, des Domaines et de la TVA, AED) (responsible for collecting indirect taxes); and the Customs and Excise Administration (Administration des Douanes et Accises, ADA). In Phase 3, the Working Group recommended that Luxembourg does more to raise awareness among its tax authorities of the need to make full use of the new measures made available to them in the 2008 Act on inter-agency and judicial co-operation in order to detect illegal transactions linked to bribery of foreign public officials, and to encourage the reporting of such transactions (Recommendation 7(c)). It was also recommended that Luxembourg takes appropriate steps to increase the intensity and frequency of on-site inspections by the tax authorities (Recommendation 7(a)). Both recommendations were assessed as partially implemented in the follow-up report. As explained in section B.3, the Luxembourg authorities indicated the exchange of tax information between the tax authorities and the FIU or the Public Prosecutor's Office has been strengthened in recent years.

57. With regard to on-site checks as possible sources of detection, the statistical data provided by the authorities reveal a decrease in in-depth on-site checks by the ACD since 2018. Meanwhile, the number of on-site checks by the AED's Anti-Fraud Service has increased. With regard to staffing levels, the ACD saw a 55% increase between 2013 and 2022, and a 120% increase for the Review Department. Other figures seem to temper the size of these increases, particularly in areas where checks are likely to be used for detecting foreign bribery (for example, 116 agents were responsible for processing corporate tax files in 2018, compared with 118 in 2022). The average number of cases handled by these agents rose from 923 to 996 over the same period, so the workload remains considerable. Comparable data were not provided for the AED. For the authorities, the information provided shows that the tax authorities are committed to maintaining momentum in carrying out checks.

58. During the on-site visit, the authorities indicated that they offer general basic and ongoing training to tax officials (via the National Institute of Public Administration in particular). However, it was not possible to determine whether bribery of foreign public officials is addressed under this framework, or which tax officials are involved (although the number of ACD officials who had taken part in training on bribery rose from 35 in 2018 to 144 in 2022). During the on-site visit, ACD representatives referred to a 2005 memorandum on the non-tax deductibility of bribes, as well as to a supervision handbook for civil servants, but made no mention of the OECD Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors.[51] At the time this report was being finalized, information provided by the ACD indicated that this memorandum will be provided to civil servants' during their compulsory in-service training. In any case, despite this specific awareness-raising work by auditors, the evaluators note that tax authorities have not detected any foreign bribery cases since the Convention came into force in Luxembourg. Additional awareness-raising efforts are essential to highlight the tax authorities' role in combating bribery, which should be targeted as an offence in itself and no longer merely as a subsidiary offence to tax evasion. This role was clearly recognised and acknowledged by the Working Group.[52] It also seems essential for the tax authorities to reconsider their practices, with a view to carrying out more proactive, in-depth checks with regard to sectors and taxable persons for whom the payment of commissions to foreign officials would present a risk.[53] In conclusion, Luxembourg has not fully implemented Recommendations 7(a) and 7(c).

Commentary

The lead examiners are encouraged by the more sustained exchange of information between tax authorities and the Public Prosecutor's Office, but regret that the tax authorities have not detected any foreign bribery cases since the Convention came into force in Luxembourg, despite the number of companies registered in Luxembourg and the foreign bribery risks associated with them. The lead examiners consider that the awareness-raising efforts recommended in Phase 3 have yet to be fully implemented, and that supervisory practices need to be reviewed with a view of detecting foreign bribery. There is also the question of the tax authorities' resources in departments able to contribute in detecting foreign bribery. The lead examiners therefore recommend that Luxembourg: (i) step up measures to raise awareness among tax officials of the need to detect illicit transactions linked to foreign bribery, including through clear and dedicated guidelines; ii) adapt tax auditing practices to adopt a more proactive policy to help detect illicit transactions linked to foreign bribery; and (iii) ensure that tax authorities have human and material resources commensurate with the challenges involved in checking and detecting allegations likely to fall within the scope of foreign bribery, in application of Phase 3 Recommendations 7(a) and 7(c).

4. The Ministry of Foreign and European Affairs and diplomatic and consular missions: A need for information

59. Luxembourg's diplomatic corps has 17 foreign trade advisors[54] to help promote its commercial activities abroad. Officials of the Ministry of Foreign and European Affairs are bound by the same reporting obligations set out in article 23(2) CCP (see Section A4) and can benefit from the protections reserved for whistleblowers (see Section A1). At the time of Phase 3, the Working Group had made no recommendations or follow-up actions relating to the capacity of the Ministry of Foreign and European

[51] OECD (2013), *Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors*.

[52] Refer to the Working Group's study on detecting foreign bribery (see Chapter 5 on the role of tax authorities in this context): OECD (2017), *The Detection of Foreign Bribery*.

[53] The evaluators welcome the introduction, from 2023, of software in tax offices to enable more efficient, digital analysis of accounts.

[54] French Ministry of Foreign and European Affairs (2022), *Rapport d'activité 2022* [*Activity Report 2022*], p. 14.

Affairs and embassies to detect and report alleged bribery of foreign public officials. No foreign bribery cases have been detected by Luxembourg diplomatic missions.

60. Representatives of the Ministry of Foreign and European Affairs met during the on-site visit said they were not aware of any reports from the Ministry of Foreign and European Affairs staff of foreign bribery since Phase 3. Reports from staff may be addressed to the Ministry of Foreign and European Affairs' secretary-general or to the director of human resources, who can, if necessary, direct these reports to the appropriate authorities, including the Public Prosecutor's Office. These mechanisms do not guarantee that the identity of the person making the report will remain confidential and anonymous. The implementation of the whistleblower protection law (see Section A1) and the requirement for administrations to establish internal reporting channels will most certainly lead to changes in whistleblowing practices within the Ministry of Foreign and European Affairs. Discussions during the on-site visit also revealed that the Ministry of Foreign and European Affairs is involved in drafting country risk sheets. On the other hand, the Ministry of Foreign and European Affairs does not specifically follow up on foreign bribery allegations made in the local or international press.

61. As regards the Ministry of Foreign and European Affairs' role in assisting Luxembourg companies in the event of bribe solicitation and raising their awareness of foreign bribery risks, the Ministry of Foreign and European Affairs' representatives met during the on-site visit indicated that diplomatic missions have a trade and investment office to support and guide the establishment of companies in foreign markets. They indicated that these offices do not offer awareness-raising services to companies based abroad, and that they have never been aware of a situation where a company has sought advice from the Ministry of Foreign and European Affairs' officials following an illicit solicitation. They pointed out that, in this case, companies would usually choose to turn to the Chamber of Commerce and other professional organisations rather than the authorities.

62. Ministry of Foreign and European Affairs representatives met during the on-site visit indicated that there are no specific recruitment requirements or procedures for the selection (or rotation) of people to fill certain categories of positions considered particularly vulnerable to bribery. Like all public-sector employees, Ministry of Foreign and European Affairs staff can attend training courses provided by the National Institute of Public Administration. However, as mentioned above (see Section A1), these training courses are not explicitly aimed at the foreign bribery offence, and the ministry does not offer dedicated training designed to raise awareness among its staff – particularly those working abroad – of the risks of foreign bribery, nor of their role in detecting foreign bribery and raising awareness among Luxembourg companies operating abroad. Following the on-site visit, the Luxembourg authorities indicated that in 2024 the ministry would be introducing mandatory training in preventing foreign bribery for staff likely to be posted abroad.

Commentary

To date, no foreign bribery cases have been detected by Luxembourg diplomatic and consular missions. Therefore, the lead examiners recommend that Luxembourg: (i) adopt targeted training and awareness-raising measures for Ministry of Foreign and European Affairs staff on their role in detecting foreign bribery offences and raising awareness among Luxembourg companies operating abroad; (ii) establish clear and easily accessible internal reporting channels for Ministry of Foreign and European Affairs staff, with a view to encouraging confidential and, where appropriate, anonymous reporting of suspected foreign bribery; and (iii) encourage proactive detection by diplomatic and consular officials posted abroad, including through media monitoring and alerts concerning acts of foreign bribery.

5. Development aid agencies: Bribery of foreign public officials still needs to be targeted

63. Since Phase 3, the institutional framework for official development assistance (ODA) in Luxembourg has remained unchanged. Luxembourg's development co-operation activities are the responsibility of the Ministry of Foreign and European Affairs, the Luxembourg development co-operation agency, the private company Lux-Development SA or LuxDev, and the Ministry of Finance. LuxDev handles around one third of ODA. In 2022, Luxembourg's ODA contributions amounted to USD 531 million, representing 1% of its gross national income (GNI) and making it proportionally the most generous member of the OECD Development Assistance Committee.[55] In 2020, Luxembourg's bilateral ODA went mainly to Africa (47.6% of gross bilateral ODA) and Asia (16.3%).

64. Two Phase 3 recommendations (Recommendations 9(a) and 9(b)), assessed as partially implemented, are reviewed in this report (see also Section C2). Since the written follow-up to Phase 3, LuxDev has revised its code of conduct and procedures and policies for reporting and preventing illicit practices. Although, during the on-site visit, LuxDev officials noted that the code of conduct contained an explicit reference to acts of bribery and its employees' obligation to report any illegal or irregular conduct, the evaluation team regrets that no explicit reference to foreign bribery and the obligations arising from article 23(2) CCP was noted. To date, no foreign bribery cases have been detected by Luxembourg's ODA actors.

65. Since Phase 3, the existing internal whistleblowing mechanism for LuxDev staff and third parties has been strengthened through the creation of a dedicated Internet portal enabling LuxDev staff, suppliers, partners and any other beneficiaries of the agency's activities to report fraudulent acts or integrity violations, including acts of corruption (bribes). As in Phase 3, LuxDev employees and third parties can also report allegations of prohibited practices within LuxDev via an internal LuxDev e-mail address. During the on-site visit, LuxDev representatives noted, however, that these channels are rarely used, and that none of the few reports received to date have required their referral to the Public Prosecutor's Office. The panellists met during the on-site visit also confirmed that there have been no reports of foreign bribery via these internal channels since Phase 3. Recommendation 9(a) has therefore not been implemented. The adoption of the new whistleblower protection law (see Section A1) and the obligation for government administrations (and similar authorities) to establish internal reporting channels are likely to lead to changes in the organisation and number of reports within LuxDev. The relationship between LuxDev's various internal reporting channels and the obligation to report to the Public Prosecutor's Office under article 23(2) CCP will require further clarification.

66. Since Phase 3, LuxDev has strengthened its project oversight and verification mechanisms, which is a positive development. In particular, LuxDev representatives referred to *ex-ante* checks during the appraisal phase, followed by *ex-post* checks during project implementation and completion phases. If necessary, LuxDev may mandate an outsourced internal auditor or an external auditor to conduct more-in-depth investigations or inquiries into suspected fraud. Discussions during the on-site visit also highlighted a stricter oversight and verification mechanism for projects in particularly high-risk countries, to which the majority of Luxembourg's ODA is destined. However, the evaluation team regrets that no specific preventive measures to combat bribery, including bribery of foreign public officials, were reported during the on-site visit.

67. LuxDev also deploys control measures before contracts are awarded (see Section C2). These affect tenderers and operational partners in particular. With regard to the integrity of tenderers, LuxDev staff identify persons, groups and entities subject to international restrictions or sanctions, using the list of persons or entities excluded from access to EU funds or subject to a financial sanction. This list is based on the European Commission's Early Detection and Exclusion System (EDES) database, as well as the

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[55] OECD (2023), "ODA Levels in 2022 – preliminary data: Detailed summary note".

EU's sanctions map.[56] During the on-site visit, however, the representatives met noted that they did not refer to either the World Bank or the United Nations exclusion lists, which is regrettable. Recommendation 9(b) has not been implemented (see Section C2).

68. In Luxembourg, the general regulations governing public procurement form the regulatory basis applicable to public procurement related to ODA for which LuxDev acts as the contracting authority.[57] In accordance with these regulations, bidders for contracts financed by ODA, and for which LuxDev acts as the contracting authority, are required to sign a declaration of integrity certifying that they are not excluded from contracts. Among other things, each tenderer certifies that they "*have not been convicted of an offence concerning professional conduct by a judgment which has the force of res judicata*". This includes convictions for foreign bribery offences. Regrettably, LuxDev does not require tenderers to submit a declaration of integrity stating that they are not on the exclusion lists of multilateral development banks.

69. LuxDev consults the EDES to verify the accuracy of the information provided by tenderers in these declarations. However, during the on-site visit, LuxDev representatives mentioned that, in the absence of a robust means of control, this obligation to submit a declaration of integrity essentially remains declaratory in nature. Those consulted also indicated that, for the purposes of awarding contracts, only final convictions handed down by a judgment that has the force of res judicata are taken into account. Consequently, foreign non-trial resolutions concluded abroad for foreign bribery offences are neither covered nor considered in the context of declarations of integrity (see Section C4). However, LuxDev staff mentioned that judgments upon agreement, as introduced in Luxembourg law, are recognised as final convictions, although no examples were provided (see Section B5).

70. During the on-site visit, LuxDev representatives discussed the introduction of new contractual anti-bribery measures. In particular, all tender applications and contracts for services, works or goods must include a termination clause stipulating that: (i) all tenders will be rejected; or (ii) all contracts will be cancelled if it is uncovered that the award or execution of a contract has given rise to payment of unusual commercial expenses.[58] It should be noted, however, that bribing a foreign public official is not explicitly mentioned in these contractual anti-bribery measures, which the lead examiners find disappointing. These measures do not apply to LuxDev partners and their subcontractors. In the event of non-compliance with contractual commitments and the provisions of the General Regulations, LuxDev may apply a range of sanctions. However, during the on-site visit, LuxDev representatives indicated that, since Phase 3, none of these measures had been applied following the detection of practices likely to constitute foreign bribery.

71. Discussions during the on-site visit, in particular with LuxDev representatives, highlighted a limited number of awareness-raising initiatives for ODA staff, including a fraud prevention training programme for new employees, as well as ongoing training for all staff involved in high-risk procedures such as public procurement. It should be noted, however, that LuxDev did not provide the lead examiners with examples of any detailed training specifically on bribery, including bribery of foreign public officials.

Commentary

The lead examiners welcome the anti-bribery efforts undertaken by LuxDev since Phase 3, but regret that the measures put in place to strengthen integrity in public procurement remain insufficient, particularly as they do not target foreign bribery risks. In particular, the lead examiners

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[56] European Commission (n.d.), "Early Detection and Exclusion System (EDES)".

[57] General Regulations "applicable to the procurement of goods, services and works financed by the contributions of the Government of the Grand Duchy of Luxembourg or other donors and for which the Luxembourg Agency for development Co-operation (LuxDevelopment) acts as awarding authority".

[58] Ethics clauses of the General Regulations "applicable to the procurement of goods, services and works financed by the contributions of the Government of the Grand Duchy of Luxembourg or other donors and for which the Luxembourg Agency for development co-operation (Lux-Development) acts as awarding authority".

consider that Recommendation 9(b) has not been implemented. They reiterate their recommendation that Luxembourg take the necessary steps to ensure that public procurement authorities, including in the context of ODA, enforce more strictly existing provisions aimed at bolstering integrity in public procurement, and in particular those relating to the exclusion, when appropriate, of bids of economic operators who: (i) are determined to have bribed foreign public officials, considering mitigating factors (such as the implementation or improvement of integrity and compliance measures); or (ii) appear on the exclusion lists of all multilateral development banks for foreign bribery offences, noting that the Luxembourg authorities' consultation of the EDES before awarding contracts is good practice, but is insufficient to implement the Phase 3 recommendation.

Finally, the lead examiners regret that no foreign bribery cases have yet been detected by Luxembourg's ODA actors, despite internal reporting mechanisms having been strengthened. The lead examiners therefore recommend that Luxembourg adopt targeted measures to raise awareness among LuxDev staff and partners, particularly those posted abroad, of their role in detecting and reporting foreign bribery offences, particularly by including an explicit reference to bribing foreign public officials in LuxDev's integrity code. In addition, the lead examiners consider that Phase 3 Recommendation 9(a) has not been implemented. They recommend that Luxembourg take any appropriate measures to ensure that the reporting channels established under the Act of 16 May 2023 on whistleblower protection, and the reporting obligation of public officials under article 23(2) CCP, are clearly and transparently articulated so that they help the detection and reporting of foreign bribery offences while ensuring adequate protection of whistleblowers within ODA.

6. The export credit agency: Accessing relevant information remains a challenge

72. As in Phase 3, the authority responsible for supporting and promoting Luxembourg's exports is the Office du Ducroire. In Phase 3, it did not report any acts of suspected foreign bribery to the Public Prosecutor's Office, as the Office du Ducroire stated that it had never detected any suspicions of foreign bribery. The situation remains unchanged. Recommendations 9(a) and 9(b), described in the previous section and in Section C3, applied to the Office du Ducroire and remained partially implemented at the time of the written follow-up to Phase 3.

73. As mentioned in Section A2, Office du Ducroire officers have a duty to report to the Public Prosecutor's Office any acts likely to constitute a felony or misdemeanour of which they become aware in the course of their duties, under article 23(2) CCP. In the Phase 4 questionnaire, the Office du Ducroire stated that it updated its internal mechanisms by adopting a new procedure for analysing environmental, social and governance (ESG) criteria in 2022, which explicitly refers to the obligation arising from article 23(2) CCP, as well as the whistleblower protection measures.[59] There is no internal reporting channel, but the ESG procedure stipulates that in the event of suspected bribery, Office du Ducroire employees are required to inform management, who may refer the matter to the prosecutor if necessary. The employee may also refer the matter directly to the prosecutor or to the FIU. The adoption of the new whistleblower protection law (see Section A1) and the requirement for administrations (and similar authorities) to establish internal reporting channels will most certainly lead to changes in how whistleblowing is organised within the Office du Ducroire.

74. The Office du Ducroire representatives met by the evaluation team noted that the new ESG procedure applied to all applicants for insurance and financial assistance enables the Office du Ducroire to examine applicants' information and project data by analysing good governance criteria, including bribery risks. This analysis incorporates the "KYC" procedure and is carried out at the start of a transaction, when the Office du Ducroire receives a indemnity request, and in the event of a claim, when the Office du

[59] Office du Ducroire "Social responsibility"; and Office du Ducroire (2022), Analyse des critères environnementaux, sociaux et de gouvernance (ESG) [Analysis of environmental, social and governance criteria], Section B16.

Ducroire receives a request for compensation. For example, when applying for insurance, the Office du Ducroire checks that the applicant is not on the EU sanctions list, the World Bank exclusion list or the European Bank for Reconstruction and Development exclusion list. The ESG procedure also provides for the monitoring of contracts insured by the Office du Ducroire in the event that suspicions of bribery are reported in the press or by a whistleblower. The existence of internal control, ethics and compliance measures within the applicant company is only examined as part of an in-depth audit in cases where suspected bribery is reported.[60]

75. According to the authorities, the application forms for export insurance and financial support informs the insuree of the legislation in force, and requires a declaration of integrity that the insuree is not on the above-mentioned sanctions and exclusions lists, and has not been prosecuted or convicted for acts of bribery as defined by the Convention within the last five years. The Office du Ducroire may report any infringement to the appropriate authorities, and the contract or compensation may be suspended, or financial support be refused or have to be repaid. However, according to the Office du Ducroire representatives met by the evaluation team, the Office du Ducroire does not have direct access to applicants' criminal record in order to verify such a declaration.

76. In the absence of any foreign bribery cases detected by the Office du Ducroire, it seems that employees are still not sufficiently aware of the foreign bribery offence. During the on-site visit, Office du Ducroire representatives noted that its staff and companies required further training in its new ESG procedure. However, the information provided does not demonstrate the extent to which existing training courses cover the foreign bribery offence, particularly with regard to assessing bribery indicators during the Office du Ducroire's screening and in-depth audit procedures. Following the on-site visit, the Luxembourg authorities indicated that the Office du Ducroire is planning external training courses in 2024 for its staff, covering its internal procedure for detecting and reporting offences, as well as the new whistleblower protection regime.

Commentary

The lead examiners are pleased to note that the Office du Ducroire has updated its internal procedures with the adoption of the ESG procedure, which includes an explicit reference to foreign bribery, to the reporting obligation under article 23(2) CCP and to the whistleblower protection regime, implementing Phase 3 Recommendation 9(a) as far as the Office du Ducroire is concerned.

The lead examiners consider, however, that Phase 3 Recommendation 9(b) has not been implemented, and are reiterating it. Despite systematically reviewing development banks' exclusion lists, the Office du Ducroire has insufficient access to information on companies sanctioned for foreign bribery in Luxembourg. The lead examiners regret that the Office du Ducroire did not take the opportunity, when updating its internal control mechanism, to systematically take into account the existence of internal control, ethics and compliance measures within companies requiring assurance. The lead examiners reiterate Phase 3 Recommendation 9(c) in this regard [2021 Recommendation XXIV ii and iii].

The lead examiners regret that no foreign bribery cases have yet been detected by the Office du Ducroire, despite internal reporting mechanisms having been strengthened. The lead examiners therefore recommend that Luxembourg adopt targeted measures to raise awareness and train Office du Ducroire staff on their role of detecting and reporting foreign bribery offences.

The lead examiners invite the Working Group to follow up the Office du Ducroire's implementation of its obligations under the Act of 16 May 2023 on whistleblower protection.

[60] Office du Ducroire (2022), *Annual Report 2021*, Office du Ducroire, Luxembourg, p. 71.

7. Certified accountants and auditors: A framework to be perfected

77. In Luxembourg, these two professions are overseen by self-regulatory bodies: the Institute of Company Auditors (Institut des Réviseurs d'Entreprises, IRE) and the Association of Certified Accountants (Ordre des Experts-Comptables, OEC). Since 2009, approved company auditors have been supervised by the Financial Sector Supervisory Commission (Commission de Surveillance du Secteur Financier – CSSF).

78. Luxembourg has been working to strengthen its auditing and accounting normative framework since Phase 3, including by introducing a new standardised chart of accounts, which came into effect on 12 September 2019, and by incorporating a number of international auditing standards (ISA 540, ISA 315 and ISA 220). During the on-site visit, the professionals met noted that these reforms, including of the ISA standards, are likely to help with detecting accounting offences linked to foreign bribery. However, it should be noted that no foreign bribery case has been detected by an audit or accounting firm since the Convention came into force in Luxembourg.

79. In Phase 3, the Working Group recommended that Luxembourg clarify the obligations of external auditors who find suspected acts of foreign bribery to inform the company's management and, where relevant, its supervisory bodies (Recommendation 6(b)).[61] This recommendation remains unimplemented. External auditors are obliged to report suspicions of money laundering to the FIU, including those linked with the predicate offence of bribery, and in this context are subject to the prohibition on communication or "tipping-off" under article 5(5) of the 2004 Act on the fight against money laundering and terrorist financing.[62] In other words, when auditors report money suspected laundering predicated on the bribery offence to the FIU, they are not authorised to inform the company's management. During the on-site visit, representatives of external auditors stated that this prohibition prevents them from informing the company's management of the discovery of acts of suspected foreign bribery, while specifying that they can communicate more general shortcomings identified during audits to the governance bodies under International Standard on Auditing ISA 250.[63] Luxembourg authorities also noted that in light of this standard, external auditors should inform a company's governance body of suspected acts of corruption only if (i) the members of these bodies are not involved in these suspected acts and, (ii) auditors are not obliged to report to the FIU under the money laundering provisions of the 2004 Act mentioned above. In light of these competing and potentially contradictory obligations it is important that Luxembourg further clarify the articulation and enforcement of these obligations for external auditors in practice.

80. In Phase 3, the Working Group recommended that Luxembourg consider requiring external auditors to report their suspicions of bribery of foreign public officials to the law enforcement authorities (Recommendation 6(c)). While the 2016 Act on the audit profession provides that auditors have a duty of secrecy in relation to information entrusted to them in the course of their professional activity or in performing their duties, this obligation does not exist when the disclosure of information is authorised by or imposed under a legislative provision, even predating the 2016 Act. During the on-site visit, representatives of auditors noted, in this regard, that this duty to secrecy did not exist in respect of the CSSF, the Institute of Company Auditors and their representatives, when acting within the powers conferred on them by the 2016 Act. The representatives of auditors also specified that they cannot assert their professional this duty to secrecy against the Public Prosecutor's Office. Auditors are therefore authorised and obliged to report any suspicion of money laundering, including those predicated on bribery, to the Public Prosecutor's Office. However, as already noted in Phase 3, auditors do not seem proactive in implementing this reporting obligation. The on-site visit revealed that auditing professionals made a marginal number of reports to the Public Prosecutor's Office, with the number of reports specifically

[61] It should be noted that in Luxembourg law "external auditor" is translated as "statutory auditor".

[62] The Act of 12 November 2004 on the fight against money laundering and terrorist financing, article 5(5).

[63] ISA 250 addresses the consideration of legal and regulatory texts in an audit of financial statements.

concerning bribery remaining unknown. Lastly, professionals' obligation to report to the Public Prosecutor's Office does not seem to be proactively implemented by the authorities.

81. Under Phase 3 Recommendation 6(c), Luxembourg was also advised to ensure that auditors who make such reports reasonably and in good faith are protected from legal action. Since Phase 3, Luxembourg has considerably strengthened its whistleblower protection framework, which should benefit external auditors who report foreign bribery, subject to the recommendations made by the Working Group concerning the Act of 16 May 2023 (see Section A1).

82. Given that auditors and certified accountants have not detected any foreign bribery cases, it seems that these professionals still have inadequate awareness of the foreign bribery offence (see Phase 3 Recommendation 5(b)) despite the efforts of the CSSF, the Association of Certified Accountants and the Institute of Company Auditors.[64] Critically, the on-site visit also revealed that auditors and certified accountants, as well as their representative bodies, appear to largely ignore the risk of bribery by Luxembourg economic actors in their commercial transactions abroad. They also seem to lack awareness of their role in detecting the bribery of foreign public officials. Recommendation 5(b) has not been implemented.

Commentary

The lead examiners recommend that Luxembourg: (i) clarify through appropriate guidance the competing and potentially contradictory obligations of external auditors who uncover suspected acts of bribery of foreign public officials to inform the company's management and, where relevant, its supervisory bodies; and (ii) consider requiring external auditors to report any suspicion of bribery of foreign public officials to the law enforcement authorities, in application of Phase 3 Recommendations 6(b) and 6(c). Furthermore, the lead examiners regret the lack of detection of foreign bribery allegations by Luxembourg's external auditors and certified accountants, and recommend that Luxembourg adopt targeted measures to raise awareness within the accounting and auditing professions of their role in detecting and reporting foreign bribery offence, in application of Phase 3 Recommendation 5(b). The lead examiners recommend that the Working Group follow up how the provisions of the Act of 16 May 2023 on whistleblower protection are applied to the auditing profession in practice.

8. Investigative journalists: A neglected source of detection presenting certain challenges

83. Journalism, including investigative journalism, is vital in detecting foreign bribery cases. Preserving the media's role in detecting bribery goes hand in hand with an appropriate legal framework that protects the freedom, plurality and independence of the press, including its sources.[65] In Luxembourg, no foreign bribery case concluded to date has come from a press article as its (direct) source of detection. However,

[64] The CSSF has adopted the 2021 edition of the Code of Ethics of the International Ethics Standards Board for Accountants, which applies directly to all approved auditors when carrying out statutory audits. The Association of Certified Accountants states that it has shared a practical guide with all its members. The 2022 edition of this guide was accompanied by a data sheet on combating bribery, which defined the active bribery of foreign public officials. Luxembourg also reported other awareness-raising efforts by the association (such as guidelines and in-service training), although foreign bribery was not clearly established as a focus. Lastly, the Institute of Company Auditors has also developed an awareness-raising programme for its members on the need to combat money laundering and bribery. The institute has organised nearly five "Fight against corruption" seminars since 2015. The institute states that the OECD Convention and its main provisions were presented on these occasions.

[65] For a description of the importance of this detection source, see the report entitled *The Detection of Foreign Bribery*, published by the Working Group in December 2017.

publication of information in the press (mainly the international press) is often the source of suspicious transaction reports to the FIU made by financial intermediaries, which illustrates the importance of the information revealed by this sector. Representatives of the Public Prosecutor's Office met during the on-site visit did not rule out the possibility of opening an investigation on the basis of a press article, but this practice appears to be marginal, as was emphasised by civil society representatives. The State Prosecutor General's circular of October 2023 encourages prosecutors to make use of the media and the information shared by the Working Group with Luxembourg into their detection activities in relation to bribery.

84. The protective principles of press freedom and media pluralism are firmly anchored in Luxembourg's Constitution and legislation.[66] However, civil society and media representatives met during the on-site visit underlined that the national press does little to publicise cases involving economic and financial crime,[67] due to its concentrated nature, as well as its level of *de facto* proximity to political and economic power.[68] In most cases, the foreign press is the source of foreign bribery disclosures, as in *Case III*, while the Luxembourg press is reluctant to pick up on such information. Furthermore, according to representatives of the media met during the onsite visit, the prosecution of the foreign journalist who helped disclose documents in the "Luxleaks" case[69] illustrates and raises a number of concerns about a culture that is persistently unfavourable to investigative journalism focusing on economic and financial crime in Luxembourg.[70]

85. Furthermore, the civil society and media representatives met by the evaluation team unanimously stressed the difficulties of accessing official documents, particularly the lengthy access procedures. This observation was also shared in 2022 by the European Commission, which asked Luxembourg to introduce a fast-track procedure for journalists.[71] While the commission noted progress in this area in its 2023 report (adoption of a circular letter on the "rights and duties of public officials in their relationship with the press" in June 2022), those met in Luxembourg during the on-site visit say that practical difficulties remain.

86. They also criticised the speed with which the Luxembourg authorities suspended public access to the register of beneficial owners[72] following the EU Court of Justice's ruling that public access to information in this field was not compliant with EU norms.[73] The register remains accessible to journalists accredited by the Luxembourg Press Council. As a result, some actors – such as journalists working in

[66] European Commission (2023), *2023 Rule of Law Report: Communication and country chapters*.

[67] For example, only one Luxembourg journalist, working for an independent daily newspaper, is a member of the International Consortium of Investigative Journalists (ICIJ) and co-operates with the Organized Crime and Corruption Reporting Project (OCCRP).

[68] Centre for Media Pluralism and Media Freedom (2021), *Monitoring Media Pluralism in the Digital Era*, pp. 6 and 14; Reporters without Borders (2023), "Luxembourg".

[69] Arrêts sur image, (2016), "Luxleaks : le journaliste perrin sera rejugé" [Luxleaks: journalist Perrin to stand trial again]; Le Monde (2017), "Procès « LuxLeaks » : les peines des lanceurs d'alerte allégées en appel" ["LuxLeaks" trial: whistleblowers' sentences reduced on appeal].

[70] In its 2018 evaluation report, the Group of States against Corruption (GRECO) also noted that "the lack of any tradition of investigative journalism and legislation on access to public documents does not make it any easier to uncover such acts [of bribery]": *Fifth Evaluation Round Evaluation Report*.

[71] European Commission (2022), *2022 Rule of Law Report 2022: The rule of law situation in the European Union*, p. 2.

[72] The Act of 13 January 2019 institutes a register of beneficial owners.

[73] On 22 November 2022, the Court of Justice of the European Union ruled that unrestricted public access to registers of beneficial owners, which could be accessed for non-legitimate interests, was disproportionately prejudicial to owners' right to privacy and the protection of their personal data. The ruling is therefore a serious setback to European efforts to promote financial transparency and make the fight against money laundering more effective. It was these registers of beneficial owners that enabled a coalition of journalists to publish the "OpenLux" investigation.

new medias – who have a legitimate interest in this information are still denied access to the register.[74] Nevertheless, it should be noted that the 2021 Recommendation XX.i requires that these registers are accessible to law enforcement authorities but does not address potential access for journalists.

Commentary

The lead examiners are concerned that existing sources of foreign bribery allegations from the media – including information forwarded by the Working Group – are not being used to initiate investigations and prosecutions in Luxembourg. They recommend that Luxembourg ensure that more investigations are opened on the basis of credible foreign bribery allegations reported in the national and foreign press, particularly when these allegations involve major Luxembourg companies. The lead examiners also recommend that Luxembourg ensure that sufficient resources are allocated to the prosecuting authorities in their efforts to monitor the national and international press. Lastly, the lead examiners recommend that Luxembourg ensure that conditions for requests to access official documents enable the media and civil society to detect and report foreign bribery allegations.

[74] Ministry of Justice (2022), "Accès au RBE: accès rétabli en faveur des professionnels et de la presse" [Accessing the beneficial ownership register: Access re-established for press professionals].

B. ENFORCEMENT OF THE FOREIGN BRIBERY OFFENCE

B1. The foreign bribery offence

87. The foreign bribery offence is defined in article 252 of the Criminal Code (CC), which extends the application of domestic bribery provisions to the bribery of foreign public officials. Specifically, three provisions cover *active* bribery of public officials (i.e. the actions of the briber, as opposed to the bribed person): article 247(1) CC (bribery), article 249(2) CC (post hoc bribery, i.e. carried out after the act or abstention by the public official) and article 250(2) CC (bribery of judges). Criminal offences are classified as "felonies" (in French, "*crimes*"), "misdemeanours" ("*délits*"), or "contraventions" ("*contraventions*"), with felonies being subject to more severe sanctions. Foreign bribery offences are felonies, but can be reclassified as misdemeanours under certain conditions, under the practice known as "decriminalisation" or "reclassification" ("*correctionnalisation*") (see Section B6). Changes to foreign bribery offences were introduced in 2020.[75] The definition of bribery has been amended in response to a Phase 3 recommendation from the Working Group (see Section B1). The other changes are just a matter of form.

1. *Stock-taking: Elements of the offence that called into question compliance with article 1 of the Convention during Phase 3*

Elements of proof

88. During Phase 3, the Working Group recommended that Luxembourg clarify, by any appropriate means, that no element of proof beyond those set out in article 1 of the Convention is required to apply articles 247 et seq. CC. The Working Group had reservations about two aspects of foreign bribery offence, which are discussed below.

89. The definition of bribery covered offering, promising, or giving advantages "without right". In particular, the Working Group had recommended that Luxembourg clarify this concept, so that it is not interpreted more restrictively than the concept of "improper advantage" in the Convention (Recommendation 1(i)). In 2020, the expression "without right" was removed from articles 246 to 251 CC. Luxembourg has thus complied with the Working Group's recommendation. Moreover, the Phase 3 report also referred to case law requiring proof of the existence of a "corruption pact" to prove the offence, despite the fact that this concept was deleted from articles 246 and 247 CC since 2001. The Working Group had therefore recommended that the notion of "corruption pact" should not, in practice, constitute an additional element of proof that judges must seek out to prove the offence (Recommendation 1(ii)). Since Phase 3, Luxembourg case law seems to confirm that proof of a "corruption pact" is not necessary (thus

[75] The Act of 12 March 2020, Official Gazette No. 153 of 16 March 2020.

implementing Recommendation 1(ii), but these judgments nevertheless present inconsistencies that warrant in-depth analysis by the Working Group).

90. More specifically, several judgments handed down in the *False Certificates Case* contain the same passage stating that, prior to the legislative amendment to the Criminal Code on 13 February 2011[76] (which was not applicable to the allegations of the case), bribery offences were formulated in a way that required proof of a corruption pact:[77] "*there was indeed confusion between the concepts: the fact of soliciting or agreeing necessarily implied a direct link between the bribe and the consideration in return, the proof of which would have to be reported by the existence of an underlying agreement between the parties. The aim was therefore to introduce neutral elements, such as giving or receiving, which are intended to make it easier to prosecute acts of bribery and which - unlike the terms soliciting or agreeing, no longer imply an agreement between the parties*." On the other hand, a judgment by the Court of Appeal in the same case emphasises that proof of a corruption pact is no longer necessary since 2001:[78] "[...] *the reasoning of the first instance decision should be corrected insofar as it defined active bribery as being an agreement, a fixed and certain unlawful pact between two persons, whereas the corruption pact is no longer a necessary condition under Luxembourg law since the legislative amendment of 15 January 2001* [...]".

91. The Court of Appeal in the *European Official Case I* seems to indicate that some judges are still looking for proof of a "corruption pact" when it comes to proving that a bribe was actually paid. However, where it is not possible to prove the existence of such an agreement between the briber and the bribed public official, the briber may be found guilty of having offered or promised a bribe:[79] "*The offence is committed upon the mere presentation of the offer, regardless of its subsequent acceptance and the provision of the advantage.* [...] *If the corruption pact has not been concluded, the author of the proposal may nevertheless be found guilty of the offence* [...]". During the on-site visit, representatives of the Public Prosecutor's Office and a judge confirmed that proof of a "corruption pact" is no longer required. One prosecutor and one academic pointed out that Luxembourg's courts could still look for the existence of such an agreement in order to establish the intent element of the offence. However, it would not be necessary to prove all the elements of the agreement in detail, but rather to demonstrate whether an advantage was sought in exchange of a bribe. In recent domestic bribery cases, the court indeed still describes bribery as an "*unlawful agreement*" between two persons or as an "*unlawful contract* [...] *entered into with a view to the act or abstention by the public official*".[80]

92. The Working Group has expressed concerns, in the evaluation reports of other countries, in requiring proof of such an agreement, particularly given the difficulty in ascertaining the public official's intent (an element not provided for in the Convention, in contradiction with Commentary 3) as well as the details of the bribery agreement.[81] Given the lack of clarity around this concept in Luxembourg case law, the Working Group will have to follow-up as case law develops.

[76] For reference, see the Phase 3 report, paragraphs 13-15.

[77] See, for example, Luxembourg district court correctional chamber,7 November 2013, No. 2909/2013, p. 15; Luxembourg district court correctional chamber,23 April 2015 No. 1204/2015, p. 11.

[78] High Court of Justice correctional chamber, 8 July 2018, No. 304/15 X (judgment on appeal, Luxembourg district court correctional chamber of 29 January 2015 No. 354/2015), p. 32.

[79] High Court of Justice correctional chamber, 3 July 2013, No. 361/13 X, p. 10.

[80] Luxembourg district court correctional chamber, 24 October 2019, No. 2539/2019, p. 8. See also Luxembourg district court correctional chamber, 16 March 2021, No. 780/2023, p. 138.

[81] OECD Working Group on Bribery (2012), Phase 3 Report – France, paragraph 30; OECD Working Group on Bribery (2022), Phase 4 Report – Italy, paragraphs 113-116 and Recommendation 10(b).

The notion of foreign public official

93. Article 252 CC lists the categories of foreign public officials whose bribery is punishable in Luxembourg. This provision does not explicitly mention employees of a public enterprise. During Phase 3, Luxembourg prosecutors indicated that bribery offences would apply to these employees. For judges, the most important thing is to identify the position held by the employee. If the employee of a public enterprise exercises a "public service mission", they could be treated as a public official. The Working Group nevertheless decided to follow up this point, in the absence of case law.

94. The Luxembourg authorities did not mention any judgments dealing with bribery of employees of a public enterprise since Phase 3. On the other hand, a judgment handed down in the *False Certificates Case* partially clarifies this point, confirming that a private enterprise can be considered to be entrusted with a public service mission for the purposes of article 247 CC:[82] "*the person 'entrusted with a public service mission' refers to someone who, despite not having decision-making power or authority deriving from the exercise of public authority, is entrusted with performing acts or exercising a function intended to be in the general interest. <u>This may be any natural or legal person carrying out such a public service mission, including private entities, as long as they perform</u>, on a temporary or permanent basis, voluntarily or at the request of the public authorities, <u>a public service of some kind.</u>*" *A fortiori,* public enterprises as defined in Commentary 14 on the Convention could well be considered to be entrusted with a public service mission. It should be noted, however, that Commentary 15 explains that an official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market. This presumption would not apply in Luxembourg, where the onus is on the Public Prosecutor's Office to prove that the official in question is entrusted with a "public service mission".

95. In a foreign bribery case, however, the Public Prosecutor's Office does not seem to be required to provide proof of the foreign country's law with regard to whether the official of a local company has the status of public official (which would contravene Commentary 3 on the Convention). During the on-site visit, prosecutors explained that the notion of "person in charge of a public service mission" is a factual notion that can be proven by any means: although prosecutors ask through MLA documents attesting the bribed person's status at the time of the acts, they can also refer to open sources, and judges will ultimately rely on Luxembourg's concepts to conclude whether the bribed person is responsible for a "public service mission". This issue will need to be followed up as case law evolves.

Exemption from liability in case of coercion

96. Coercion excludes criminal liability (articles 71-2(1) CC: "*a person who has acted under the influence of force or coercion which they were unable to resist is not criminally liable*"). Concerned that this notion might include the fact that the immediate perpetrator had been "coerced" by a foreign public official to pay a bribe in order to obtain or keep a contract, the Working Group had decided to follow up this issue, in view of the lack of consistent case law in this area. It had also recommended that Luxembourg ensure that coercion does not cover cases where a bribe is sought and cannot be considered a ground for the non-liability of the legal person (Recommendation 2(b)(ii)). This recommendation was considered partially implemented in the written follow-up to Phase 3, as Luxembourg had referred to long-standing case law equating "coercion" with *force majeure*.

97. During this evaluation, the Luxembourg authorities provided two more recent rulings confirming the particularly strict conception of "moral coercion" as a cause for exemption from criminal liability. One ruling specified that a reduction in freedom of decision alone would not be sufficient for coercion to be

[82] Luxembourg district court correctional chamber, 4 May 2017 No. 1350/2017, p. 21. In this case, a person working for a Portuguese private-law entity was considered a foreign public official because a Portuguese government decree-law had given this entity the exclusive prerogative of issuing EEC certifications in accordance with a European directive.

considered a cause of non-liability:[83] "*the official must have acted under the influence of the fear of an evil such that, in the total obliteration of conscience, the complete annihilation of free will, the commission of the felony or misdemeanour appeared to them to be absolutely indispensable. Consequently, a reduction in freedom of decision does not constitute moral coercion*." Another judgment concluded that economic coercion "*does not constitute an irresistible coercion that would likely justify an illegal economic activity*".[84] In this case, the defendant, accused of carrying on an activity without authorisation, invoked this defence, arguing that halting construction would have had serious consequences for the developer and future buyers.

98. These decisions do not directly concern acts of bribery. They nevertheless confirm the restrictive interpretation of this ground for exemption from criminal liability. During the on-site visit, prosecutors confirmed that giving in to the demands of a foreign public official and paying a bribe as a result of severe economic constraints should not fall within the scope of "moral coercion" and thus exonerate the payer from liability.

2. New issues concerning compliance with article 1 of the Convention arising in practice from foreign bribery cases handled since Phase 3

99. As mentioned in the Introduction, since Phase 3, the Luxembourg authorities have dealt with two cases resulting in convictions for foreign bribery and for trading in influence of foreign public officials, respectively. Another foreign bribery case is at the prosecution stage, but for alternative offences. These cases raise the following issues under article 1 of the Convention: (i) the use of the alternative offence of trading in influence; (ii) the restrictive interpretation of the act of office of the public official; (iii) the need to identify the public official who is the recipient of the bribe; and (iv) the possibility that the intent element of the offence also cover *dolus eventualis* or wilful blindness.

Using the alternative offence of trading in influence

100. Active bribery and trading in the influence of public officials are covered by the same provision of the Criminal Code (article 247). Both offences share the definition of offering, promising, or giving a bribe to a public official, and carry the same sanctions for individuals. They differ in terms of the briber's purpose that:

i. Either the public official "performs or refrains from performing an act of his or her office, mission, or mandate, or facilitated by his or her office, mission, or mandate" (bribery, article 247, 1° CC).

ii. Either the public official "abuses his or her actual or presumed influence in order to obtain distinctions, employment, business, or any other favourable decision from a public authority or administration" (trading in influence, article 247, 2° CC).

101. The Luxembourg authorities appear to frequently use the offence of trading in influence as an alternative to active bribery (in the cases examined, the Public Prosecutor's Office often presents an alternative formulation of the indictment, prosecuting the offence of bribery of public officials as a principal offence and trading in influence as a subsidiary offence. This seems to be due to a narrow interpretation of some aspects of the active bribery offence, which are analysed further in the sections below. This difficulty in prosecuting the offence of bribery as opposed to trading in influence could give rise to problems of compliance with the Convention.

[83] High Court of Justice criminal chamber, 13 July 2016, No. 22/16, p. 69.

[84] High Court of Justice correctional chamber, 16 November 2016, No. 549/16 X, p. 5 (also citing High Court of Justice correctional chamber, 11 March 2013, No. 139/13 VI, concluding that commercial pressure exerted by a salesperson does not constitute coercion within the meaning of articles 71-2 of the Criminal Code).

102. More specifically, trading in influence does not cover all possibilities of foreign bribery within the meaning of the Convention. In the context of trading in influence, the briber wants the public official to abuse his or her influence "in order to obtain distinctions, employment, business, or any other favourable decision from a public authority or administration". This wording is narrower than article 1 of the Convention, according to which the briber aims to "obtain or retain business or other improper advantage". The notion of "any other favourable decision" does not appear to cover, for example, a simple acceleration of procedure, the disclosure of confidential information concerning a call for tenders, or an unfavourable decision taken against a competitor of the company that paid the bribe. In addition, the offence is limited to the purpose of obtaining benefits from a public authority or administration. This could exclude, for example, benefits obtained from a public company. Finally, the sanctions for trading in influence are less severe. For natural persons, trading in the influence of public officials is punishable by the same sanctions as active bribery (article 247 CC), but the maximum fine applicable to legal persons may be considerably lower (see Section C4). Trading in influence between private individuals (article 248 CC, covering bribes offered to a private individual to exert their influence to obtain benefits from a public authority or administration) is a misdemeanour that carries significantly less severe penalties for both natural and legal persons. This offence would be used in particular when bribery through intermediaries is difficult to prove.

103. The Working Group examined the use of alternative offences to foreign bribery in other evaluations.[85] It recognises the merits of law enforcement authorities taking a pragmatic approach, using these offences to overcome practical obstacles to the application of the foreign bribery offence and thus ensuring that this offence is tackled effectively. The use of charges that are less demanding in terms of establishing evidence often enables better use of law enforcement resources and can also reduce procedural delays. Nevertheless, for the purposes of the implementation of the Convention, these alternative offences should be applied in accordance with the principle of functional equivalence. This principle does not seem to be met in this case, neither in terms of the scope of application of the trading in influence offence, which is narrower than that of Article 1 of the Convention, nor in terms of the applicable sanctions, which are not entirely compliant with the conditions of Article 3 of the Convention.

Restrictive interpretation of the act of office the public official

104. Article 1(4)(c) of the Convention specifies that to "act or refrain from acting in relation to the performance of official duties" includes any use of the public official's position, whether or not such use falls within that official's authorised competence. The cases reviewed adopt a more restrictive interpretation of the concept of an act of office the public official (or facilitated by the office). In the *False Certificates Case*, the offence of bribery was retained because specific acts performed by public officials for the benefit of the defendants could be identified. On the other hand, when it is not possible to identify such specific acts, Luxembourg courts seem more inclined to retain the offence of trading in influence.

105. In *European Official Case I*, the defendant was accused of having offered a bribe to the public official "so that he would abuse his position as the official responsible for examining credit applications [...] with a view to helping grant these applications and to helping iron out any difficulties that might arise in the course of the procedure for granting these loans". The defendant was acquitted by the court of first instance, which concluded that the official in question had no decision-making power in granting the loans the defendant wished to influence. The purpose of the bribery had therefore not been proven. The Court of Appeal overturned the decision, but convicted the defendant of trading in influence rather than bribery, concluding that the official "while not having decision-making power, was nevertheless in a position to influence the decision-making process within the bank".[86] The following passages from the judgment confirm that the court uses the offence of trading in influence when it is not possible to identify a specific

[85] See OECD Working Group on Bribery (2018), Phase 4 report – Germany, paragraph45-47; OECD Working Group on Bribery (2021), Phase 4 Report – France, paragraphs 119-121.

[86] High Court of Justice correctional chamber, 3 July 2013, No. 361/13 X, p. 10.

act by the public official that would immediately satisfy the briber by providing the desired advantage:[87] "under application of article 247.2°, bribery does not relate to an act that is within the function of the bribed, but to the influence that the bribed is willing to exert to make a third party perform this act [...] In trading in influence, the individual addresses a public official who is not in a position to immediately satisfy him/her[...]"

106. The concept of an act of office as interpreted by the Luxembourg courts appears to be much narrower than under the Convention. In this case, the official was responsible for processing credit applications. Giving these applications preferential treatment may well be considered to be acting in an official capacity within the meaning of the Convention. Conversely, the judgment seems to consider that only the final decision to grant the credit could constitute an act of office within the meaning of the bribery offence (article 247, 1° CC).

107. During the on-site visit, judges and prosecutors confirmed that the offence of active bribery can only be retained if proof is provided that the bribed public official has exercised a real influence in affording an advantage to the briber. This is unlike trading in influence, for which it is sufficient to prove a supposed influence. One judge also highlighted that the offence of bribery will be used when the public official has a direct opportunity to intervene in granting an advantage. If an intermediary is involved, for example, the offence of trading in influence will be preferred. This contradicts Commentary 19 on the Convention, according to which foreign bribery includes the case where a senior official uses his or her office (even acting outside his or her competence) to make another official award a contract to a company. More generally, the restrictive interpretation of the concept of an act of office runs counter to a principle, well established by the Working Group, according to which "for the purposes of foreign bribery, it does not matter whether a foreign public official is in fact in a position to influence [the] matter for which the bribe was paid".[88] In foreign bribery cases, the prosecution should focus on the intent of the briber. The public official's willingness or ability to accept or give in to the offer of a bribe should not be a consideration.

Identification of the public official receiving the bribe and bribery through intermediaries

108. According to information obtained during the on-site visit it appeared that in order to prove the offence of foreign bribery, the Luxembourg Public Prosecutor's Office must identify the *specific* foreign public official who is the intended recipient of the bribe. This interpretation of the foreign bribery offence would be an obstacle to prosecuting acts of bribery committed through intermediaries. The Working Group has already stressed in other country evaluations that the offence of bribery should not require proof of an intention to bribe a particular foreign public official, i.e., that the briber knows the identity of the recipient of the bribe.[89] At the time of finalising this report, representatives of the Public Prosecutor's Office underlined the need to make a distinction between the material element and the intent element of the offense. In order to prove the material element, prosecutors only need to prove that the advantage was for a public authority. In cases of corruption involving intermediaries, it is nevertheless necessary to connect the intermediary to the public authority in question. In contrast, in order to prove the intent element of the offense, it is not necessary to prove that the briber knew the identity of the recipient of the bribe. The Working Group should follow up on the application of these principles as case law and practice develop.

Dolus eventualis and bribery through intermediaries

109. The Working Group has repeatedly asserted that the intent element of the foreign bribery offence should also include *dolus eventualis* or wilful blindness. These notions refer to circumstances in which a

[87] High Court of Justice correctional chamber, 3 July 2013, No. 361/13 X, p. 9-10.

[88] OECD Working Group on Bribery (2017), Phase 4 Report – Finland, paragraph 86 and Recommendation 3(iii).

[89] OECD Working Group on Bribery (2012), Phase 3 Report – Australia, paragraph 16 and Recommendation 2(b); OECD Working Group on Bribery (2013), Phase 3 Report – Portugal, paragraph 33 and Recommendation 1(a)(ii).

person accepts a risk or deliberately omits to make enquiries, not caring to ascertain whether sums paid would constitute bribes. The possibility of punishing these forms of criminal intent is particularly important in enabling the authorities to prosecute bribery committed through intermediaries.[90] In Phase 1, the Luxembourg authorities had pointed out that *dolus eventualis*, "in the sense of imprudence, negligence, or endangerement", does not apply in cases of bribery.[91] However, the report did not address the question of whether the intent element of *dolus eventualis* could be applied to the offence of bribery, not in the sense of simple negligence or imprudence, but rather in the sense of recklessness or wilful blindness. In the *False Certificates Case*, the foreign public official was bribed both directly and through intermediaries. Two defendants, who had paid large sums of money to an intermediary (EUR 1 000 and EUR 4 000 respectively), were acquitted of foreign bribery because there was "*a doubt as to the degree of knowledge* [...] *of the exact procedure for obtaining*" the certificate or establishment permit. The court concluded that the Public Prosecutor's Office had failed to present positive evidence that each defendant "*knew that the money they were paying was intended to bribe a public official or any other person entrusted with a public service*".[92] It was not established, however, that the Public Prosecutor's Office had put forward (or at least could have put forward) an argument based on *dolus eventualis* or wilful blindness.

110. Luxembourg prosecutors reported a case in which the defendant was convicted of concealment and money laundering on the basis of *dolus eventualis*.[93] According to this decision, "*dolus eventualis, i.e. the fact of having serious grounds to doubt the lawful origin, is sufficient to constitute conduct with criminal intent*" for the purposes of concealment. Similarly, for money laundering, the court concluded that the circumstances of the case "*should have aroused the suspicions of any normally vigilant person*" as to the illegal origin of the funds. During the on-site visit, a judge and prosecutors indicated that the general intent element of the bribery offence should cover *dolus eventualis*. However, they were not aware of any bribery convictions on this basis.

Commentary

The lead examiners welcome the fact that Luxembourg has removed the notion of offering, promising or giving advantages "without right" from the definition of bribery in the Criminal Code, thereby complying with Phase 3 Recommendation 1(i). They also note that since Phase 3, case law has confirmed the restrictive interpretation of the "moral coercion" defence in Luxembourg law.

The lead examiners congratulate the Luxembourg authorities on having obtained convictions for bribery of foreign public officials for the first time since the Convention came into force. They note, however, that cases dealt with since Phase 3 raise new questions concerning compliance with article 1 of the Convention. More specifically, the lead examiners recommend that Luxembourg clarify by any appropriate means that, for the purposes of foreign bribery it is not necessary to prove that a foreign public official is in fact in a position to influence the matter for which the bribe was paid.

The lead examiners also note that the Luxembourg authorities seem to be using the offence of trading in influence as an alternative to the offence of active bribery. While this pragmatic approach may be welcome when it allows the authorities to overcome practical obstacles to enforcing the foreign bribery offence and thus to ensure that the fight against this offence is effective, it raises

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[90] See, for example, OECD Working Group on Bribery (2019), Phase 3 Report – Latvia, paragraph 31 and Recommendation 1(a); OECD Working Group on Bribery (2020), Phase 2 Report – Costa Rica, paragraphs 197-201 and Recommendation 12(a); OECD Working Group on Bribery (2022), Phase 4 Report – Italy, paragraphs 117-121 and follow-up issue 20(a).

[91] OECD Working Group on Bribery (2001), Luxembourg: Review of Implementation of the Convention and 1997 Recommendation, p. 3.

[92] Luxembourg district court correctional chamber, 7 November 2013, No. 2909/2013, pp. 26 and 33.

[93] High Court of Justice correctional chamber, 14 May 2019, No. 173/19 V, pp. 4 and 12.

problems of conformity with the Convention, both in terms of the foreign bribery acts that should be covered and the applicable sanctions. The lead examiners therefore recommend that Luxembourg examine the potential causes for this tendency to use alternative offences instead of the foreign bribery offence, and on the basis of this analysis consider either criminalising foreign bribery in a sufficiently broad manner, or extending the offence of trading in influence so that the constituent elements of the offence and the applicable sanctions conform with the Convention.

The lead examiners also suggest that the Working Group follow up on the following elements as practice develops, given the lack of established case law on these points: (i) whether courts still require proof of a corruption pact; (ii) whether the foreign bribery offence covers any employee of a foreign public enterprise and whether the definition of "person entrusted with a public function" is autonomous (i.e. does not require proof of the foreign law); (iii) the extent to which it is necessary to identify the public official to whom the bribe is destined, especially in corruption cases involving intermediaries; and (iv) whether the foreign bribery offence can be established through the intent element of dolus eventualis.

B2. Investigative and prosecutorial framework

111. Luxembourg organises investigations and prosecutions based on a tripartite division of power between the State Prosecutor (hereafter the prosecutor), investigating judges and the judicial police. Judicial police officers carry out preliminary investigations, either on the instructions of the prosecutor or on their own authority, in accordance with article 46 of the Code of Criminal Procedure (CCP). The investigating judge can only inform and carry out a preparatory investigation after having received an indictment from the prosecutor or a civil complaint (article 28 CCP). Unless there are special provisions, preparatory investigations are mandatory for felonies (and therefore for foreign bribery) but optional for misdemeanours ("*délits*") (article 49 CCP).

1. Tripartite organisation of prosecution and investigation services

Judicial police

112. The Judicial Police Service or judicial police is part of the Grand Ducal police. The Judicial Police Service carries out investigations into more serious or particularly complex offences. It is organised into five departments, including the Economic and Financial Crime Department, which has several units[94] responsible for combating financial crime and investigating foreign bribery allegations.

113. Since the Convention came into force in Luxembourg, the judicial police have not helped uncover any foreign bribery allegations, even in the course of preliminary investigations into related offences (such as money laundering) that could uncover acts of foreign briber. During the on-site visit, representatives of the judicial police identified international rogatory commissions, the media and information exchanges between competent authorities (notably from the CSSF and the tax authorities) as sources likely to trigger financial investigations. These detection sources have not, however, triggered any foreign bribery investigations, as specified in Section A, despite the fact that some international press articles have reported foreign bribery prosecutions or investigations targeting Luxembourg companies. It has also not been established that the specialist units of the Judicial Police Service have mechanisms for monitoring the both national and international press for detection purposes. Following the on-site visit, the authorities noted that the Judicial Police Service relies heavily on information shared by Europol, but did not specify

[94] These include the Economic and Financial Offences Unit; the Anti-Money Laundering Unit, which combats money laundering and recovers criminal assets; and the International Mutual Legal Assistance Unit, which is responsible for executing assistance requests from foreign judicial authorities.

the manner in which this information is useful in detecting foreign bribery. Investigators monitor the national and international press rather on a voluntary basis. They participate in a number of European and international networks, which also gives them access to relevant information from their counterparts.

The Public Prosecutor's Office

114. The Public Prosecutor's Office receives complaints and allegations, particularly from victims of offences or from the police. It decides independently on the action to be taken, based on the principle of prosecutorial discretion (see below).

115. Prosecutors are able to consult enforcement data gathered by the Working Group, and to use this information for investigation and prosecution purposes. They may pass this information on to the police services if it contains evidence suggesting that an offence has been committed or participated in that falls within the jurisdiction of the Luxembourg authorities. Such communications may take place upstream, for the purposes of opening an investigation. In theory, there is nothing to prevent the information from being communicated during ongoing proceedings, to shed light on the international dimension of complex cases. During the on-site visit, prosecutors regretted that the foreign bribery allegations listed by the Luxembourg Working Group were very old, ruling out any new investigative measures. The authorities state that the daily press review distributed to Public Prosecutor's Offices ensures that bribery allegations in the media are proactively monitored, and this information can be used for investigation and prosecution purposes. Lastly, they stress that the Economic and Financial Prosecutor's Office is also alerted when the Judicial Press Service or the Government Information and Press Service detect articles on bribery allegations involving Luxembourg. Only one case referred to in this report appears to have been initiated on this basis.

Investigating judges and the Chambre du Conseil of the district court

116. The investigating judge is a statutorily independent judge, attached to a specific court. They do not judge cases but rather conduct the criminal investigation phase, known as a judicial investigation (or preparatory investigation, according to other terminology). The Investigation Offices at the Luxembourg and Diekirch district courts are staffed by investigating judges. The investigation, which suspends the statutory limitation period for public prosecution, consists of an exculpatory and incriminatory investigation to determine whether or not there is sufficient evidence to bring the accused to stand trial before a court. Once the investigation appears to be complete, the investigating judge issues an order closing the investigation. They then forward the case to the prosecutor, who is responsible for submitting their conclusions to the Chambre du Conseil of the district court, either to refer the case back to the trial court if there is sufficient evidence of guilt, or to dismiss the case. Any civil parties may also apply to the court in accordance with article 127 CCP. Chambre du Conseil decisions may be appealed before the Chambre du Conseil of the Court of Appeal. In matters of mutual legal assistance, the Chambre du Conseil automatically examines the "formal" regularity of procedures in cases where such assistance involves implementing coercive measures (see Section B4).

2. Resources, specialisation and prioritisation: Major challenges

Despite recent efforts, economic and financial justice is far from adequate

117. In Phase 3, the Working Group recommended that, for investigations and prosecutions of foreign bribery cases, Luxembourg ensure that the level of resources, training and specialisation within the police force enable effective investigation and prosecution (Recommendation 4(c)). This recommendation was assessed as partially implemented at the time of the written follow-up to Phase 3, as the budget and number of police officers had increased.

118. In their responses to the Phase 4 questionnaires, and confirmed during the on-site visit, the authorities provided several sets of statistical data illustrating the Judicial Police Service's lack of resources. For example, the Economic and Financial Offences Unit – responsible for any foreign bribery investigations – had 21 investigators in 2018 and 23 in 2022 when over the same period, the number of cases to be addressed increased by 101%, while pending cases (for which processing has not officially begun) increased by 178%. The latest annual report from the Ministry of Justice[95] confirms this trend. In 2021, the minister of Internal Security emphasised that the judicial police urgently needed to increase personnel and have a modern and adequate infrastructure.[96] The Working Group is concerned about the judicial police's heavy workload in its main areas of expertise, in the context of an increasing number of referred offences and mutual legal assistance requests. The Working Group is also concerned about the ability of the judicial police to conduct and handle financial investigations effectively, within the set time limits (risk of evidence disappearing and expiry of the statutory limitation period, growing difficulties in recovering assets, etc.). During the on-site visit, prosecutors identified the lack of police resources and specialisation (and the rotation of staff in this profession) as key issues in financial criminal policy. To address the workload, efforts to recruit specialists remain a strategic priority for the Judicial Police Service.[97]

119. This lack of resources and ever-increasing workload also affects judges and prosecutors in Luxembourg, as illustrated by the Ministry of Justice's activity reports.[98] These underline the need for resources to be strengthened substantially, and for staff to be re-allocated or staffing structures reorganised. The Ministry of Justice cites the situation at the Diekirch Public Prosecutor's Office as an example, stating it "*does not at present allow us to implement a real prosecution policy*". Furthermore, in 2022, the Superior Court of Justice published a report on the attractiveness of the judicial office, the so-called "Wiwinius" report.[99] The report stresses the shortage of staff and notes a form of "malaise" within the judiciary. This obvious lack of resources, clearly identified by the judges and prosecutors themselves during the on-site visit, is detrimental to criminal proceedings, heavily affecting the length of investigations and preparatory investigations, and the level of sentences handed down (see Section B2). In the *False Certificates Case*, exceeding the reasonable time limit was one of the reasons for reduced sentences. There also seems to be a considerable delay between the pre-trial judicial investigation closing and the request for referral to the Public Prosecutor's Office. As in Phase 3, the decision on whether or not to prosecute may be affected by the anticipation of excessively long procedural delays, which may result in insignificant sanctions due to failure to comply with the "reasonable time limit". Judges and prosecutors are encouraged to ensure that this time limit is respected in bribery cases, particularly during the preparatory investigation phase. At the time of finalising this report, Luxembourg authorities referred to the new government's coalition agreement for 2023-2028, dated 20 November 2023, which confirms in

[95] Government of the Grand Duchy of Luxembourg, Ministry of Justice (2021), *Rapport d'activité 2021* [Activity Report 2021].

[96] Government of Luxembourg (2021), "Henri Kox a présenté les défis, projets et priorités de la police grand-ducale" [Henri Kox presents the challenges, projects and priorities of the Grand Ducal police].

[97] Grand Ducal police (2021), *Rapport d'activités 2021* [Activity Report 2021].

[98] Government of the Grand Duchy of Luxembourg, Ministry of Justice (2021), *Rapport d'activité 2021* [Activity Report 2021]. Since 1 April 2023, the Luxembourg Investigation Office has been staffed by 16 judges and 16 clerks, including 8 investigating judges for the Economic and Financial Crime Department.

[99] Government of the Grand Duchy of Luxembourg, Ministry of Justice (2022), *Rapport sur l'attractivité de la fonction de magistrat* [Report on the Attractiveness of the Judicial Office]: "Although the Luxembourg judges and prosecutors' degree of unease is not comparable to their French colleagues, certain letters sent over the last two years nevertheless show that, for some, the situation is becoming untenable: notably [the letters] from the two State Prosecutors and from the Director of the Investigation Office ... to the State Prosecutor General and to the Minister of Justice, requesting more staff. For example, the Luxembourg State Prosecutor informed the undersigned that in the 2021 calendar year, the equivalent of five and a half tasks were missing, the President of the Administrative Court indicated that only 11.5 positions out of 18 are operational, and the President of the Luxembourg district court has been forced to close several chambers."

particular an increase to the resources available to the judicial police and judicial authorities to ensure effective application of the law. A Bill (PL8299) was also introduced in August 2023.[100]

120. The heavy workload of judges in the Chambre du Conseil is another example of these difficulties. As previously mentioned, all investigations are submitted to the Chambre du Conseil for review once the preparatory investigation has been completed. This often translates into considerable delays between the conclusion of the preparatory investigation and the prosecution stage: the annual justice system report (2021) mentions delays of more than 12 months in cases, while the FATF report (2023) notes delays of 18 months on average for money laundering cases. At the time of writing this report, the Chambre du Conseil had three judges and three clerks to carry out a very wide range of tasks. The number of orders issued by the Chambre du Conseil of the Luxembourg district court, for example, rose from 3 796 in 2017 to 5 125 in 2021, according to figures in the annual justice report (2021). This figure does not reflect the increasing complexity of the cases handled. It should also be noted that for each case referred to the Chambre du Conseil, the Public Prosecutor's Office is required to formulate a written indictment or to appear before the court to make oral submissions, which represents a significant workload for the prosecutors.

121. The number of requests for international mutual assistance involving enforcement obligations addressed to Luxembourg by foreign judicial authorities continues to rise (from 741 in 2020 to 894 in 2021, i.e. an increase of 20%, see Section B4). Insofar as the Act of 8 August 2000, as amended, on international mutual legal assistance in criminal matters requires such requests to be processed as a priority (see below), and insofar as these cases mainly concern economic and financial crime and are generally very complex, processing these cases accounts for a significant proportion of the workload of judges and prosecutors at the Public Prosecutor's Office, the Investigation Office, the Chambre du Conseil, and of Judicial Police Service investigators. As a result, these spend more than a quarter of their time (on average) executing international rogatory commissions, to the detriment, in their view, of investigations relating to national cases. While welcoming the diligence with which the Luxembourg authorities execute mutual assistance requests, including those regarding bribery offences, the examiners note that this may have a potentially negative impact on detecting and prosecuting domestic cases of foreign bribery of public officials.

122. Luxembourg's justice system is clearly under-resourced, even in comparison with other European countries, as highlighted by the latest report from the European Commission for the Efficiency of Justice (CEPEJ).[101] This situation is particularly critical in the field of economic and financial justice, and at all stages of the criminal justice chain, as the local authorities emphasised and confirmed. In an interview in 2020, the deputy public prosecutor at Luxembourg's Economic and Financial Prosecutor's Office stated: "*The balance in terms of available resources is clearly in favour of defendants in economic and financial criminal cases*."[102] The FATF report adopted in September 2023 highlights that "*throughout the review period, competent authorities relied heavily on the dedication and professionalism of their personnel to overcome issues pertaining to the increasing volume of ML [money laundering] investigations and incoming MLA [mutual legal assistance] requests. Despite Luxembourg's initiatives to increase resources*

[100] The Bill proposes to create a pluriannual programme, over six years (2023/2024 to 2028/2029), for recruiting judges and prosecutors in Luxembourg to address increasing workloads due to demographic and economic growth. It aims at reducing judicial delays and improving access to justice and plans to create 194 new positions for judges and prosecutors within different judicial services. The bill also aims to improve the attractiveness of judicial careers by creating the majority of these new positions in middle level management.

[101] According to the CEPEJ's 2022 report (European Judicial Systems: CEPEJ Evaluation Report – 2022 Evaluation Cycle), Luxembourg has a very high judicial system budget per capita, but this represents only 0.17% of GDP, compared with the average of 0.33% of GDP for the 47 countries evaluated.

[102] Abdelilah, A. (2020), "La justice financière manque de soldats" [Financial justice lacks soldiers].

among investigative and judicial authorities, mainly within SPJ [Judicial Police Service], these authorities remain insufficiently resourced."

123. Many discussions about resources took place during the on-site visit, and the examiners noted that the authorities are increasingly aware that the judicial police and the judiciary must be provided with additional resources. The "Wiwinius" report highlighted the need to remedy this shortfall and to make the profession of judges and prosecutors more attractive, including by reducing the workload and improving working conditions and career prospects.

124. In terms of solutions, the government authorities' recent strategy has been two-pronged: i) to relieve judges and prosecutors of some tasks that law clerks ("*référendaires de justice*") can perform; and ii) to adopt a new legal framework for recruiting and training junior judges and prosecutors ("*attachés de justice*"). Between 2022 and 2024, the judicial and administrative authorities opened the recruitment process of up to 50 junior judges and prosecutors, of which 26 have been recruited. At the end of 2022, it was announced that 40 law clerk positions would be allocated and deployed over several years to the ordinary courts and the FIU, within the framework of implementing the Act of 23 December 2022 on law clerks.[103] The position of law clerk is open to nationals of EU member states, making it possible to recruit jurists or other specialists who do not meet the Luxembourg nationality requirement (a condition set out in the ordinary law on the civil service, including the judiciary). Law clerks provide important support to judges and prosecutors, who retain the exercise of public authority. All the panellists viewed this development very favourably during the on-site visit, and it deserves to be commended. Some panellists favoured increasing recruitment among private-sector professionals, and it seems that this change is under way. However, it is essential that efforts made at one point in the criminal justice chain are not isolated efforts, which would risk further destabilising the delicate balance of Luxembourg's economic and financial justice system. In fact, other breaking points would emerge if the increase in Judicial Police Service or Chambre du Conseil staff numbers would not keep pace with that of the Public Prosecutor's Office, hindering the objective of a more effective and efficient criminal justice system.

125. While the examiners welcome the pragmatic measures (such as recruiting law clerks) and innovative solutions recently adopted, finding structural solutions to the lack of resources and means for bringing about economic and financial justice remains crucial. These solutions must be backed by genuine political will, while taking into account the challenges posed by Luxembourg's limited size and human capacity. Given the growing workload of all actors involved, a model should be established that also takes this into account. The prosecutors met during the on-site visit showed great dedication and expertise in financial crime, and an ability to work as a team and share information to maximise available resources. Nevertheless, the framework in which they operate must be analysed and reconsidered. For example, the role of the Chambre du Conseil in financial crime cases could be reviewed, with its management of tasks and cases prioritised, in order to prioritise particularly strategic cases[104] and make the handling of financial cases a smoother process. The annual report on the justice system (2021) calls on the authorities to reflect on this procedure, which "*sometimes leads to totally disproportionate additional delays, and hence to more than unreasonable delays in hearings*". The organisation of Public Prosecutor's Office, and also the way in which criminal cases are handled, must be designed in such a way that prosecutors can devote themselves to the most serious and sensitive cases, the most complex investigations and, more generally, to all criminal law enforcement issues requiring legal expertise. According to the annual report on the justice system (2021), "*prosecutors at the Public Prosecutor's Office must not be in a situation in which most of their available time is taken up implementing medium- or low-level criminal responses to an ever-increasing number of cases. Such a situation prevents them from devoting their time to prosecuting more serious and/or complex behaviours that require an effective response within a reasonable time limit*". The

[103] Search results for "Luxembourg législatif pour la fonction de référendaire" [the role of the law clerk in Luxembourg].

[104] See also the conclusions of the 2023 FATF Report, p. 39.

civil society representatives met in Luxembourg unanimously regretted the slowness of the economic and financial justice system.

The challenges of specialisation and training

126. Specialisation among prosecuting authorities is a further issue that warrants consideration. The Luxembourg Public Prosecutor's Office has not established a special unit to investigate foreign bribery but has the necessary expertise within the Economic and Financial Offences Unit, which deals with this type of case in general, including the offence of bribery. The prosecutors in this unit have experience in this field, even if the limited number of foreign bribery investigations and prosecutions is not enough to maintain a pool of expertise in this area. Nevertheless, the prosecutors consulted during the on-site visit showed great understanding of their cases, including in foreign bribery cases.

127. In terms of training, the Act of 18 July 2018 on the Grand Ducal police introduces measures relating to recruiting members of the police force, as well as the obligation to train its members. These measures (basic training, continuous training, etc.) cover a very wide range of subjects, and training focused on foreign bribery is not prioritised. It should be noted that Luxembourg does not have its own training institution for the judiciary due to the small number of judges and prosecutors. The authorities have therefore made arrangements for Luxembourg judges and prosecutors to attend training courses abroad. These can attend specialised training courses in financial matters offered by the French National School for the Judiciary (around 100 participating per year), the European Judicial Training Network (around five per year) and the Academy of European Law (around 25 per year). This ensures that they can acquire the skills required in the field of foreign bribery, even if these courses are not based on the Luxembourg legal framework. Judges and prosecutors continue to have access to targeted training courses abroad (such as training sessions and conferences on the Foreign Corrupt Practices Act). Within this framework it seems important that training activities dealing with investigating and prosecuting legal persons should be provided to them given the complexity and challenges of these types of cases.

Prioritisation of foreign bribery yet to be defined

128. Recommendation 4(d)(i) of Phase 3 recommended that Luxembourg take the necessary steps to ensure that its criminal policy clearly identifies the investigation and prosecution of bribery of foreign public officials as a priority. The Working Group considered this recommendation not implemented in the written follow-up to Phase 3, noting that "*the authorities of Luxembourg have not taken any other measures, such as updating a criminal circular examined in Phase 3 which prioritises investigations and prosecutions of the offence of bribery of foreign public officials*". Several of the State Prosecutor's memoranda were shared with the examiners, none of which specifically targets foreign bribery as deserving priority treatment, or at the very least special attention, from the investigating and prosecuting authorities. Bribery is broadly referred to on several occasions, notably as the predicate offence to money laundering. One of these memoranda encourages offences with an international element to be prioritised, when linked to a politically exposed person and bribery or tax offences (see Section B3). These cases are assigned to the specialised prosecutors at the Anti-Money Laundering Unit at the Luxembourg Public Prosecutor's Office and to the Judicial Police Service's Anti-Money Laundering Unit.

Commentary

Among the issues of concern to the lead examiners, the lack of resources, and in particular of personnel available for economic and financial crimes, is the most significant, and this at all stages of enforcing the foreign bribery offence: detection services (including the FIU), investigation services, the Public Prosecutor's Office, investigating judges, the Chambre du Conseil and courts (see Section B5). The lead examiners observed the great dedication and expertise in financial crime

of the prosecutors met during the on-site visit, as well as their ability to work as a team and share information to maximise available resources. Pragmatic (such as recruiting law clerks) and innovative solutions seem to be favoured, but it remains essential that lasting and structural solutions be found, backed by a genuine political will. The lack of implementation of Phase 3 Recommendations 4(c) and 4(d) in this area is notable and regrettable. The lead examiners believe that Luxembourg's economic and strategic importance as a financial centre would entail that priority is given to combating money laundering compared to other economic offences, including combatting foreign bribery.

In this context, the lead examiners recommend that Luxembourg: (i) clearly identify that tackling economic and financial crime, and particularly the investigation and prosecution of the offence of foreign bribery is a priority; and (ii) urgently carry out a comprehensive review of how the enforcement of economic and financial crime is organised and the resources it is allocated in order to improve its effectiveness and performance. They also recommend that Luxembourg urgently take all necessary measures to ensure that: (i) sufficient resources are allocated to all investigation and prosecution services (police, Public Prosecutors' Offices, Investigation Offices, Chambre du Conseil); (ii) these services can be staffed by the necessary personnel with expertise in dealing with foreign bribery cases effectively and within a reasonable time limit; and (iii) these services have the necessary training to deal with such cases.

The European Public Prosecutor's Office: An important partner but in need of a specific procedural framework?

129. The European Public Prosecutor's Office was established by Regulation (EU) 2017/1939 adopted by 22 EU Member States, including Luxembourg. It started operating in June 2021 and has jurisdiction over criminal offences under Directive (EU) 2017/1371, including foreign bribery, insofar as the facts (e.g. payment of a bribe to an EU public official) affect the EU's financial interests and were committed after 20 November 2017. In particular, the European Public Prosecutor's Office can investigate, prosecute and bring crimes before the courts of member states, which retain jurisdiction to try cases. European Delegated Prosecutors, placed at the disposal of the European Public Prosecutor's Office, are stationed in their countries to conduct investigations. Luxembourg has appointed two such prosecutors. When the European Public Prosecutor's Office is able to exercise its jurisdiction, the investigating judge leading the case must relinquish jurisdiction in favour of the European Public Prosecutor's Office (article 136(8) CCP). The representatives of the Public Prosecutor's Office consulted during the on-site visit indicated that they did not foresee any particular difficulties in handling investigations likely to fall within the jurisdiction of both the European Public Prosecutor's Office and the national authorities. It is worth noting that *European Official Case I* could have been covered by this regime.

130. European Delegated Prosecutors and national prosecuting authorities follow separate rules of procedure, even when they operate in the same country. In Luxembourg, for offences falling within their jurisdiction, European Delegated Prosecutors exercise the powers of the State Prosecutor and the Prosecutor General (article 136(4) CCP), but also have powers reserved for investigating judge. Allocating powers to public prosecutors that were previously strictly reserved for investigating judges (who are independent judges) can be justified by the greater independence of the European Delegated Prosecutors, who are not subject to the hierarchical authority of the Prosecutor General's Office and the Ministry of Justice. The reality of this independence has been the subject of debate in Luxembourg, as in other EU countries (France in particular). According to the Luxembourg authorities, the country has resolved the issue of European prosecutors' independence by establishing a clear legal framework, namely the Act of 31 March 2021 amending the Act of 7 March 1980, as amended, on the organisation of the judiciary with a view to organising the Office of European Delegated Prosecutors. It has also established a separate organisational structure for European Delegated Prosecutors. However, the Ministry of Justice notes the complex relationship between European prosecutors' powers and those of the investigating judge (who

alone can order or authorise the most intrusive measures on individual liberties), which requires a specific procedural framework.[105] The rules in place also call into question the Chambre du Conseil's role in relation to decisions taken by European prosecutors to refer a case to a court. Luxembourg states that, to date, no foreign bribery case opened in Luxembourg falls within the jurisdiction of the European Public Prosecutor's Office.

Commentary

The lead examiners note with interest the creation of the European Public Prosecutor's Office, which could be called upon to deal with foreign bribery cases in participating countries, including Luxembourg. They note the complex manner in which rules applicable to European delegated prosecutors are articulated in Luxembourg, particularly the fact that they exercise the powers of the State Prosecutor and State Prosecutor General while also retaining powers reserved to investigative judges. They recommend that the Working Group follow up on how the European Delegated Prosecutors stationed in Luxembourg handle the foreign bribery offence when Luxembourg natural or legal persons are involved. The Working Group should verify in particular whether they have the necessary resources and independence to manage these cases in accordance with the Convention, and to ascertain how these Delegated Prosecutors co-ordinate, where appropriate, with the Luxembourg authorities during joint investigations.

3. Inter-institutional co-ordination: an asset

131. As the Luxembourg authorities themselves acknowledge, the main obstacle to carrying out investigations and prosecutions is the limited number of staff available to the authorities. In this context, particular attention is paid to inter-institutional co-ordination and co-operation. In particular, the Judicial Police Service, the Public Prosecutor's Office and the investigating judge' offices work together to prioritise ongoing cases within the "Comité P", which meets quarterly, enabling available human resources to be managed more efficiently. Prioritising the most serious cases also helps to avoid potential obstacles linked to the statute of limitation period and the reasonable time limit on proceedings (see above).

132. Given the importance of Luxembourg's financial centre, the analysis reports drawn up by the FIU are among the main sources of information for the Public Prosecutor's Office. In accordance with article 74(4) of the Act of 7 March 1980 on judicial organisation,[106] the FIU's mission is to disseminate, spontaneously and on request, the results of its analyses and any other relevant information to the judicial authorities and competent administrations when there are reasonable grounds to suspect money laundering and/or an associated predicate offence. The exchange of information is reflected in the growing number of requests for analysis reports from the Public Prosecutor's Office to the FIU, in support of ongoing investigations. Since 2018, the FIU has also been carrying out strategic analyses of money laundering risks in specific areas, including bribery. The results of these strategic analyses are shared at conferences, training courses and meetings with regulated professions and the relevant authorities. The FIU also often makes good use of highly effective international co-operation channels with its counterparts, to obtain information available abroad.

133. The Act of 27 December 2016 implementing the 2017 tax reform [107]amends the Act of 19 December 2008 relating to inter-agency and judicial co-operation and the strengthening of the resources of the ACD, the AED and the Customs and Excise Administration. It remains possible for the tax authorities and the FIU or the Public Prosecutor's Office to exchange information on tax matters, and

[105] See Government of the Grand Duchy of Luxembourg, Public Prosecutor's Office (2021), *Rapport d'activité des juridictions judiciaires et des parquets* [Activity Report on Courts and Public Prosecutors' Offices], p. 14.

[106] The Act of 7 March 1980, as amended, on judicial organisation.

[107] Grand Duchy of Luxembourg, Official Gazette.

this practice has become more sustained in recent years (following the appointment of two liaison prosecutors, joint meetings and training sessions, and an increase in number of spontaneous transmissions by the tax authorities). In addition, the Public Prosecutors' Offices can rely on other sources of detection and information besides the FIU and the tax authorities. These additional sources include mutual assistance requests (see Section B4), Grand Ducal police reports on predicate offences and reports from supervisory authorities (including the CSSF and the CAA). In its 2023 report, the FATF underlines the very positive inter-institutional co-operation and satisfactory information exchange between competent authorities.

Commentary

The lead examiners commend the effective co-operation between, on the one hand, the investigating and prosecuting authorities competent in foreign bribery cases, and, on the other, the FIU and government agencies that may detect allegations of foreign bribery, as well as the measures that have helped strengthen this co-operation since Phase 3. They regret that these efforts have not led to the detection of foreign bribery allegations, and call for increased awareness-raising efforts, as previously mentioned.

4. Judges and prosecutors' status and factors prohibited under article 5: Favourable developments to follow

The status of judges and prosecutors: A welcome constitutional reform

- **Constitutionality of judicial independence**

134. For a long time in Luxembourg, the principle of judicial independence was only implicit in constitutional rules, even though the authorities are keen to stress that the Public Prosecutor's Office has always been independent in practice, despite the imprecise applicable legislation. The Act of 23 January 2023 on the status of judges and prosecutors,[108] which came into force on 1 July 2023, introduced a major reform to Luxembourg's Constitution.[109] Two new constitutional articles now enshrine the independence of judges and prosecutors ("*magistrats*"). Article 104 provides that, "*(1) Judges are independent in carrying out their jurisdictional functions. (2) the Public Prosecutors Offices are responsible for public prosecution and enforcing the law. They are independent in carrying out individual investigations and prosecutions, without prejudice to the government's right to issue criminal policy directives*." Article 105 states that, "*(1) The status of sitting judges and prosecutors is determined by law; (2) Judges are irremovable; (3) The law regulates the retirement of judges and prosecutors for reasons of age, infirmity or unfitness*." Even if the independence of the judiciary does not seem to be generating any particular debate in Luxembourg, the lead examiners welcome this reform and hope that it will be implemented in compliance with the letter and spirit of the law and the guarantees that existed prior to the Constitution being revised. Civil society representatives met during the on-site visit also expressed this wish. The Working Group will need to follow up on this issue. Discussions held during the on-site visit revealed that representatives of the judiciary are attached to the office of the investigating judge and the guarantees of independence that the Constitution provides.

[108] The Act of 23 January 2023 on the status of judges and prosecutors (see Section 2).

[109] Grand Duchy of Luxembourg (2023), Consolidated version applicable as of 1 July 2023: Constitution of the Grand Duchy of Luxembourg.

- **Maintaining the right of positive injunction and reporting within the Public Prosecutor's Office**

135. The reform also introduces amendments to the CCP. It abolishes the power of the Minister of Justice to instruct the State Prosecutor General to initiate proceedings or to refer any written requests they deem appropriate to the competent court. Although the Minister of Justice has, in practice, exercised this power only in exceptional circumstances, the reform is welcome.

136. However, the practice of written instructions from the State Prosecutor General, exercising hierarchical power, to State Prosecutors has been maintained. Although as part of the judiciary, the Public Prosecutor's Office has a hierarchical structure of authority: the State Prosecutor General is under the authority of the Minister of Justice,[110] and directs and supervises the prosecutors at its office, State Prosecutors and their deputies (the latter are also supervised and directed by State Prosecutors).[111] According to the Luxembourg authorities, the right of instruction is corollary to the principle of prosecutorial discretion that applies in Luxembourg. The lead examiners were pleased that the constitutional reform provides a framework for this right of instruction, in that these instructions can be used to initiate proceedings or to refer a case to the competent court, but cannot be used to prevent proceedings. They must also be in writing and be attached to the case file, which ensures transparency.[112] It points out that article 16-2 CCP stipulates that while a public prosecutor who has received a prosecution order "*must issue a written summons in accordance with the instructions given to them",* they are *"free to make any oral observations they consider appropriate for the good of justice".* This principle, known as *"the pen is subservient, the spoken word is free",* takes into account that representatives of the Public Prosecutor's Office retain freedom of speech, even after receiving such an order.[113] The guarantees provided by the law, and the fact that the State Prosecutor General cannot order prosecutors to refrain from prosecuting, are welcome, but it is important that the Working Group follow up on the practice of the State Prosecutor General's right to instruct prosecutors. It should also be noted that under article 18 CCP, the State Prosecutor General is responsible for enforcing criminal law throughout the entire country. The State Prosecutor General co-ordinates the work of State Prosecutors in preventing and prosecuting criminal offences, as well as Public Prosecutors' Offices' implementation of prosecution policy. Regular consultation meetings are held between the Prosecutor General's Office and the Public Prosecutors' Offices. The Prosecutor General's Office issues circulars to exercise its prerogatives. One such circular (dated October 2023) stipulates that the prosecutor at the Public Prosecutor's Office in charge of bribery cases (including foreign bribery) must inform the State Prosecutor and the State Prosecutor General. Any draft decision on the direction of the case (closure without further action, judgment upon agreement, opening of an investigation, etc.) is first forwarded to the State Prosecutor. Any difficulty or incident in the investigation process (delays, including in the case of an international rogatory commission) must also be reported. The Working Group will follow up on the practice of using the right of positive injunction within the Public Prosecutor's Office and the reporting obligations in foreign bribery cases.

137. The evaluators also note that the fact that foreign bribery cases require *a priori* preparatory investigations under the direction of an investigating judge is likely to protect them from the practice of positive injunctions and reporting within the Public Prosecutor's Office.

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[110] The procedure for appointing the Prosecutor General also changed in 2023: now, the National Council of Justice proposes a single candidate to the Grand Duke for the position of State Prosecutor General. The Grand Duke is legally obligated to appoint the candidate proposed by the National Council of Justice.

[111] Article 70 of the Act of 7 March 1980 on judicial organisation – Mémorial A no. 12 of 1980, p. 144 – Strada lex Luxembourg.

[112] These reforms have been welcomed by GRECO: *Luxembourg Fourth Evaluation Round Interim Compliance Report.*

[113] Cf. Joint Opinion of the Prosecutor General's Office and the Public Prosecutors' Offices Near the Luxembourg and Diekirch District Courts on constitutional reform.

- **Retention of the principle of criminal policy directives despite lack of practice**

138. Under article 19 CCP, the Minister of Justice may issue “criminal policy directives” to the State Prosecutor General, as decided by the Government in Council. This power devolved to the Minister of Justice was widely commented on in Luxembourg during the constitutional reform. For example, the Conseil d'État had proposed “*abandoning the reference to these criminal policy directives, particularly in view of the encroachment they are likely to have on the powers of the legislature. Even if they are not binding, such directives ultimately boil down to a recommendation not to apply the law. This recommendation can be direct, by encouraging people not to prosecute certain offences under certain conditions. It can also be indirect, by encouraging a focus on prosecuting certain categories of offence that the government deems to have priority, which, given the finite nature of the resources in terms of time and personnel of the judicial authorities and police services, implicitly but necessarily implies neglecting, or at any rate overlooking, other categories of offence. It is therefore difficult to imagine a directive that cannot be understood as a general negative injunction*.”[114] The same source indicates that the government has so far refrained from issuing such directives, which are unknown in Luxembourg in practice. No such directives exist for foreign bribery, and only memoranda from the State Prosecutor, within the judicial hierarchy, are made available to prosecutors to guide them in conducting and prioritising investigations. In its future evaluations, the Working Group should follow up on the practice of criminal policy directives.

- **Establishment of a National Council of Justice and more transparent procedures for appointing judges and prosecutors**

139. Another aspect of the aforementioned constitutional reform is the creation of the National Council of Justice,[115] which oversees the smooth running of the justice system while respecting its independence, and takes part in the procedure for appointing judges and prosecutors. According to article 17 of the Act of 23 January 2023, “*with regard to judges and prosecutors, the Council exercises, under the conditions determined by law, its powers in terms of recruitment, training, appointments, ethics, discipline, absences, leave, part-time service, secondment and retirement*”. Article 107 of the 2023 constitutional reform stipulates that “*The Grand Duke appoints judges and prosecutors proposed by the National Council of Justice and in accordance with the conditions determined by law*”. The text of the law favours the traditional European configuration: the Head of State appoints judges and prosecutors, on the recommendation of a collegiate body representing the judiciary. Investigating judges are appointed by the Grand Duke, on the recommendation of the National Council of Justice, from among the vice-presidents, senior judges, and judges, for a period of three years. The criteria for appointment are experience, skills, merit, and seniority in the judiciary. GRECO welcomed the progress made by the law establishing the Council, in particular in harmonising procedures and criteria for appointing and promoting judges and prosecutors.[116]

The influencing factors prohibited by article 5

140. In the absence of prosecutions for foreign bribery, during Phase 3 the Working Group was unable to assess whether the factors prohibited by article 5 of the Convention were likely to influence investigations and prosecutions, and decided to follow up on this issue. As in Phase 3, the prosecutors and judges met during the on-site visit emphasised the extensive constitutional and legal guarantees they enjoy in order to ensure the independence of the judiciary from any desire to interfere with or pressure them. Proceedings against a major Luxembourg company operating in a strategic sector seem to lend credence to these

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[114] Cf. Joint opinion of the prosecutor general's office and the public prosecutors' offices near the Luxembourg and Diekirch district courts on constitutional reform.

[115] Act of 23 January 2023 on the organisation of the National Council of Justice. The National Council of Justice is made up of nine full members: six judges and three non-judges.

[116] *Luxembourg Fourth Evaluation Round Interim Compliance Report*.

assertions. The prosecutors met in Luxembourg said they did not envisage any difficulties in investigating companies that represent a significant part of the country's economy. This must be seen in the light of reality: a relatively low prosecution rate for legal persons, as discussed in Section C4. The statements of a retired prosecutor about the indirect pressure exerted on the judiciary "*particularly in the fight against financial crime, where the pressure was sometimes terrible*"[117] seems isolated, and none of the panellists agreed with these statements. Civil society representatives nevertheless expressed reservations about the authorities' proactivity in pursuing strategic economic actors, particularly in the financial sector, citing the phenomenon of "revolving doors". They pointed out that close social relations could, at the same time, impede the detection and prosecution of bribery, as GRECO has identified in past evaluations.[118] The question of how cases are distributed within the Public Prosecutor's Office and between investigating judges was raised during the on-site visit. This is based in particular on a certain horizontal specialisation, and the experience and availability of each judge or prosecutor. The most complex cases are assigned to the most experienced investigating judges.

Commentary

The lead examiners welcome the many advances in the constitutional reform strengthening and modernising the status of judges and prosecutors, and invite the Working Group to follow up on several aspects of this reform, including (i) how the principle of independence of the judiciary newly enshrined in the Constitution is applied in practice; (ii) how the right of positive injunction within the Public Prosecutor's Office and reporting to the State Prosecutor and State Prosecutor General in foreign bribery cases are applied in practice; and (iii) the use of criminal policy directives. Given the marginal number of foreign bribery prosecutions since the Convention entered into force in Luxembourg, the lead examiners are not in a position to fully assess whether the factors prohibited by article 5 of the Convention are likely to influence investigations and prosecutions. They recommend that the Working Group continue to follow up this issue [article 5 of the Convention].

B3. Conducting investigations and prosecutions

141. Prosecutors are generally responsible for initiating criminal proceedings in Luxembourg. The Grand Duchy has two Public Prosecutors' Offices, one at the Luxembourg district court and the other at the Diekirch district court. The Prosecutor General's Office, attached to the Superior Court of Justice (which includes the Luxembourg Court of Cassation and Court of Appeal) and placed under the authority of the State Prosecutor General, has supervisory powers over all members of the Public Prosecutor's Office.

1. Initiating foreign bribery proceedings: unanswered questions

142. Luxembourg criminal procedure is governed by the opportunity principle. The Public Prosecutor's Office must prove all elements constituting the offence of bribery of a foreign public official – the intent element (*mens rea*) and the material element. The prosecutor may therefore launch a preliminary investigation under his or her own supervision (article 46(1) CCP). It is usually at the end of this investigation that the prosecutor may decide to initiate criminal proceedings by referring the matter to an investigating judge for a preparatory investigation. At all stages of the proceedings, the prosecutor or the person being prosecuted may opt for an alternative to prosecution by means of a judgment upon

[117] This person refers to the indirect pressure that was exerted on the judiciary, without the need for instruction: "There was what the Germans call 'vorauseilender Gehorsam', this culture of anticipatory obedience which meant that the person in charge didn't need to give orders, because we already knew and had anticipated what they wanted": REPORTER (2021), "Indépendance du Parquet: En finir avec la culture de la soumission".

[118] *Luxembourg Fourth Evaluation Round Interim Compliance Report*.

agreement (article 563 et seq. CCP, see Section B5). Any person claiming to have been injured by a felony or misdemeanour may file a complaint seeking status as a civil party before the competent investigating judge (articles 56 and 57 CCP). An unhappy competitor who has been forced out of a contract because of a bribe paid by a less scrupulous rival company could file a complaint as a civil party, but there is no case law illustrating this practice. On the other hand, the possibility for an approved anti-bribery association to institute civil proceedings (and thus counter the possible inertia of the Public Prosecutor's Office), introduced by the Act of 6 October 2009, has remained unchanged since Phase 3. This possibility has not been exercised in relation to foreign bribery. A very small number of these complaints have given rise to prosecutions in cases involving economic and financial crime. One case was cited during the on-site visit, involving ill-gotten gains. Jurisdiction based on the principle of territoriality and nationality is reviewed in Section C3.

143. The memoranda sent to Public Prosecutors' Offices in 2019, designed to provide a framework for the prosecution of money laundering offences and financial offences more generally in Luxembourg, set out several criteria for a preparatory investigation to be triggered, including the severity and complexity of the events. The memorandum of 30 October 2019 on prosecution policy in relation to money laundering (which is an offence in Luxembourg) clearly identifies the need for coercive acts to be used as a trigger for referral to an investigating judge, as the coercive powers of the Public Prosecutor's Office are limited. It was an investigating judge who carried out the investigation in the *False Certificates Case* and led the investigations in *Case I*.

144. During Phase 3, the Working Group recommended (Recommendation 4(d)(ii)) that, with regard to the investigation and prosecution of foreign bribery cases, Luxembourg should ensure that the appreciation of the level of evidence necessary for initiating a preparatory investigation is not so stringent that it constitutes an obstacle to the investigation of foreign bribery. This recommendation was considered unimplemented at the time of the written follow-up to Phase 3, as no action had been taken on the matter. In Phases 2 and 3, the Working Group looked at the attention paid by the Public Prosecutor's Office to foreign bribery cases when deciding whether or not to prosecute. The information available seems to indicate that this decision depended on an appreciation of the level of evidence gathered during the preliminary investigation: if it was deemed insufficient, or if excessively long procedural delays risked resulting in insignificant sentences for failure to respect the "reasonable time limit", these factors could weigh into the decision to prosecute. Similarly, the existence of judicial proceedings already under way abroad could prompt the Public Prosecutor's Office not to prosecute. The Working Group had questioned the relevance of "sufficient evidence" as a criterion for assessing the appropriateness of prosecution, particularly in cases of active bribery of foreign public officials, where it can be particularly difficult to gather detailed evidence at the preliminary investigation stage. As in Phase 3, the prosecutors met during the on-site visit disagreed with the Working Group's analysis, insofar as, in their view, no specific level of proof is required to initiate a preparatory investigation (mere suspicions suffice), and any serious allegation of bribery is investigated and, where appropriate, prosecuted, including when it comes from the press. Following the on-site visit, the authorities clarified that, according to the established case law of the Chambre du Conseil of the Luxembourg district court, mere suspicion justifies the initiation of a preparatory investigation by the investigating judge.[119] Representatives of the Public Prosecutor's Office have made it clear that the opportunity principle should not, however, lead to the arbitrary opening of an investigation or judicial inquiry in the absence of any indication that acts likely to be classified as criminal have been committed, at the risk of leading to illegal practices such as exploratory investigations or fishing

[119] "Suspicions justify the opening of an investigation. Signs enable the case to be investigated, the persons to whom they pertain to be charged, and a number of investigative measures to be ordered, possibly involving fundamental rights. Charges are assessed at the end of the investigation, and constitute a sort of summary of the research carried out throughout the investigation. Finally, evidence is examined by the trial judge in the final phase of the trial, and serves as the basis for the judgment on guilt." (A. Jacobs (2001), "Les notions d'indices et de charges en procédure pénale", *Jurisprudence de Liège, Mons et Bruxelles*, Vol. 6, Larcier, Luxembourg, pp. 262.)

expeditions. It should be noted that while prosecutors have complete freedom to decide what action to take on criminal offences brought to their attention, they must give reasons for their decisions to close cases, and may also reverse these decisions in light of new information.

2. *Investigative powers and techniques: Some disparity*

Satisfactory powers and resources for preparatory investigations

145. The lead examiners welcome the gradual strengthening of the investigative techniques and resources available to Public Prosecutors' Offices and investigating judges, including in foreign bribery cases (articles 30 et seq., 46 et seq., 48(10), 48(13), 48(17), etc. CCP). Some of these measures, such as searches, computer searches, seizure of evidence and geolocation, restrict or deprive individuals of their liberty, and must be issued by an investigating judge. The use of forensic and special investigative techniques, such as infiltration, communications interception or international mobile subscriber identity-catchers, is authorised under the supervision of an investigating judge. The prosecutors met during the on-site visit noted that they had a very wide range of resources at their disposal, with the notable exception – for bribery and other financial offences – of listening devices (bugging) inside vehicles and homes, and real-time computer data capture tools. These techniques are available for other offences (terrorism and cases affecting the interests of the EU, where European prosecutors have more resources), but extending them to other offences raises major privacy issues in the view of Luxembourg's Ministry of Justice.

Persistent difficulties in conducting preliminary investigations

146. In Phase 3, the Working Group recommended (Recommendation 4(b)) that Luxembourg should continue to reflect on the investigative powers of the police at the preliminary investigation stage. This recommendation was considered partially implemented at the time of the written Phase 3 follow-up report, as a working group has been set up within the Ministry of Justice to examine the investigative powers of the police at the preliminary investigation stage. In 2018, a reform of the judicial police, already announced during Phase 3, introduced an organic reorganisation of the entirety of the Grand Duchy's police forces, providing them with additional resources and means. The Working Group notes that use of certain investigative means is still limited at the preliminary investigation stage, as is the use of coercive means (for example, under the terms of article 47 CCP, searches, on-site visits and seizure of evidence can only be carried out with the express agreement of the persons concerned). The Act of 22 June 2022[120] amended article 47 CCP, adding "*property liable to confiscation or restitution*" to the list of items that can be seized with the authorisation of the person whose home is being searched. Multidisciplinary investigations, carried out with other authorities (which do not have judicial police officers), still cannot be used. During the on-site visit, one prosecutor highlighted the persistent difficulty of obtaining information from banks as part of preliminary investigations. Recommendation 4(b) has not been implemented.

Limited access to banking information despite progress

147. The issue raised by Recommendation 4(b) of Phase 3 is part of a more general issue concerning access to financial information by the investigating and prosecuting authorities. In Phase 3, the Working Group recommended that Luxembourg pursue the efforts made in obtaining information from banks and financial institutions (Act of 27 October 2010) and from tax authorities (Act of 19 December 2008, cf. Section B2) so that such information can be obtained even in the absence of a formal referral to an investigating judge (Recommendation 4(a)). This recommendation was considered not implemented at the time of the written follow-up to Phase 3, due to the absence of any measures to facilitate investigators'

[120] Act of 22 June 2022.

access to banking and tax information, in particular by clarifying the "under exceptional circumstances" criterion for authorising access to such data by the investigating judge.

148. Since Phase 3, access to banking and financial information has been facilitated by the creation of databases directly accessible to the Public Prosecutor's Office and the judicial police, even when the case is not before the investigating judge. Firstly, and following the adoption of the EU's fourth and fifth anti-money laundering directives,[121] Luxembourg has taken steps to enhance the transparency of the beneficial ownership of legal persons and other legal entities by instituting the register of beneficial owners through the amended Act of 13 January 2019. The Public Prosecutor's Office, investigating judges and judicial police officers have access to information in the register while carrying out their work. A second register is dedicated to fiduciaries and trusts.[122] In addition, the Act of 25 March 2020 instituted a central electronic system for retrieving data concerning payment accounts and bank accounts identified by an international bank account number (IBAN) and safe-deposit boxes held by credit institutions in Luxembourg, referred to as the bank account register. Prosecutors, investigating judges and judicial police officers, as well as the FIU and the ACD have access to this register. Despite this progress, discussions during the on-site visit revealed that prosecutors and judicial police officers continue to face bank secrecy issues in preliminary investigations, forcing them to turn to an investigating judge or the FIU, which can lead to delays. As far as co-operation between tax authorities and financial institutions is concerned, there is no general legal provision authorising tax authorities to demand information from domestic financial institutions, for domestic taxation purposes, apart from the possibility for tax authorities to access information via the FIU (see Section B2). However, mechanisms for sharing tax information also allow tax authorities to ask for information from financial institutions that may be useful for a requesting foreign state. In addition, as part of the application of the amended law of 18 December 2015 on the common reporting standard (CRS), the ACD is carrying out an automatic exchange of information relating to financial accounts held with financial institutions in Luxembourg by residents for tax purposes of jurisdictions participating in the CRS.

149. Under articles 66(2) and 66(3) CCP (adopted as part of the Act of 27 October 2020), Luxembourg has established a legal basis enabling investigating judges "under exceptional circumstances" to order credit institutions to provide banking information concerning accused persons, including in cases of national and foreign bribery and money laundering. Article 66(2) CCP thus provides that, in the context of a preparatory investigation, an investigating judge may order credit institutions to inform him or her if the accused (a natural or legal person) owns, controls or has power of attorney over one or more accounts. Article 66(3) also introduces real-time monitoring of bank accounts. Under Article 66(4) CCP, an investigating judge may ask a credit institution for information or documents concerning accounts or transactions. During Phase 3, the Working Group expressed concern about the restrictive nature of the notion of "under exceptional circumstances", although it seems to be broadly interpreted by investigating judges. These judges can now obtain banking information upon written request (whereas a search used to be necessary) from all banks (previously the request had to be made to each bank individually). The notion of "under exceptional circumstances" remains open to interpretation, although it does not appear to raise any particular difficulties in practice. It should be noted that these powers continue to be reserved for investigating judges and are unavailable at the preliminary investigation stage.

[121] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (fourth directive); and Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and Directives 2009/138/EC and 2013/36/EU (fifth directive).

[122] The amended Act of 10 July 2020establishes a register of trusts.

Personal data protection: The challenges of the GDPR

150. Data relating to offences committed by individuals' or their convictions are particularly sensitive and their processing is strictly regulated in criminal matters. Since Phase 3, two European instruments have been adopted in terms of personal data protection: the General Data Protection Regulation (GDPR) and its directive, known as the Police-Justice Directive.[123] Luxembourg integrated the provisions of the GDPR and transposed the Police-Justice Directive in 2018.[124] Luxembourg points out that, as many similar provisions were already in force, these developments have had a marginal impact on the national data protection system and have had no influence on how investigations and prosecutions of cases of bribery of foreign public officials are conducted.

151. As the Working Group has already noted in another country evaluation, despite a special regime applying to the processing of personal data in criminal matters, the rules on personal data protection can create difficulties in the context of foreign bribery investigations and prosecutions, in particular when internal investigations are conducted by a company with a view to negotiating a judgment upon agreement or in relation to mutual legal assistance outside the EU.[125] The authorities specify that this type of obstacle is only theoretical in Luxembourg. Nevertheless, it will be necessary to follow up on this issue as practice develops.

Commentary

The lead examiners welcome the introduction of new tools and other registers (including the bank account register) that offer interesting opportunities for investigating and prosecuting authorities to access financial and banking information. They regret that the investigative powers of the judicial police have not been amended, and that access to certain banking information as part of a preliminary investigation remains limited, only partially implementing Recommendations 4(a) and 4(b) of Phase 3.

The lead examiners recommend that Luxembourg (i) 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; (ii) consider extending the investigative powers of the police in order to strengthen its means and methods of investigation to gather sufficient evidence of bribery of foreign public officials at the preliminary investigation stage.

The lead examiners recommend that the Working Group follow up the impact of data protection regulations on foreign bribery investigations and prosecutions, including in particular where companies and the Public Prosecutor's Office co-operate in coming to a judgment upon agreement.

3. The use of offences related to foreign bribery: Trends developing at different speeds

Prosecution of the offence of money laundering predicated on foreign bribery

152. The offence of money laundering is covered by article 506(1) CC. The offence is punishable by a prison sentence of between one and five years and/or a fine of between EUR 1 250 and EUR 1 250 000.

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[123] Regulation (EU) 2016/679 (GDPR) and Directive (EU) 2016/680.

[124] Bill No. 7184 on the organisation of the National Data Protection Commission and the implementation of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data was adopted on 31 July 2018 by the Luxembourg Parliament. Bill No. 7168 on data protection in national security and criminal matters was also adopted on 31 July 2018.

[125] OECD Working Group on Bribery (2021), Phase 4 Report – France, paragraph 218.

Under Luxembourg law, this is a misdemeanour, not a felony, which is dealt with by the correctional court. Since Phase 3, Luxembourg has extended the scope of the money laundering offence to include several predicate offences, including aggravated tax evasion and tax fraud.

153. The 2010 FATF report, available at the time of the Phase 3 evaluation, revealed that: "the criminalisation [of money laundering] is highly unsatisfactory; since 2003, sanctions have been imposed in only eight cases, and the overall level of these sanctions is low".[126] This raised questions about the effectiveness of enforcing the money laundering offence. The FATF report published in September 2023 highlighted the same pitfall, although it acknowledges Luxembourg's political will to pursue the offence.[127] However, the FATF regrets that only a very small proportion of money laundering cases reached the prosecution stage between 2017 and 2022, with an average of 18 months elapsing between investigation and prosecution. Furthermore, although the FATF considers the sanctions provided for money laundering under Luxembourg law to be proportionate and dissuasive, it regrets the frequent application of suspended sentences and the low level of fines imposed in practice.

154. According to statistical data provided by the authorities, five cases (between 2018 and 2022) were prosecuted for money laundering with bribery of foreign public officials as the primary offence, and only one case resulted in a final conviction for money laundering predicated on foreign bribery. Prosecutors confirmed that a legal person is prosecuted for money laundering in a foreign bribery case.

155. Since 2019, the pursuit of money laundering predicated on bribery appears to be one of the priorities of Luxembourg's criminal policy, as evidenced in particular by memoranda from the State Prosecutor and the Lead Investigating Judge. A memorandum dated 30 October 2019 sets out the prosecution policy for cases of money laundering. Prosecutors are obliged to *systematically* prosecute money laundering offences when they are committed by the perpetrator of the primary offence, when money laundering does not require in-depth financial investigation, and when the property-related benefit exceeds EUR 1 000. In this memorandum, the Public Prosecutor's Office also recommends "considering prosecution for money laundering in cases requiring in-depth financial investigation" and "when the money laundering is committed by a perpetrator unrelated to the primary offence and has a financial value in excess of EUR 5 000", or "when a professional (from the financial sector or other regulated professions) was involved". A memorandum dated 15 November 2022 clarifies this criminal policy and invites investigative judges to expedite money laundering cases that meet a number of specific criteria, first and foremost a primary offence (including corruption) committed abroad, and investigations opened for the same case in foreign jurisdictions. The lead examiners welcome these criteria as they are likely to encourage more proactive prosecution of the laundering of proceeds from the bribery of foreign public officials. During the on-site visit, representatives of the Public Prosecutor's Office also indicated that they were paying particular attention to the possible involvement of Luxembourg-based professionals in money laundering cases. The memorandum dated 20 October 2022 describes the legal framework of professional obligations in the fight against money laundering, and sets out the priority treatment of offences with a foreign element, in relation to a politically exposed person and in relation to bribery or tax offences. As part of their prosecution policy, prosecutors are now invited to target both the laundering of bribes paid and the laundering of the advantage gained by the briber.

156. Despite the information shared by Luxembourg and the discussions held with representatives of the Public Prosecutor's Office, it remains difficult to assess the degree of proactivity shown by the Luxembourg authorities in prosecuting money laundering predicated on the bribery of foreign public officials. In the context specific to the Grand Duchy and described above, it is important that efforts to enforce the offence of money laundering focus not only on the laundering of the product of passive bribery

[126] FATF (2010), *Lutte contre le blanchiment de capitaux et le financement du terrorisme. Rapport d'évaluation mutuelle du Luxembourg* [*Anti-money laundering and counter-terrorist financing measures. Mutual Evaluation of Luxembourg report*].

[127] FATF (2023), Anti-money laundering and counter-terrorist financing measures – Luxembourg.

(committed in particular by foreign politically exposed persons, including foreign public officials) but also active bribery committed by Luxembourg companies in foreign bribery schemes. If the Luxembourg authorities took a restrictive approach to the offence of money laundering predicated on foreign bribery, it would severely limit enforcement action in this area.

Commentary

The lead examiners are pleased to note the new criminal prosecution policy on money laundering adopted by Luxembourg, which encourages the proactive prosecution of money laundering predicated on bribery (both the laundering of bribes paid and the laundering of the advantage gained by the briber). They highlight, however, that since Phase 3, enforcement actions and prosecutions for money laundering predicated on bribery of foreign public officials remains very limited: only one case has resulted in a final conviction for money laundering predicated on foreign bribery, despite the money laundering risks to which Luxembourg is exposed. The lead examiners therefore recommend that Luxembourg take any appropriate measures to enforce the offence of money laundering in cases of foreign bribery more effectively, and raise awareness among, and provide the necessary training on this matter to, the law enforcement authorities.

Prosecution for accounting offences

157. Accounting offences (forgery and use of forgeries) are covered by Luxembourg law (articles 196 and 197 of the Criminal Code and article 1500(8) of the Act of 1915 on commercial companies). The Working Group regrets that there have been almost no convictions for these offences since Phase 2. However, they are defined clearly enough for professionals to be able to refer to them relevantly and effectively. In Phase 3, it was recommended that Luxembourg take measures, jointly with the Association of Certified Accountants and the Institute of Company Auditors, to ensure that the provisions in Luxembourg legislation implementing article 8 of the Convention are fully used (Recommendation 6(a)).

158. Luxembourg has not provided precise data on the implementation of accounting offences in relation to foreign bribery, nor relevant information demonstrating their vigorous enforcement. However, in its responses to the Phase 4 questionnaires, Luxembourg clarified that legal persons may be discharged from their criminal liability for any felony or misdemeanour, including forgery and the use of forgeries punishable under articles 196 and 197 of the Criminal Code, provided that the conditions of article 34 of said code are met (see Section C1). However, Luxembourg has not demonstrated the value of this offence as an alternative to foreign bribery in prosecution strategies. Since Phase 3, prosecuting authorities have received no strategic guidance on the offence of forgery and the use of forgeries in cases of bribery of foreign public officials.

Commentary

In the absence of data on accounting offences committed with the aim of bribing a foreign public official or concealing the offence, the lead examiners recommend that Luxembourg (i) take measures to enforce accounting offences in foreign bribery cases more effectively, in application of Recommendation 6(a) of Phase 3, and (ii) maintain detailed statistics on investigations, prosecutions, convictions and sanctions against natural and legal persons for false accounting, including data on whether foreign bribery is the predicate offence.

Enforcement of non-tax deductibility of bribes, implementation of non-deductibility and exchange of information

159. Companies and individuals who intentionally attempt to pass off bribes and commissions as deductible expenses to the tax authorities are liable to administrative or criminal sanctions in Luxembourg, in addition to having to rectify or adjust their tax return. In practice, the offender will be taxed on the evaded sum, to which an administrative fine set by the tax authorities may be added. In Phases 2 and 3, the

Working Group recommended that Luxembourg raise awareness among tax authorities regarding the importance of making more rigorous use of the administrative sanctions at their disposal to dissuade tax deduction claims of expenses likely to constitute bribes (Recommendation 7(d)). Tax adjustments accompanied by administrative fines were rare, even in cases of fraud, and the Working Group considered that this would only encourage taxpayers to pass off export commissions as deductible expenses to the tax authorities. This recommendation was assessed as unimplemented as no action had been taken on the matter at the time of the written follow-up to Phase 3. Although the ACD and AED officials were aware of the existence of these sanctions in theory, they admitted in Phase 3 that they almost never applied them in practice. In response to the Phase 4 questionnaires, Luxembourg stated that the Act of 23 December 2016 implementing the 2017 tax reform amends the Act of 19 December 2008 relating to inter-agency and judicial co-operation and the strengthening of the resources of the ACD, the AED and the Administration des Douanes et Accises (Customs and Excise Administration, ADA), as well as the Criminal Code. Aggravated tax evasion and tax avoidance involving direct or indirect taxes have been added to the list of predicate offences. Other than these legislative changes, Luxembourg does not report any information on adjustments made by the tax authorities on the basis of the non-tax deductibility of bribes paid to foreign public officials.

160. In practice, Luxembourg has also been unable to provide data on the implementation of the principle of non-tax deductibility of bribes paid to foreign public officials. This is despite efforts to provide training (integrated into the general training of new public officials within the administration) and awareness raising efforts among officials (reference was made to a 2005 memorandum), the scope and content of which are not clearly established. No measures are in place to ensure that the judicial authorities systematically disclose to the tax authorities information necessary for the latter to ascertain that bribes have not been improperly deducted.

Commentary

The lead examiners recommend that the Luxembourg authorities raise awareness among tax authorities regarding the importance of making rigorous use of all the sanctions available under its tax legislation in order to deter any attempt on the part of taxpayers to pass off bribes paid abroad as deductible charges, thus reiterating Recommendation 7(d) of Phase 3.

The lead examiners also recommend that the tax authorities (i) collect information on the implementation of the principle of non-tax deductibility of bribes paid to foreign public officials; (ii) adopt a more proactive approach towards implementing the non-tax deductibility of bribes, including targeted awareness-raising measures; and (iii) set up information exchange mechanisms enabling them to stay informed of convictions handed down by the courts in cases of foreign bribery, and to systematically review the tax situation of companies convicted, where appropriate, of foreign bribery.

B4. International co-operation

161. Luxembourg receives a large and increasing number of requests for mutual legal assistance, largely due to its position as a leading financial centre. Its contribution to mutual legal assistance is thus essential in effectively conducting numerous international investigations and prosecutions, including those involving the bribery of foreign public officials. It should be noted that no recommendations in relation to extradition were made during Phase 3, and Luxembourg has not received any extradition requests relating to foreign bribery since Phase 3. This topic is therefore not covered in this evaluation.

1. Gaps in the mutual legal assistance framework

A robust and reinforced legal framework

162. In Luxembourg, in addition to bilateral and international treaties, the legal framework for international co-operation is defined by the aforementioned Act of 8 August 2000, which governs incoming requests for mutual legal assistance (MLA) from non-EU member states, requesting the execution of a coercive measure. Since Phase 3, the Act of 2018 transposing Directive 2014/41/EU has introduced the European Investigation Order (EIO) in criminal matters and therefore a special regime for mutual legal assistance requests from EU member states. In addition, the possibility to refuse mutual legal assistance requests related to tax matters was abolished by the Act of 29 July 2022.[128]

163. Requests for mutual legal assistance are treated under Luxembourg law as urgent and priority cases. The authority that receives the request must inform the requesting authority on the status of the procedure and of any delays. In this context, the investigating judge is not bound by professional and banking secrecy and the protection of personal data.[129] Credit institutions (banks), as well as their directors and employees, may not reveal to the customer concerned or to third parties, without the prior express consent of the authority having ordered the measure, that the seizure of documents or communication of documents or information has been ordered by an investigating judge executing a request for mutual legal assistance; doing so is punishable by fine.[130] However, this provision only applies to credit institutions. In the case of a request for mutual legal assistance concerning an account held with a non-banking financial institution or any other financial information held by a non-banking financial institution or non-financial profession, the person concerned may be notified so that they can exercise their right to appeal against the investigation order. The investigating judges and representatives of the Public Prosecutor's Office met during the visit stated that requests for mutual legal assistance of this kind are frequent, but that this provision does not present any practical difficulties, in that such appeals are rarely used. For the lead examiners, however, this measure is likely to affect confidentiality and may potentially slow down procedures.

164. The Act of 2018 on the European Investigation Order explicitly provides for the execution of administrative and civil requests from EU member states, but no equivalent framework exists for mutual legal assistance requests from non-EU member states. However, one Party to the Convention, which is not an EU member state and which has an administrative corporate liability regime, reported that the Luxembourg authorities had executed 16 requests for mutual legal assistance relating to legal persons. As such, it would appear that, in practice, mutual legal assistance in administrative procedures can be – and is – executed, which confirmed by the investigating judges and prosecutors during the on-site visit.[131]

An inconsistent institutional framework with limited resources

165. The Service for International Mutual Legal Assistance in Criminal Matters of the Prosecutor General's Office, remains the central authority responsible for processing incoming requests for mutual legal assistance in criminal matters involving coercive measures,[132] with the exception of direct requests for mutual legal assistance between judicial authorities involving non-coercive measures. The Prosecutor General's Office is responsible for (i) ensuring that there are no reasons preventing the execution of a

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[128] Act of 29 July 2022.

[129] Article 66, 66(2) to 66(4) CCP.

[130] The Act of 8 August 2000 on international mutual assistance in criminal matters, article 7.

[131] Article 1(3), Act of 23 July 2021 approving the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, drawn up in Strasbourg on 8 November 2001.

[132] The Act of 8 August 2000 on international mutual assistance in criminal matters, article 2; the Act of 1 August 2018 on the European Investigation Order, article 22.

request for mutual legal assistance; and of (ii) forwarding the request to the competent authority for its execution. Conversely, outgoing requests for assistance are made within a decentralised structure. This is the responsibility of either the investigating judge in the context of a preparatory investigation (article 51 CCP) or the Public Prosecutor's Office in the context of a preliminary investigation or a European Investigation Order. Only the investigating judge can issue outgoing requests for assistance in coercive investigative acts.

166. Since 2022, the Service for International Mutual Legal Assistance in Criminal Matters is composed of six part-time assistant public prosecutors specialising in international mutual legal assistance in criminal matters, supported by a secretariat of three full-time administrators. They are responsible for processing incoming requests for mutual legal assistance and compiling statistics, which are published in the Ministry of Justice's Annual Report. As far as the judicial authorities responsible for executing incoming requests for mutual legal assistance are concerned, 10 of the 14 investigating judges working at the Luxembourg Investigation Office are specialised in executing such requests. The two investigating judges at the Diekirch Investigating Office also handle such requests. It should be noted that each investigating judge is assisted by a clerk. The investigating judges are supported by the Judicial Police Service's International Mutual Legal Assistance Section, comprising 17 investigators. Within the Chambres du Conseil, nine judges rule on the (formal) regularity of proceedings on international mutual legal assistance in criminal matters, as well as on the execution of European arrest warrants and, where applicable, extradition requests.

167. As previously stated and as illustrated in Table 1, Luxembourg receives a lot of requests for mutual legal assistance from foreign authorities, requiring both an appropriate framework and resources.

Table 1. Statistics on incoming and outgoing international rogatory commissions (IRCs) and European Investigation Orders (EIOs)

	2018	2019	2020	2021	2022*	Total
Number of incoming non-coercive EIOs and IRCs	1 194	999	1 036	1 108	863	5 200
Number of incoming coercive EIOs and IRCs	550	591	624	728	665	3 158
Number of outgoing IRCs and EIOs (coercive and non-coercive)	N/A	N/A	744	829	861	2 434*
Number of outgoing IRCs and EIOs (issued by Public Prosecutors' Offices)	396	370	355	442	425	1 988
Number of outgoing IRCs and EIOs (Issued by Investigation Offices)	N/A	N/A	389	387	436	1 212
Number of incoming IRCs and EIOs relating to bribery*	38	34	27	20	20	139
Number of outgoing IRCs and EIOs relating to bribery*	0	0	0	0	0	0

Note: Please note that these data include all bribery cases, and do not identify those involving foreign bribery specifically.

168. In line with Phase 4 procedures, the member states of the Working Group were invited to share their experiences of international co-operation with the Luxembourg authorities, and to underline the main challenges they have encountered. According to the answers provided by three states that have had experience in international cooperation matters with the Luxembourg authorities, their cooperation is of substantively good and provided within reasonable time frame. However, the timeline reported vary between 1 month and 4 years (Luxembourg indicates that the average execution time is between 4 and 12 months, depending on the number and complexity of the procedural steps to be taken). One Party to the Convention indicated that the initial response of the Luxembourg authorities is often to request additional information from them. The sometimes-lengthy delays in processing incoming mutual legal assistance requests clearly illustrate the lack of resources made available to the Luxembourg authorities responsible for executing MLA requests, and this despite the efforts made and the willingness of the responsible prosecutors. The European Commission's 2022 Rule of Law Report noted the lack of resources within prosecution services dealing with economic and financial crime and the inherent risk it

poses to the ability of the Luxembourg authorities to formulate their own MLA requests and execute incoming requests for mutual legal assistance.[133] The 2023 FATF report notes that "timeliness is an issue in some cases, as approximately 30% of incoming mutual legal assistance requests requiring coercive measures are executed by Luxembourg in a timeframe longer than seven months." The aforementioned Ministry of Justice Annual Report (2021) also notes the steady increase in the number of international rogatory commissions involving coercive acts and in the number of legal proceedings these entail (intervention of an investigating judge, control of the Chambre du Conseil, response to possible appeals), for which already overworked judges and prosecutors are responsible for. The Report also mentions the large number of additional international rogatory commissions, often following up on the findings resulting from the initial request, which are not registered under a separate reference but require at least the same type of procedural acts as the initial requests. These additional MLA requests "increases the already existing pressure on judges and prosecutors and public officials". The issue of the role and resources of the Chambre du Conseil, in the context of mutual legal assistance, is also addressed in this annual report (see Section B2). All representatives of the law enforcement authorities met during the visit confirmed this pressure in relation to their resources, while emphasising the execution of international rogatory commissions in practice, despite existing constraints. Efforts are also being made to strengthen the framework available for mutual legal assistance. For example, since November 2022, the EU's e-Evidence Regulation, which enables the secure exchange of mutual legal assistance requests and related documents within the EU, has been implemented at the Diekirch district court, and work is also under way to this effect at the Luxembourg district court.

169. The representatives of the Prosecutor General's Office we met during the visit indicated that requests for mutual legal assistance are very rarely refused, and that to their knowledge a request for mutual legal assistance relating to a bribery offence had never been refused. Most of these requests concern the seizure of documentation relating to bank accounts and transactions, as well as the seizure of funds. The Luxembourg authorities regularly request mutual legal assistance from their foreign counterparts. Between 2018 and 2022, 2 434 outgoing mutual legal assistance requests for coercive and non-coercive measures were sent to the competent foreign authorities. The three Parties to the Convention with experience in receiving mutual legal assistance requests from the Luxembourg authorities have confirmed the quality of these requests. With regard to the foreign bribery investigations listed in this report, it should be noted that requests for mutual legal assistance were made in particular in the *False Certificates Case* and *Case II*. The authorities have not expressed any difficulties in this context, including in terms of the timely execution of these requests. The purpose of these requests was most often to obtain bank and asset information or procedural documents, as well as searches and requests for interrogations.

Statistics are collected effectively but there is need them be consolidated in relation to foreign bribery cases and outgoing MLA requests

170. In Phase 3, the Working Group had difficulty in reviewing and analysing the practice on incoming MLA requests due to a lack of detailed statistics. These requests are now included in the general software tool for managing criminal cases, known as JUCHA.[134] When the request is executed, the various procedural acts performed, as well as any related documents, are included. The status of the request and any related documents can be consulted directly. The lead examiners praised the performance of this tool, but regretted that it could not be used to extract cases of foreign bribery (listed under the general heading of "bribery"). Outgoing requests for mutual legal assistance are also not specifically recorded in JUCHA, as they form part of the acts carried out as part of the preparatory investigation, and are monitored directly by the investigating judge or prosecutor in charge of the investigation.

[133] European Commission (2022), *2022 Rule of Law Report*, pp. 1 and 9

[134] They are given a national number and the relevant data are entered (order number, date of request, name of requesting authority, name and date of birth of persons involved, offence involved, Luxembourg prosecutors in charge).

Participation in international and regional networks of law enforcement authorities, without this encouraging the spontaneous exchange of information

171. The Luxembourg authorities can rely on a network of direct contacts with their foreign counterparts. The prosecutors met during the on-site visit indicated that they participate in international and regional co-operation networks, the law enforcement officials meetings (LEO) of the Working Group, the European Judicial Network and Eurojust. The Luxembourg authorities use the European Judicial Network to make mutual legal assistance requests to authorities of other EU member states. Luxembourg has also ratified the European Convention on Mutual Assistance in Criminal Matters and, in 2021, ratified the second protocol to this Convention. The investigating judges met during the on-site visit noted that by participating in these networks, they are able to develop and maintain personal contacts that are essential to their profession. There is no centralised list of these contacts at present due to a lack of resources, but such a list would be welcomed by the prosecutors and investigating judges met during the on-site visit. These representatives also acknowledged the usefulness of spontaneous transmissions of information, including for the FIU, but have stressed their limited or even impractical use in investigations or preparatory investigations. The duty to secrecy in criminal proceedings would prevent the investigating judge from exchanging preliminary information informally and spontaneously, outside the pre-existing framework of a request for mutual legal assistance. Prosecutors have said that they have this option but make little use of it, mainly because of the difficulty of identifying the competent authorities to whom to send this information, which is then exchanged via the FIU.

Requests for mutual legal assistance in seizure and confiscation: Welcome developments, but a need for more resources

172. The lead examiners are encouraged by recent developments, which are likely to strengthen the practice of seizure and confiscation (see Section B6), including in the context of international co-operation, where requests for mutual legal assistance to Luxembourg frequently result in the seizure of assets, and for considerable amounts (EUR 200 million and EUR 180 million in 2019 and 2020, respectively, according to figures from the 2023 FATF report). Confiscation or freezing orders issued by foreign courts are implemented in Luxembourg for requests originating from an EU member state by means of the Act of 23 December 2022[135] relating to the mutual recognition of freezing and confiscation orders, and for third party countries by the procedure of exequatur provided for in articles 659 et seq. CCP. The management of requests for mutual legal assistance in this area is subject to significant constraints in terms of human resources, as highlighted above for all other types of international rogatory commissions. Between 2017 and 2022, the Asset Recovery Office received and executed 36 confiscation requests, worth around EUR 47 million. Luxembourg can share assets with foreign states, and has done so for most incoming requests.

Underwhelming co-operation with international governmental organisations and multilateral development banks

173. Since Phase 3, the Luxembourg authorities have concluded one case which was detected and reported by an EU body (*European Official Case I*). Furthermore, in 2019, two Luxembourg companies were placed on the World Bank's exclusion list (*World Bank Case*, see Annex 1). During the on-site visit, the authorities noted that they had no knowledge of this case, nor of the exclusions imposed on Luxembourg companies. As a result, they could not be taken into account in the procedures for access to public contracts or other benefits granted by the Luxembourg public authorities (see Section A4).

Commentary

According to the information available, Luxembourg is an efficient and attentive partner in

[135] Act of 23 December 2022 on the mutual recognition of freezing and confiscation orders.

executing mutual legal assistance requests from countries that are Parties to the Convention. The lead examiners are pleased to note that the existing system relies in particular on specialised and experienced staff. However, the lack of resources affecting all of Luxembourg's judicial authorities is likely to undermine the performance of the existing framework, in a context of ever-increasing incoming and outgoing requests for mutual legal assistance. They therefore recommend that Luxembourg urgently take any appropriate measures to strengthen the resources of all the authorities involved in executing and issuing requests for mutual legal assistance, including those relating to seizure and confiscation.

The lead examiners note the introduction of a new statistical management and monitoring mechanism for incoming requests for mutual legal assistance. They regret that this new mechanism does not make it possible to identify requests relating to bribery of foreign public officials, and does not track outgoing requests for mutual legal assistance. They recommend that Luxembourg equip their generic software tool for managing requests with new functionalities enabling statistics on incoming and outgoing requests for mutual legal assistance relating to allegations of foreign bribery to be collected separately, and outgoing requests for mutual legal assistance to be monitored and disaggregated.

The lead examiners were pleased to note that Luxembourg co-operates informally with its foreign counterparts through the networks of contacts established by its prosecutors and investigating judges. Nevertheless, the lead examiners are of the opinion that Luxembourg should make better use of these contacts to initiate the spontaneous transmission of information, without prejudice to investigations and procedures carried out in Luxembourg and in accordance with national law.

2. *Mutual legal assistance in the resolution of multi-jurisdictional cases: An overly passive partner*

174. As a preliminary remark, it should be noted that the Act of 21 March 2006 sets out the legal framework for creating joint investigation teams (JIT) with the judicial authorities of EU member states.[136] There is no legal framework for setting up joint investigation teams with third party countries to the EU third, except in the context of bilateral treaties (such as with the United States), and with countries that are Parties to the Second Protocol to the Council of Europe's European Convention on Mutual Assistance in Criminal Matters.

175. Luxembourg has not been involved in any joint foreign bribery investigation teams since the Convention came into force in the country. The interviews conducted during the on-site visit revealed that the authorities are not inclined to form a joint investigation team with third party states to the EU, as investigative acts conducted within the framework of the JIT may be invalidated due to their non-compliance with Luxembourg's provisions governing requests for mutual legal assistance. The Luxembourg authorities underlined that other forms of co-ordination are envisaged early on in the procedure through coordination meetings held at Eurojust with the European countries concerned and the involvement of the FIU. Such co-ordination was carried out in *Case III*.

176. In response to the survey concerning Luxembourg’s performance in the area of mutual legal assistance, a Party to the Convention indicated that, in a case not relating to foreign bribery, the Luxembourg authorities refused to set up a joint investigation team. However, they participated actively in the investigation, which required prosecutors from the Party to the Convention to travel to Luxembourg, mainly to organise the transfer of evidence and documents back to the Party to the Convention.

Commentary

The lead examiners take note of Luxembourg's efforts to co-ordinate multi-jurisdictional cases with

[136] The Act of 21 March 2006 on joint investigation teams, article 1.

their foreign counterparts. Nevertheless, Luxembourg is not yet making sufficient and appropriate use of the available range of international co-operation instruments, particularly in terms of its participation in the resolution of multi-jurisdictional foreign bribery cases. For this reason, they are of the opinion that Luxembourg is more of a passive partner in the resolution of multi-jurisdictional cases, contenting itself with executing incoming mutual legal assistance requests without seeking to participate more actively in resolving these cases, notably through the creation of joint investigation teams. They recommend that Luxembourg consider creating a joint or parallel investigation team when conducting investigations and prosecutions for bribery of foreign public officials that may require co-ordinated and concerted action with one or more Parties to the Convention, in conformity with national laws and relevant treaties and arrangements.

3. International exchange of tax information: Gradual progress

177. In Luxembourg, the legal basis for exchanging information originates in double taxation treaties, tax information exchange agreements (when they are integrated into Luxembourg's domestic legislation) and the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, as amended. In Phase 3, the Working Group recommended that Luxembourg facilitate international exchanges of information in line with the 2009 Recommendation of the Council on Tax Measures, in particular by considering including in its bilateral tax treaties the option provided for in paragraph 12.3 of the Commentary on article 26 of the OECD Model Tax Convention (sharing of tax information by tax authorities with law enforcement and judicial authorities)[137] (Recommendation 7(b)). The recommendation was considered partially implemented in the written follow-up to Phase 3, with Luxembourg having incorporated this provision into some of its bilateral agreements, but not systematically. Since Phase 3, the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Tax Forum) has adopted its Phase 2 evaluation of Luxembourg (2019).[138] In 2019, Luxembourg had a treaty network of 85 treaties covering 135 jurisdictions. This is considered to be predominantly in line with the international standard, due in particular to the Multilateral Convention that came into force in Luxembourg on 1 November 2014 and the six bilateral instruments signed since 2015. For the Global Forum, these treaties are both interpreted and applied in practice in line with the standard. Thanks to renegotiation efforts (notably agreements with Austria and Switzerland which were not in line with the standard) and the implementation of the Multilateral Convention, Luxembourg now has a treaty network in line with the standard, except for six tax treaties with jurisdictions not covered by the Multilateral Convention. The same report notes significant progress in the interpretation of the "foreseeably relevant" criterion[139] (*pertinence vraisemblable*) in Luxembourg. This interpretation was considered too restrictive in the past, and in some cases prevented information from being shared. The Global Forum notes that Luxembourg has modified its interpretation of the concept of foreseeably relevant, and that no problems have been raised by its partners. For the Global Forum, Luxembourg continued to interpret this concept in line with the standard during the evaluation period. Recommendation 7(b) has therefore been implemented.

[137] The international standard for exchange of information on request (EOIR) is mainly reflected in the OECD Model Agreement on Exchange of Information on Tax Matters and its commentary, article 26 of the OECD Model Tax Convention on Income and on Capital and its commentary as updated in 2012, and article 26 of the United Nations Model Double Taxation Convention between Developed and Developing Countries and its commentary.

[138] OECD (2019), Global Forum on Transparency and Exchange of Information for Tax Purposes: Luxembourg 2019 (Second Round): Peer Review Report on the Exchange of Information on Request.

[139] Article 26(1) of the Multilateral Convention: "The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2."

B5. Conclusion of foreign bribery cases

1. Organisation of the courts: Resources and specialisation

178. The district courts exercise jurisdiction as correctional and criminal courts. They have jurisdiction over misdemeanours and felonies referred to them by the Chambre du Conseil or the Court of Appeal. The Luxembourg district court comprises six “criminal” chambers. The Diekirch district court is divided into civil, commercial and criminal chambers, depending on the case. Luxembourg has no specialised courts to try foreign bribery cases. The resource challenge noted for the investigating and prosecuting authorities also applies to the courts dealing with cases of financial crime: during the on-site visit, reference was made to a “definite” workload and the robust pace of hearings (on average, 4.5 hearings per week, 3 weeks to deliver a judgment, or 6 weeks for complex cases). It was also pointed out that judges write their own rulings, which adds to their workload. The report from the Ministry of Justice (2021) points out that a number of positions of judges could not be filled during the period under review due to insufficient recruitment. As a partial response to these difficulties, the pool of law clerks recruited and in the process of being recruited will be used by the criminal and correctional courts, the latter of which are responsible for hearing foreign bribery cases (due to the reclassification of the foreign bribery offence, as previously mentioned). Discussions also revealed that no foreign bribery-specific training in Luxembourg law is available for trial judges,[140] although some may be specialised in economic and financial crime.

2. Access to decisions and assessing criminal policy: A heterogeneous reality

179. Since 2019, decisions of legal interest handed down by Luxembourg’s courts, including judgments and rulings handed down in bribery cases, have been freely accessible online in two formats: extracts in the form of information sheets on court decisions, which are published on the JUDOC case law database, and a full version that has been pseudonymised within the meaning of the GDPR, which is published on the “Juridictions judiciaires” (Judicial Jurisdictions) database. These databases can be accessed via the official Judicial Administration website (justice.public.lu – Jurisprudence). According to a judge met during the on-site visit, most decisions are actually published. The State Prosecutor’s circular of 30 October 2019 points out the importance of encoding new cases carefully with regard to the codes for offences used in order to extract accurate and reliable statistical data. In this respect, since Phase 2 the Working Group has noted the lack of adequate statistical tools for assessing criminal policy in this area. This is still the case. The Prosecutor General’s Office did mention, however, that major work is under way to introduce an electronic form for criminal matters, which should make it possible to extract relevant statistical data.

180. Criminal records in Luxembourg’s contain convictions handed down by the country’s criminal courts against individuals and legal persons (any legal entity with its actual registered office in Luxembourg) and may contain convictions handed down by foreign courts. For centralisation purposes, under the European Criminal Records Information System (ECRIS), convictions handed down in an EU member state are automatically reported to the member state in which the legal person’s registered office is located. The Criminal Records Department issues extracts from criminal records free of charge to individuals and legal persons who request them. It also issues extracts of criminal records to certain authorities authorised by Grand Ducal regulation, which must have the consent of the person concerned.[141]

[140] It should be noted that judges and prosecutors can access a training module on “national and international corruption” at the École Nationale de la Magistrature in Paris.

[141] guichet.lu (2021). “Extract from the criminal record of a natural person”.

3. Transparency in the application of sanctions: Progress expected

181. The 2021 Recommendation added to the standards for foreign bribery sanctions the fact that these sanctions should be "transparent" and that important elements of resolved cases should be made public and accessible, in compliance with data protection regulations. As previously mentioned, judgments presenting a certain legal interest, including those relating to bribery, are freely accessible online, both in the form of information sheets containing extracts and as full, pseudonymised, decisions.

182. However, issues remain with the transparency of the information available as to the reasons behind the application of the sanctions handed down by the courts. As noted in Phase 3, judgments contain very succinct reasons for the severity of the sentences imposed and the application of mitigating circumstances. For example, in *European Official Case I*, the defendant was convicted of one count of trading in influence for having offered the official a bribe. The court imposed an 18-month prison sentence, suspended in full, together with a fine of EUR 20 000 "in view of the seriousness of the offences". No reasons were given as to the circumstances taken into account. Judgments that explain in greater detail the aspects considered in sentencing could help increase the use of more transparent, effective, proportionate and dissuasive sanctions in practice.

Commentary

The lead examiners are concerned about the lack of resources available to criminal and correctional courts. They recommend that Luxembourg urgently take all necessary measures to ensure that: (i) sufficient resources are allocated to the courts with jurisdiction for economic and financial cases; (ii) these courts can be staffed by the necessary personnel with expertise in dealing with foreign bribery cases effectively and within a reasonable time limit; and (iii) these courts have the necessary training to deal with such cases.

The lead examiners also regretted the lack of adequate statistical tools for evaluating criminal policy and encouraged Luxembourg to continue its efforts to digitise its case files, which should provide access to relevant statistical data. They also consider that judgments that explain in greater detail the factos taken into account during sentencing could help increase the use of more transparent, effective, proportionate and dissuasive sanctions, and promote more consistent case law.

The lead examiners therefore recommend that Luxembourg take any appropriate measures to raise awareness among judges of the importance of imposing sanctions for foreign bribery that are sufficiently transparent, effective, proportionate and dissuasive, including by explaining in greater detail the factors taken into account during sentencing in judgments. Finally, they recommend collecting statistics on the sanctions applied in practice for bribery offences, including bribery of foreign public officials.

4. Judgment upon agreement (jugement sur accord): A "plea bargaining" tool

183. In Phase 3, the authorities examined the possibility of introducing a "plea bargaining" procedure, and the Working Group decided to follow up the progress made in setting up such a mechanism. The Act of 24 February 2015[142] introduced the judgment upon agreement (*jugement sur accord*) into Luxembourg law, enabling the Public Prosecutor's Office and the offender, in cases involving the commission of a misdemeanour or felony to propose to the competent court that a sentence established by mutual agreement be handed down for the offences acknowledged by the offender.

184. Judgment upon agreement is similar to a "plea bargaining" procedure, but does not constitute an alternative to prosecution, since the agreement is the subject of a court hearing in the presence of the

[142] Act of 24 February 2015. Article 563 to 578 of the Criminal Code.

defendant. It is applicable to all misdemeanours and felonies for which, due to mitigating circumstances, the main penalty is likely to be either imprisonment of five years or less, or a fine. It is therefore applicable to the foreign bribery offence.

185. The lead examiners welcome the significant guarantees introduced by the law, which provides a clear and transparent framework: the agreement is reached between the prosecutor and an natural or legal person against whom the preliminary or preparatory investigation is directed, on the basis of a request from the prosecutor or the person being prosecuted. The agreement is concluded by a legal act that lists all the offences in question, including those that the person being prosecuted acknowledges having committed, as well as the criminal nature of the offences acknowledged, any mitigating circumstances to be taken into account, and the primary and related sanctions to be imposed. The agreement is signed by the State Prosecutor, the person being prosecuted and the lawyer assisting them. The authorities indicate that the conclusion of a judgment upon agreement is without prejudice to article 34, paragraph 3 of the Criminal Code, according to which "the criminal liability of the legal person does not exclude that of natural persons who are perpetrators of or accomplices in these same offences". Decisions on the appropriateness of prosecuting natural persons, and on judgments upon agreement for legal persons, are made on a case-by-case basis.

186. Such an agreement is presented for approval at a hearing before the correctional court, where the parties (including the civil party, where applicable) are heard. The procedure differs from other "plea bargaining" models in that the judge is involved in and oversees the terms of the agreement. According to a number of commentators, Luxembourg legislature considered that the judge's involvement is necessary to ensure transparency in the justice system, to avoid the criticism that justice is dispensed behind closed doors, after negotiations, and that only certain individuals would benefit. The correctional court rules on the guilt of the person being prosecuted in relation to the offences they have admitted to committing, and reviews the legality of the sentences proposed, taking into account any mitigating circumstances set out in the plea agreement. If the court considers that the guilt of the person being prosecuted has been established and that the sanctions set out in the plea agreement are legal and appropriate, it will sentence the person being prosecuted to the sanctions proposed in the plea agreeemnt in a reasoned judgment. It cannot deviate from the sanctions and other provisions proposed in the plea agreement, or the court will rule that the plea agreement has failed and send the parties back to the previous stage of the procedure. Reference cannot be made to documents and declarations relating to the plea agreement if the plea agreement procedure expires. They may not be used as evidence against or on behalf of the person being prosecuted. A judgment upon agreement puts an end to the criminal proceedings against the person being prosecuted who entered into the agreement for all the offences covered by the agreement. Ordinary appeal procedures apply. A judgment upon agreement may lead to debarment from public procurement.

187. However, the lead examiners note a number of shortcomings. The law is unclear as to the criteria governing the use of such plea agreements. It involves voluntary disclosure of the offence, but the degree of co-operation required with law enforcement authorities is not clearly established (although it is understood that the offender's spontaneous co-operation can be taken into account in this context). There is no clear and publicly accessible information available on the benefits that the defendant can obtain through a judgment upon agreement, apart from the intention stated in the law, which is to bring the number of cases to court within a reasonable time limit. The lawyers met during the on-site visit praised the system as "nothing but advantageous" in that it spares the legal person a lengthy trial and possible damage to its reputation, while ensuring its supervision by a judge and giving the parties involved a degree of certainty over the outcome and, in particular, the financial sanctions applied. As for the publicity given to these judgments, it should be noted that pseudonymised versions can be consulted online. These reports include a summary of the procedure and the offences covered by the agreement, as well as anonymised information on the natural and/or legal persons concerned, the nature of the sanctions imposed and the reasons why they were applied. Some personalised elements of a sentence (such as confiscation) are

also published. Discussions during the on-site visit did not clarify whether a judgment upon agreement would allow coordinating negotiated resolutions with one or more other Parties to the Convention.

188. With respect to sanctions, from discussions and a review of pseudonymised judgments upon agreement available online it emerged that the courts take into account not only the defendants' detailed confessions, but also mitigating circumstances, whether or not the defendants already have a criminal record, and the length of time that has elapsed since the offences were committed, as is also true in similar cases that do not benefit from this "plea bargaining" system. The existence of internal control, ethics and compliance programmes or mechanisms is not clearly recognised as a possible mitigating circumstance (see Section C2). During the visit, reference was made to various agreements rendered invalid by the judges in question because of the inadequacy of the sanctions being proposed, for example in cases of recidivism. However, the lack of information available on the sanctions imposed in this context makes it impossible to determine whether this method of resolving cases has an impact on the level of sanctions imposed and their compliance with article 3 of the Convention.

189. The authorities consulted in Luxembourg pointed out that judgments upon agreement, originally aimed mainly at misdemeanours (especially traffic offences), are now frequently used in cases relating to financial and tax offences. Use of this procedure seems to be particularly favoured in cases of breaches of due diligence obligations. During the visit, one company noted that the adoption of a judgment upon agreement in Luxembourg would not necessarily protect it from prosecution in another country, as sanctions can be lenient under Luxembourg law (see Section C2).

Commentary

The lead examiners are encouraged by Luxembourg's adoption of a "plea bargaining" procedure, in response to the recognised need – demonstrated in this report – to reduce the time required for proceedings in criminal matters. While the law provides an appropriate framework for this type of agreement, the lead examiners believe that certain clarifications, arising in particular from case law, would likely strengthen the measures in place and create conditions favourable to the use of this type of agreement in foreign bribery cases. They recommend that Luxembourg, by any appropriate means: (i) clarify the criteria governing the use of such agreements, including the expected degree of co-operation with law enforcement authorities; and (ii) make public, via clear and publicly accessible information, the benefits that the defendant may obtain from entering into such an agreement; (iii) consider taking into account, for the purpose of judgments upon agreement, appropriate remedial measures, including the adoption or improvement of internal controls and anti-corruption compliance programmes. They also recommend that Luxembourg examine the application of judgments upon agreement for financial offences to determine the effectiveness of this tool, including in terms of sanctions, and identify best practices.

B6. Sanctions against individuals

1. Criminal sanctions available against individuals: The need for reform

190. The sanctions applicable to the offence of foreign bribery have not been modified since Phase 3. The offences of active bribery (article 247 CC) and "post hoc" bribery (article 249 CC, see above) are punishable by five to ten years' imprisonment and a fine of between EUR 500 and EUR 187 500. The offence of bribery of judges (article 250 CC) carries more severe penalties: ten to fifteen years' imprisonment and a fine of between EUR 2 500 and EUR 250 000. When an act of bribery is committed in with the context of a criminal organisation, the minimum term of imprisonment is increased by two years (article 251(1) CC). In addition to the main sanctions of imprisonment and fine, individuals may be subject to other ancillary criminal sanctions. These include: dismissal of titles, grades, functions, jobs and public offices; prohibition of exercising certain civil and political rights; closure of undertakings; publication or

posting of the conviction decision or an excerpt of the decision; and prohibition of the practice of certain professional or social activities (article 7 CC).

191. As noted in Phase 3, criminal fines for bribery offences in Luxembourg are low compared with fines in other Parties to the Convention.[143] They are also low compared with the fines given out for other offences in Luxembourg, such as money laundering, which is punishable by a fine of up to EUR 1 250 000. During Phase 3, the Luxembourg authorities had indicated that the Ministry of Justice intended to launch a general reform of the Criminal Code, including the issue of sanctions. The Working Group had therefore noted with satisfaction the ongoing discussions and had decided only to follow up the level of sanctions applicable to individuals. The lead examiners consider the lack of measures taken in this area since Phase 3 to be particularly problematic.

2. Determining sanctions and applying mitigating circumstances: A substantial impact on deterrence

192. The Luxembourg Criminal Code contains no provisions on the elements to be taken into account by judges in sentencing, with the exception of a provision on fines. The amount of the fines imposed "*is determined taking into account the circumstances of the offence and the resources and expenses of the defendants*" (article 28 CC). The Luxembourg authorities have generally indicated that, when applying sanctions for bribery, the court takes various factors into account, including recidivism, the perpetrator's position within the company, the scale of the offence, and the benefits derived from the bribery committed. During the on-site visit, prosecutors indicated that judges do not have internal sentencing guidelines. This would be seen as interfering with their discretion. Nevertheless, trial judges often follow Court of Appeal precedents.

193. The Criminal Code does not contain a list of aggravating factors, nor any general rules on them, apart from recidivism. On the other hand, it does establish rules for the application of mitigating circumstances (articles 73-79 CC), but does not list these circumstances, leaving judges to identify them at their own discretion. During Phase 3, judges mentioned that the following elements could be taken into account when applying aggravating factors/mitigating circumstances to the offence of foreign bribery: the criminal history of the person(s) being prosecuted, premeditation, the amount and frequency of the bribes paid, and the size of the gain obtained. During the Phase 4 on-site visit, prosecutors explained that the absence of a criminal record, the defendant's co-operation, the low level of harm caused, and lengthy procedural delays are the mitigating circumstances applied most often.

194. A particularly significant consequence of the application of mitigating circumstances is the practice of "decriminalising" or "reclassifying" offences ("*correctionnalisation*"). As mentioned in Section B1, criminal offences are classified as "felonies", "misdemeanours" or "contraventions", with felonies subject to more severe sanctions (article 1 CC). Foreign bribery offences are classified as felonies under Luxembourg law, but can be "reclassified" as misdemeanours where mitigating circumstances are applied.[144]

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[143] In France, for example, an individual who commits the offence of foreign bribery is liable to a fine of EUR 1 million, which can be increased to double the proceeds of the offence. Since 2020, when foreign bribery is committed by an organised group, the fine incurred is EUR 2 million or, if the proceeds of the offence exceed this amount, double these proceeds. See OECD Working Group on Bribery (2021), Phase 4 Report – France, paragraph 126.

[144] It should be noted that the reclassification of criminal bribery cases has no impact on the limitation period. The limitation period applicable to the offence of foreign bribery has not changed since Phase 3 (article 637 et seq. CCP). The limitation period for the offence of foreign bribery is ten years, and is not affected by the possible reclassification of the offence (article 640-1 CCP). The limitation period begins when the acts that are the constituent elements of the offence are committed; it is suspended when there is a legal or *de facto* obstacle, and each time an act of investigation or prosecution is performed. Requests for mutual legal assistance are among the investigative acts that also interrupt limitation periods.

195. More specifically, under article 74 CC, if there are mitigating circumstances, the sentence of imprisonment for the offences of active bribery and "post hoc" bribery (articles 247 and 249 CC) is replaced by a misdemeanour sentence of at least three months' imprisonment (the maximum would always be five years, per article 15 CC); the penalty for bribery of judges (article 250 CC) is reduced to imprisonment of five to ten years, or even further to a misdemeanour sentence of no less than three years' imprisonment. The judge may also order the prohibition, in whole or in part, of the exercise of certain civil and political rights (article 253(1) CC). Case law on bribery is contradictory as to the applicable provisions regarding fines after an offence has been reclassified. Some decisions suggest that in the event of reclassification, the amount of the fine should remain that of the mandatory fine for active bribery (i.e. between EUR 500 and EUR 187 500).[145] However, another decision applied a provision whereby, when sanctions are commuted to shorter imprisonment, the judge can only impose a fine of between EUR 251 and EUR 10 000 (article 77 CC),[146] i.e. an even less dissuasive level of sanctions. Representatives of the Public Prosecutor's Office have pointed out that this was an isolated decision. They argue that this provision allows an optional fine to be applied when a felony carries only a custodial sentence. In principle, therefore, it should not be applied if the offence of foreign bribery is decriminalised.

196. From a procedural point of view, State Prosecutors can request that an offence of bribery be reclassified in the written requisitions they submit to the district court Chambre du Conseil. The Chambre du Conseil then decides whether to refer the accused to the court's correctional chamber (rather than the criminal chamber), by applying – or not – mitigating circumstances (articles 127, 130-1 and 132 CCP). In addition, two provisions specify that "*the correctional chamber may not decline jurisdiction with regard to the defences and mitigating circumstances accepted by the Chambre du Conseil*" (articles 130-1(2) and 132(2) CCP). It would therefore seem that a decision on reclassification due to the application of mitigating circumstances is made upstream and cannot be reviewed by trial judges.

197. As a result, the consequence of reclassification is often a substantial reduction in the level of sanctions for foreign bribery offences. The fact that the decision to reclassify an offence and the consequences of that decision (a reduction in the sanction handed down) are not decided by a trial judge at the end of a trial raises additional concerns (although judges who make these decisions offer the same guarantees of independence and impartiality as trial judges). The prosecutors consulted during the on-site visit also explained that financial crime offences are decriminalised almost systematically. According to established practice, the Public Prosecutor's Office requests reclassification if the applicable sentence is less than five years. Historically, reclassification would have been used to avoid the cumbersome procedure of going through the court of assizes. After the abolition of the court of assizes and the creation of the criminal chamber in the late 1980s, the practice is said to have continued, with financial offences systematically referred to the correctional chambers, which have also developed expertise in this area.

198. The Working Group questioned this practice in Phase 2: while finding it understandable, it considered that it "*nevertheless raises the question of the imbalance between concerns about criminal administration (not overburdening the criminal courts, making savings) and the symbolic and thus deterrent nature of the appearance of gravity of the offence which the legislator decided to classify as a crime. This appearance of gravity is diminished because its characterisation as a crime will not automatically appear in the records of bribery cases*". The systematic use of this practice continues to raise questions and should be reviewed. Since Phase 2, the Luxembourg legislator has also introduced for misdemeanours (such as money laundering) higher fines than those for financial offences classified as felonies, such as foreign bribery. This could prompt the classification of financial offences in Luxembourg criminal law to be reconsidered.

[145] See, for example, Luxembourg district court correctional chamber, 8 February 2021, No. 303/2021, p. 6.

[146] Luxembourg district court correctional chamber, 24 October 2019, No. 2539/2019, p. 11.

199. There is one other provision that may also systematically reduce the deterrent effect of applicable sanctions. Since 2018, courts are required to issue a suspension of custodial sentences for first-time offenders, unless reasons are given as to why this would not be appropriate: "*in correctional and criminal matters, the court may only issue a non-suspended imprisonment sentence after giving special reasons for opting for this measure ...*", article 195(1) CCP. This provision therefore does not apply to fines. The prosecutors consulted during the on-site visit added that the court must give reasons for even a partially suspended sentence it intends to propose. According to one judge, the provision is not particularly problematic, as any suspension can be rejected if there are good reasons for doing so. Nevertheless, suspended sentences are often handed down.

3. Criminal sanctions imposed on individuals in practice: A lack of relevant data

200. In Phase 3, the Working Group had decided to follow up, in light of developments case law and practice, the level of sanctions handed down in foreign bribery cases, as well as the impact of mitigating circumstances on the deterrent nature of the sanctions, particularly in cases where the foreign bribery offence is reclassified (follow-up issues 10(d) and (f)).

201. As mentioned in the Introduction, one case has been concluded with final convictions for foreign bribery since Phase 3 (the *False Certificates Case*). The Luxembourg authorities state that this case is not representative of the level of sanctions applicable. Indeed, the courts applied the rules in force prior to the Act of 13 February 2011 strengthening the means to combat bribery, as the acts were committed before this act came into force. Among other things, this act reclassified the offence of bribery of foreign public officials as a felony and increased the sanctions applicable. Nevertheless, it should be noted that the sanctions applicable to the facts of the case were imprisonment of between six months and five years, and a fine of between EUR 500 and EUR 125 000. Of the eight individuals convicted of foreign bribery, three were only imposed a fine of EUR 1 500, four received prison sentences of between 9 and 30 months (all suspended in full) and fines of between EUR 1 000 and EUR 2 500, and one received a prison sentence of 42 months (6 of which were unsuspended) and a fine of EUR 15 000. These sanctions include those handed down for other connected offences. The main reasons given for the reduced sentences were that a long time had elapsed since the offence was committed and the reasonable time limit set out in article 6, paragraph 1 of the European Convention on Human Rights had been exceeded, and some of the defendants had confessed to the offences. None of the judgments examined mentions the intrinsic seriousness of foreign bribery (or domestic bribery, for that matter).

202. In the absence of convictions for foreign bribery under current legislation, the Working Group's practice is to examine the average sanctions handed down in cases of domestic bribery. However, this was not possible for this evaluation, as the Luxembourg authorities have no statistics on sanctions. The statistics available only enabled the Working Group to determine the number of bribery cases in which convictions have been handed down. The issues concerning collecting statistics are reviewed in Section B5.

Commentary

The lead examiners consider it particularly problematic that, contrary to the plan announced by the Ministry of Justice in Phase 3, no reform has been implemented to raise the level of financial sanctions available for individuals. They also note with concern that the almost automatic practice of "reclassifying" financial offences ("correctionnalisation") and granting suspended sentences to first-time offenders is likely to considerably weaken the deterrent effect of custodial sentences for the offence of foreign bribery. Furthermore, they note that Luxembourg case law is inconsistent as to the amount of the fines applicable when the offence is reclassified.

The lead examiners therefore recommend that Luxembourg increase the maximum fines available for natural persons to a level that is proportionate, effective, and dissuasive, in accordance with

article 3 of the Convention, as soon as possible. Given the significant impact that "reclassification" has on financial offences and foreign bribery in particular, the lead examiners recommend that Luxembourg undertake an assessment of this practice in order to make its use and consequences clearer and more predictable, including in terms of the level of fines that can be applied.

4. Confiscation of bribes and proceeds from foreign bribery: Progress to be measured

203. "Special confiscation" is classed as a penalty under Luxembourg law (articles 7, 14 and 25 CC). It is applied to property forming the object or proceeds of an offence or constituting a property-related benefit of an offence, to property substituting the above, and to property that was used or intended for use in committing the offence. Since 2007, confiscation can also be applied to property with a monetary value equal to that of the property that constitutes the object, the proceeds, or a property-related benefit of the offence (confiscation by equivalent). Under article 31 CC, confiscation is always ordered for felonies, and therefore also for the offence of foreign bribery. However, as mentioned above, foreign bribery is often "reclassified" and prosecuted as a misdemeanour. It would be important that Luxembourg authorities clarify that special confiscation should also be mandatory, where applicable, in foreign bribery cases where the offence has been reclassified as a misdemeanour.

Positive legislative developments

204. Over the past five years, a number of legislative amendments have been made to extend the confiscation regime and make it more effective. Amendments to the Criminal Code have both reorganised existing provisions and introduced new ones extending the scope of confiscation.

205. In 2018, Luxembourg introduced extended confiscation for assets of any kind whose origin the convicted person cannot explain.[147] This confiscation may cover both assets owned by the convicted person and those freely at their disposal, subject to the rights of the *bona fide* owner. It is applicable to felonies or to misdemeanours that are punishable by at least four years' imprisonment, thus including the felony of foreign bribery, and that generate a direct or indirect profit (article 31(2), 5° CC). Extended confiscation makes it possible to "*retrieve all assets likely to have been acquired through criminal activity, without the prosecuting authority being obligated to prove that each individual asset was generated by an offence*".[148] In 2022, the act on the management and recovery of seized or confiscated assets extended the scope of confiscation by equivalent.[149] "Value-based confiscation" can be ordered when no property liable to confiscation has been identified, or when the property identified is insufficient to cover the object or proceeds of the offence, or the property-related benefit of the offence. In addition, it may be applied to property of any kind belonging to, or freely available to, the convicted person, subject to the rights of the *bona fide* owner (article 31(4) CC). The prosecutors interviewed during the on-site visit pointed out that it was not previously possible to confiscate property that had not been identified prior to conviction, which constituted a major obstacle in practice. They therefore consider this legislative development to be an important step forward.

206. The same law introduced major institutional and procedural innovations. It established the new Asset Management Office, placed under the authority of the Minister of Justice, which is now responsible for managing seized and confiscated assets. The Asset Recovery Office, set up within the financial and economic section of the Public Prosecutor's Office of the Luxembourg judicial district, is responsible for tracing and identifying criminal assets, as part of both national criminal proceedings and international

[147] Act of 1 August 2018, amending the Criminal Code, the Code of Criminal Procedure [and other laws] to adapt the confiscation regime.

[148] Bill reforming the confiscation regime, parliamentary document no. 7220/00, Commentary on articles, p. 8.

[149] Act of 22 June 2022 on the management and recovery of seized or confiscated assets.

mutual legal assistance (see Section B4).[150] The Asset Management Office currently has five full-time members and one part-time employee, and was in the process of recruiting four asset managers in July 2023. Since March 2023, the Asset Recovery Office has been staffed by three prosecutors from the Public Prosecutor's Office, assisted by the secretariat of the economic and financial unit. Investigations to identify criminal assets are carried out by the Judicial Police Service's Anti-Money Laundering Unit. In its 2023 report, the FATF stressed the need to consolidate the resources and means of the Asset Recovery Office and Asset Management Office.

207. From a procedural point of view, the possibility of seizing "property liable to confiscation or restitution" has been expressly added to the provisions on searches during preliminary investigation and judicial inquiry (articles 47 and 65 CCP). Lastly, the 2022 law introduced "post-sentence asset investigations" (articles 705 et seq. CCP), the purpose of which is to identify, after conviction, assets that can be confiscated (in particular confiscation by equivalent), where it has not been possible to identify them beforehand. These investigations are carried out under the direction of the Asset Recovery Office, which may (i) obtain information on the convicted person's assets from professionals; (ii) access administrative and financial information held by any other public administration; and (iii) instruct the judicial police to carry out an investigation into the convicted person's assets.

Approaches to confiscation and raising awareness among the competent authorities: Encouraging developments

208. Regarding the use of available measures and the proactive use of confiscation, the lead examiners are encouraged by the adoption of two memoranda from the State Prosecutor in October 2022, which serve as reference documents for the practical implementation of the legal provisions in this area. One, which covers "prosecution policy [...] on seizures and confiscations in general", recommends that the provisions on the seizure of assets liable to confiscation or restitution be applied automatically in any appropriate cases as part of the investigation or judicial inquiry. The other, concerning seizure and confiscation, stresses that "*the aim of prosecution in any case where the offence generated an illicit property-related benefit must also ultimately be to deprive the criminal of the profit*". The memorandum also outlines the essential procedural steps to be taken, identifies the competent authorities, and organises practical co-operation between the Asset Recovery Office, the Judicial Police Service's Anti-Money Laundering Unit, and the FIU. No guidelines are available for law enforcement authorities on identifying, quantifying, and confiscating the instrument and proceeds of foreign bribery. In their answers to the Phase 4 questionnaires, the Luxembourg authorities mention the documentation produced by the FIU on the subject, the conferences, training courses and meetings it organises, and the information published on its website. However, these measures do not appear to be sufficient as practical tools for law enforcement authorities.

Confiscation in practice: Lack of data for the evaluation

209. During Phase 3, the Working Group had decided to follow up on the use of confiscation as a penalty in foreign bribery cases, given the lack of enforcement. Although the *False Certificates Case* has resulted in convictions for foreign bribery since Phase 3, the use of confiscation has been very limited in this case, due to both the long time that had elapsed since the offence was committed and the fact that confiscation by equivalent, which came into force in 2007, could not be applied.[151] These rulings are

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[150] The Luxembourg authorities pointed out that in 2009, the economic and financial unit of Luxembourg's Public Prosecutor's Office was designated as the "national Asset Recovery Office" within the meaning of European Union Council Decision 2007/845/JHA, and has performed this function continuously ever since.

[151] See, for example, Luxembourg district court correctional chamber, 4 May 2017 No. 1350/2017, p. 182.

therefore not relevant for evaluating confiscation in practice based on the current provisions (nor, for that matter, the provisions in force during Phase 3).

210. It would appear that, as with sanctions, Luxembourg does not collect detailed statistics on confiscation. However, the new Asset Recovery Office is responsible for the centralised, computerised management of data relating to all seized and confiscated goods, and must produce an annual activity report, including a statistical summary.[152] It would be important that the Asset Management Office, through the statistics it collects, be able to identify seizures and confiscations made in connection with foreign bribery cases, regarding both the bribe and the proceeds of bribery obtained by the bribers.

Commentary

The lead examiners note that confiscation is only mandatory for felonies, not misdemeanours. They recommend that Luxembourg clarify, by any appropriate means, that special confiscation should also be mandatory, where applicable, in foreign bribery cases where the offence has been reclassified (i.e. prosecuted as a misdemeanour).

The lead examiners congratulate Luxembourg on the legislative changes that have considerably extended the confiscation regime. They note that the Asset Recovery Office and the Asset Management Office are responsible for recovering criminal assets and managing confiscated assets, respectively. This centralised approach to confiscation should make implementation more efficient. The lead examiners also welcome the efforts made by the Luxembourg authorities to develop a proactive approach to identification, seizure, and confiscation. Nevertheless, they consider that the competent authorities could be made more aware of this issue and given more guidance, particularly in cases of foreign bribery.

The lead examiners recommend that Luxembourg (i) further raise awareness among investigating and prosecuting authorities of the importance of carrying out thorough financial investigations in order to detect, recover, and confiscate (including by equivalent), the instrument and proceeds of foreign bribery; (ii) consider adopting and disseminating to these same authorities guidelines specifically aimed at identifying, quantifying, and confiscating the bribe and proceeds of foreign bribery; (iii) ensure that the Asset Management Office is able to identify, in its statistics, seizures and confiscations carried out in connection with foreign bribery cases, regarding both the bribe and the proceeds of bribery obtained by the bribers; and (iv) ensure that the Asset Management Office and the Asset Recovery Office have resources and means commensurate with their mandates.

[152] Act of 22 June 2022, articles 3(1)5° and 9.

C. RESPONSIBILITY OF LEGAL PERSONS

C1. Scope of liability of legal persons for foreign bribery

211. Since 2010, legal persons can be held criminally liable in Luxembourg. They may be sanctioned for felonies or misdemeanours committed on their behalf and in their interest, including for foreign bribery and other related offences. Articles 34 to 40 of the Criminal Code set out the conditions governing the liability of legal persons and the criminal sanctions that can be applied to them. The Code of Criminal Procedure also contains provisions that apply specifically to proceedings against legal persons. All legal persons, including public enterprises, can be held liable for acts of foreign bribery.

1. Level of authority of the individual whose actions may engage the liability of the legal person: A welcome new law

212. In Phase 3, article 34 CC provided that a legal person could only be held liable for an offence when it was committed "by one of its legal bodies or by one or more of its *de jure* or *de facto* managers". Liability was therefore triggered only by the actions of individuals with a high level of managerial authority, and not by the actions of others. The Working Group had recommended that Luxembourg ensure, by any appropriate means, that the liability regime for legal persons adopt one of the two approaches described in Annex I.B of the 2009 (now 2021) Recommendation with regard to the level of managerial authority and type of act that may cause that liability to be incurred (Recommendation 2(a)).

213. In 2020, Luxembourg adopted a legislative amendment to the criteria for engaging the liability of legal persons[153] under a revision of article 34 CC (see Annex 4). The lead examiners welcome this positive development. Luxembourg has chosen to follow the second approach put forward by the 2021 Recommendation. Firstly, the legal person is held liable for acts of foreign bribery performed by persons with the highest levels of authority. The wording of this criterion in Phase 3 raised issues, as the company's liability being incurred "*by one of its legal bodies*" corresponded to "identification theory" and to an approach that the Working Group consistently considered too narrow.[154] Doubts also remained as to the scope of the notion of "*de jure* or *de facto* managers". These doubts should be dispelled, as the wording of the provision is extended to "*any person* [...] *who exercises managerial authority* [within the legal person]*, based on any power to represent the legal person, any power to make decisions on behalf of the legal person, or any power to exercise control*" (article 34(1) CC). This last category (persons exercising a control

[153] Act of 12 March 2020. See also Bill No. 7411, parliamentary document no. 7411/00 of 26 March 2019, p. 7. This law was intended both to transpose Directive (EU) 2017/1371 on the fight against fraud to the EU's financial interests by means of criminal law and to comply with the recommendations of the Working Group.

[154] OECD Working Group on Bribery (2011), Phase 3 Report – Latvia, paragraphs 33-37.

power) appears to be broad enough to cover the highest levels of authority. Nevertheless, the application of this provision in Luxembourg case law should be followed up.

214. Secondly, although not explicitly provided for, it appears that the legal person may also be held liable if a person with a high level of authority directs or authorises a person with less authority to perform acts of foreign bribery. This was the case according to most of the members of the judiciary interviewed during Phase 3. The prosecutors met during the Phase 4 on-site visit also confirmed that this situation would trigger the liability of the legal person. The person with a higher level of authority would be held liable as co-perpetrator or accomplice for giving instructions for the offence to be committed, or for aiding or assisting the perpetrator, by virtue of articles 66 and 67 CC. Finally, following the 2020 reform, the legal person is also liable "*where a lack of supervision or control on the part of a* [person with a high level of authority] *has enabled a felony or misdemeanour to be committed, in the interest of said legal person, by a person under their authority*" (article 34(2) CC). This new provision clearly includes a lack of supervision. However, it is not certain that judges will take into account the failure of managers to implement appropriate internal control, ethics, and compliance programmes or measures, as called for by the 2021 Recommendation. The judges met at the on-site visit indicated that article 34(2) CC had not yet been applied at the time. In the absence of case law, the Working Group will have to follow up the application of this provision as practice develops.

2. Offences committed "on behalf of" and "in the interest of" a legal person: Concerns remain

215. The legal person is only liable for offences committed "on behalf and in the interest" ("*au nom et dans l'intérêt*") of said legal person when the offence is committed by persons with a high level of authority (article 34(1) CC). However, when an offence is made possible by a lack of supervision or control, the criterion is that the offence is committed "in the interest of said legal person" (article 34(2) CC). The first criterion is therefore narrower. It may reflect identification theory (see above), in the sense that the provision would only cover acts performed by bodies or managers who can represent the company and therefore act on its behalf. The presence of this criterion restricting the scope of liability could be mitigated by the new article 34(2) CC. According to prosecutors interviewed during the on-site visit, following the 2020 reform, there is no longer a need to bind the legal person to a decision made by official bodies. This new paragraph would make it possible to establish liability more broadly. This aspect can be assessed when following up how the new provision is applied.

216. Furthermore, the Phase 3 report expressed concern that the criterion for the offence to be committed in the "interest" of the legal person would considerably restrict the possibility of establishing the liability of legal persons in practice. This criterion mainly raised three issues: (i) that it would be interpreted only in the sense of profit or a pecuniary advantage; (ii) that it would not be met when an offence is committed primarily in the personal interest of the individual who commits it; and (iii) that it would not be met when an offence is committed in the interest of an affiliated legal person, such as the parent company or a foreign subsidiary. The Working Group had therefore recommended that Luxembourg take the necessary measures to ensure that the criterion of the "interest" of the legal person does not exclude certain cases of foreign bribery where a bribe is offered or paid only in the partial interest of the enterprise or in the interest of another legal person, possibly linked to the first (Recommendation 2(b) (iii)). The Luxembourg authorities have not reported any developments concerning the implementation of this recommendation. In fact, this criterion is also present in the new article 34(2) CC, covering offences made possible by a lack of supervision or control.

217. The Luxembourg authorities refer to case law confirming that the criterion of the "interest" of the legal person is interpreted only in the sense of profit or a pecuniary advantage. According to this case law, "*an offence is committed in the interest of the legal person, and is therefore attributable to it, when said offence is committed with a view to obtaining a gain, or a financial profit, or savings in its favour or to avoid*

losses".[155] As noted in the Phase 3 report, this criterion restricts the liability of legal persons because, for example, a company may pay a bribe to win an unprofitable contract in order to establish a foothold in a new market. Moreover, it raises concerns about the need to establish proof of a pecuniary advantage, whether expected or actual. This could be difficult in cases where the foreign public official does not provide the consideration or the pecuniary advantage does not appear in the books. The Working Group expressed similar concerns in its evaluation of a state that could establish the criminal liability of a legal person only if "*the purpose or result of the commission of the offence was to obtain a pecuniary advantage for the legal person* [...]".[156]

218. The Public Prosecutor's Office considers that, as suggested by the parliamentary work on the 2010 law, the notion of "interest" does not necessarily have a pecuniary meaning and can be interpreted more broadly. According to one prosecutor met during the on-site visit, simply gaining entry to a market could be considered an advantage in the broadest sense of the term, which does not have to be proven in accounting terms. However, the Luxembourg authorities have not provided case law confirming this approach, nor have they provided case law that might shed light on the other problematic aspects of the criterion of the "interest" of the legal person mentioned above. During the on-site visit, prosecutors suggested that relationships within groups of companies could be taken into account when looking at the overall context of the offence. They confirmed, however, that it is difficult to give an opinion in the absence of case law on this point.

3. Autonomous liability of legal persons from the prosecution or conviction of individuals: A principle in need of clarification

219. In Phase 3, Luxembourg had indicated that "the liability of legal persons is an autonomous concept that does not depend on the guilt of a representative of the company". In the absence of case law clarifying this issue, the Working Group had nevertheless recommended that Luxembourg take the necessary measures to ensure that the liability regime for legal persons does not restrict such liability to cases where the individual(s) who committed the offence are prosecuted and convicted (Recommendation 2(b)(i)).

220. Representatives of the Public Prosecutor's Office confirmed that the liability of legal persons is autonomous. This principle would derive from article 34(3) CC ("*the criminal liability of legal persons does not exclude that of natural persons who are perpetrators or accomplices of the same offence*"). Courts have relied on this provision and on parliamentary work to affirm the autonomy of the liability of legal persons: "*Since the Act of 3 March 2010 entered into force, making it possible to seek the criminal liability of legal persons, particularly when there are shortcomings or deficiencies in the organisational process or other processes attributable to the company, it is no longer necessary to prosecute ipso facto the company director, even though the criminal liability of legal persons does not exclude that of natural persons who are perpetrators of, or accomplices in, the same offences (Report of the Legal Committee of 3 February 2010 on Bill No. 5718, document no. 5718/08, identifier J-2009-O-1488, p.2)*".[157] The Working Group will follow up the application of this principle to bribery of foreign public officials. In *Case I*, charges were only brought against the company. This case could therefore confirm that it is possible to establish the liability of a legal person independently of the individual perpetrator(s)'s liability.

[155] High Court of Justice correctional chamber, 13 December 2013, No. 565/13 X, p. 11.

[156] See, respectively, OECD Working Group on Bribery (2011), Phase 3 Report – Luxembourg, paragraphs 43-44; OECD Working Group on Bribery (2005), Phase 4 Report – Hungary, paragraphs 147-149 and 210(a)https://www.oecd.org/fr/daf/anti-corruption/Finlande-Rapport-Phase-4-FR.pdf.

[157] Luxembourg district court correctional chamber, 25 March 2021, No. 723/2021 (emphasis added).

4. Liability of companies for complicity and for using related entities: In view of the risks involved, the approach to prosecution needs to be reviewed

221. As mentioned above, Luxembourg is a preferred destination among multinational corporations for creating holdings and other companies for the purpose of strategies relating to investment and corporate group structuring. These Luxembourg entities could be complicit in foreign bribery in various ways, including through assistance or authorisation. They could also use related entities to commit the offence. Allegations that have surfaced since Phase 3 confirm these risks.

222. Article 1(2) of the Convention requires Parties to take the necessary measures to ensure that complicity in foreign bribery (including through incitement, aiding and abetting, or authorisation) constitutes a criminal offence. In Luxembourg, the following are among those punished as perpetrators of an offence: those who committed it or co-operated directly in its commission, and those who provided indispensable assistance in its commission (article 66 CC). The following are punished as accomplices: (i) those who gave instructions for the offence to be committed; (ii) those who procured the weapons, instruments, or any other means used to commit the offence, knowing that they were to be used for such purpose; and (iii) those who knowingly aided or assisted the perpetrator in the acts that prepared or facilitated commission of the offence, or in committing it (article 67 CC). The Luxembourg authorities reported a case involving a company suspected of having collaborated in the payment of bribes to foreign public officials (*Case II*).

223. Annex I.C(1) of the 2021 Recommendation prescribes that Parties should ensure that a legal person cannot avoid liability by using an intermediary, including a related legal person or any other third party, regardless of nationality, to commit a foreign bribery offence. The Luxembourg authorities indicated that there have been no cases falling into this scenario. On the other hand, an allegation of foreign bribery investigated in other countries seems to raise this question: in the *Iron and Steel Industry Group I Case*, the Luxembourg holding company of a multinational group is suspected of having authorised (or at least tolerated) the payment of bribes to officials of a Brazilian state-owned company in order to obtain contracts for a local subsidiary controlled by another group company. The funds allegedly used to pay the bribes were made up of profits from the Luxembourg company, transferred through Uruguayan companies. These allegations were the subject of proceedings in Italy and the United States (see Annex 1). Luxembourg has not opened an investigation into the matter. Prosecutors met during our on-site visit nonetheless argued that, in principle, it would be possible to prosecute a holding company involved in bribery, provided that a sufficient connection with the company could be established. Given the lack of enforcement, it is difficult to assess the extent to which the Luxembourg authorities could prosecute a company for using a related entity to commit the foreign bribery offence.

224. In another evaluation, the Working Group recommended that law enforcement authorities systematically examine the involvement of financial institutions, shell companies, and other corporate structures in foreign bribery schemes, including as accomplices.[158] Similarly, in view of the specific context at play in Luxembourg, it would be important that law enforcement authorities systematically examine the involvement and assess the possibility of prosecuting companies headquartered in Luxembourg that may have acted as accomplices or used intermediaries, including related entities, to commit foreign bribery. The Luxembourg authorities underlined the importance of the prosecution policy in relation to money laundering in that it constitutes an important pillar for detecting, investigating and prosecuting natural and legal persons involved in foreign bribery schemes. For example, an entity that is used as an intermediary for the payment of bribes could also be prosecuted for money laundering. However, as noted in section C4, it would be preferable to also prosecute legal persons for foreign bribery in all situations where they are likely to be involved either as the perpetrator or accomplice of the offence.

[158] OECD Working Group on Bribery (2019), Phase 3 Report – Latvia, paragraphs 132-135 and Recommendation 6(b).

5. Successor liability: The need for measures

225. Luxembourg has no comprehensive legal provisions covering successor liability. The Luxembourg authorities have only indicated a provision enabling the investigating judge to, among other things, suspend proceedings for the dissolution of the legal person or prohibit asset transactions likely to result in its insolvency, if they find serious indications that the legal person is guilty during the judicial inquiry (article 89 CCP). This provision is limited, however, as it concerns operations that take place only after criminal proceedings have been initiated and only provides for the option to suspend such operations in special circumstances. At the time of finalising this report, Luxembourg authorities also referred to Article 2(2) CCP, which provides that prosecution of a legal person is extinct when a legal person loses its legal personality unless this was done for the purpose of escaping prosecution. According to the authorities this provision can be used to establish the liability of companies that have fraudulently undertaken corporate transformations. Therefore, this provision is restricted by its limited scope. In Luxembourg, there are no provisions establishing, more generally, the possibility that, in cases of corporate transformation such as mergers or acquisitions, the company succeeding the one that committed the offence could be held criminally liable or punished for it. This would be particularly important, given the context mentioned in the previous section, as a company that has committed a foreign bribery offence could then undergo a transformation resulting in the incorporation of a new entity in Luxembourg.

Commentary

The lead examiners welcome the amendments to the Criminal Code enabling Luxembourg to comply with Phase 3 Recommendation 2(a) by adopting one of the approaches described in the 2021 Recommendation with regard to the perpetrator's level of authority and the type of act for which legal persons may be held liable. Given that the new provisions have not yet been applied at the time of writing this report, they recommend that the Working Group follow up their application as case law and practice develop.

The lead examiners note the lack of developments in case law clarifying the notion of the "interest" of the legal person, with the exception of one decision confirming that the interpretation of this notion is limited to profit or pecuniary advantages. They therefore consider it necessary to reiterate Phase 3 Recommendation 2(b) and recommend that Luxembourg take the necessary measures to ensure that the criterion of the "interest" of the legal person does not exclude certain cases of foreign bribery where a bribe is paid without the aim of obtaining a profit or pecuniary advantage, or is paid only in the partial interest of the enterprise or in the interest of another legal person, possibly linked to the first. On the other hand, case law seems to confirm the principle that the liability of legal persons is not limited to cases in which the natural person (or persons who committed the offence are prosecuted or convicted. The lead examiners recommend that the Working Group follow up the application of this principle to foreign bribery.

In light of the risks described above, the lead examiners also recommend that law enforcement authorities: (i) systematically examine the involvement of Luxembourg entities in foreign bribery schemes and (ii) assess the possibility of prosecuting, where appropriate, entities that may have acted as accomplices or used intermediaries, including related entities, to commit foreign bribery or related offences.

Finally, the lead examiners note with concern that Luxembourg has no comprehensive legal provisions covering successor liability. They therefore recommend that Luxembourg adopt any appropriate measures to ensure that legal persons cannot avoid liability or related sanctions by restructuring, merging, being acquired or otherwise altering their corporate identity.

C2. Sanctions available for legal persons in foreign bribery cases

1. Criminal sanctions available: Amounts to be reconsidered as soon as possible

226. The criminal sanctions that can be imposed on legal persons are: (i) fines, (ii) special confiscation; (iii) exclusion from participation in procedures for awarding public contracts and concession contracts; and (iv) dissolution (article 35 CC). Since Phase 3, there have been no reforms affecting the sanctions applicable to legal persons, with the exception of the new provisions already noted with regard to confiscation (see Section B6) and the adoption in 2018 of new laws on public procurement and concession contracts (see below).

227. The fine applicable to legal persons for felonies is between EUR 500 000 and EUR 750 000 (article 36 CC). This amount can be increased fivefold for certain offences, including active bribery (article 37 CC). The maximum fine for the felony of foreign bribery is therefore EUR 3 750 000. In certain cases of recidivism, the maximum rate is quadrupled and can therefore reach a maximum of EUR 15 million (article 57(2) CC). It is clear that the maximum fine (except in the case of recidivism) is low and an inadequate deterrent, especially for large companies. The Working Group has often recommended that States Parties to the Convention set higher maximum fines and has even encouraged them to set fines based on a company's turnover.[159]

228. Regarding the other sanctions, the provisions applicable to special confiscation are the same for natural and legal persons (see Section B6). Since 2010, article 35 CC has included debarment from public procurement among the sanctions applicable to legal persons. In 2018, this debarment was extended to procedures for awarding concession contracts.[160] Luxembourg's legislation on public procurement and concession contracts, transposing the relevant EU standards, also provides for the exclusion from award procedures in case of a conviction for bribery (see Section C2). Dissolution can be ordered only when the legal person was intentionally "created" or "diverted from its purpose" to commit the offence of foreign bribery. It cannot be applied to legal persons governed by public law (article 38 CC).

2. Mitigating factors: Consider clarifying

229. The Criminal Code does not contain a list of mitigating factors, leaving judges to apply these at their own discretion (see Section B6). It is therefore unclear whether and to what extent the existence of internal compliance programmes would be taken into account when sentencing a legal person found guilty of foreign bribery. According to the prosecutors met during the on-site visit, judges could in principle take into account the fact that a company has adopted compliance programmes. However, they would not expect any analysis that went beyond simply noting the existence of these programmes.

230. As mentioned above, foreign bribery offences are felonies, but can be reclassified, i.e. reduced to misdemeanours, by applying mitigating factors (see Section B6). The reclassification of the offence of foreign bribery also has significant consequences for the sanctions applicable to legal persons. If an offence is reclassified, the maximum fine applicable to legal persons is ten times that applicable to natural persons (as the latter is doubled under article 36(2) CC and multiplied by five under article 37 CC). As mentioned in the section on sanctions, case law is contradictory as to the fines applicable to individuals in the event of reclassification. Even if we consider the case law that imposes the highest fines, the maximum fine for legal persons would be EUR 1 875 000. In addition, the court has the option not to impose a fine

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[159] See, for example, the OECD Working Group on Bribery (2018), Phase 4 Report – Germany, paragraph 243 and the commentary following paragraph 244. Germany increased its fines to EUR 10 million, but was also encouraged to continue examining a proposal to introduce administrative fines of up to 10% of a company's turnover.

[160] Act of 3 July 2018 on awarding concession contracts, article 45(1): "Article 35(3) of the Criminal Code is supplemented as follows: 3) exclusion from participation in procedures for the award of public contracts and concession contracts" (underlined text added in 2018).

on the legal person, if it is sanctioned with confiscation or debarment from public procurement (article 39 CC).

3. Sanctions imposed in practice: Lack of enforcement

231. During Phase 3, in view of the lack of enforcement, the Working Group decided to follow up, in light of developments in case law and practice, the level of sanctions and the use of confiscation in foreign bribery cases, and in particular the sanctions imposed on legal persons to ensure that they are effective, proportionate and dissuasive. No foreign bribery cases against legal persons have been closed since Phase 3. In fact, no legal person has ever been convicted of active bribery (see Section C4). Furthermore, as noted in Section B5, the Luxembourg authorities do not have any statistics on sanctions that would provide an overview of those imposed on legal persons in cases of economic crime.

4. Tax treatment of fines and confiscated assets: Positive developments

232. The Working Group takes note of article 12(4) of the Income Tax Act, which establishes the principle of non-deductibility of criminal and administrative fines, confiscations, settlements, and other penalties of any nature imposed on the taxpayer for non-compliance with legal or regulatory provisions. It also welcomes a landmark ruling by the Luxembourg Administrative Court on the non-deductibility of a settlement fee imposed by foreign authorities on a Luxembourg company. In essence, the Administrative Court held that the fine paid corresponded to a settlement that put an end to proceedings brought against the company for the violations it had committed. The company's claim was disallowed and the fine paid was recognised as non-deductible pursuant to article 12(4) of the Income Tax Act.

5. Exclusion from public procurement contracts: A system in need of review

233. At the time of Phase 3, a 2009 Grand Ducal regulation transposing the relevant EU standards provided for debarment from public procurement following a bribery conviction. Since Phase 3, Luxembourg passed two laws in 2018 that reflect the new European standards and lay down rules on exclusion from participation in procedures for awarding public contracts and concession contracts.[161] These rules establish an obligation to exclude from award procedures any economic operators that have been convicted of acts of bribery by a final judgment. Candidate operators must provide a sworn declaration and an extract from the criminal record. The obligation to exclude also applies when the convicted person is a member of the administrative, management, or supervisory body of said economic operator, or has any powers of representation, decision-making, or control within it. The period of exclusion may not exceed five years from the date of final conviction, except where such exclusion has been established by a judgment. As in Phase 3, the Luxembourg authorities state that they have no statistics indicating the number of economic operators excluded due to a bribery conviction, except for foreign bribery.

234. An economic operator that should be excluded on the grounds of a bribery conviction can avoid this exclusion by attesting that it has taken measures that demonstrate its "reliability". To do so, the operator must prove that it has: (i) paid or undertaken to pay compensation for any harm caused by the offence; (ii) fully clarified the facts and circumstances by working actively with the investigating authorities; and (iii) taken specific technical, organisational, and personnel-related measures to prevent a new criminal offence or misconduct. These measures are assessed taking into account the seriousness of the offence and the particular circumstances of the operator. Each contracting authority has its own method of assessment. When an operator has been excluded from award procedures pursuant to a final judgment,

[161] The Act of 8 April 2018 on public procurement, article 29; and the Act of 3 July 2018 on the award of concession contracts, article 37. These rules transpose Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

it is not possible to avoid the exclusion throughout the period set by the judgment. Although they have not yet been applied in practice, these provisions are a positive development, because they can incentivise companies to adopt compliance programmes and they allow their corrective measures to be taken into account, as advocated by the 2021 Recommendation.

235. These rules have some significant gaps, however. Firstly, exclusion from award procedures applies to convictions for an "o*ffence under articles 246 to 249 CC on bribery*". No mention is made of article 252 CC, which extends the application of the provisions on domestic bribery to bribery of foreign public officials. This provision could therefore be interpreted as excluding the offence of foreign bribery. It likewise fails to include article 250 CC on bribery of judges. Secondly, the exclusion obligation only applies to final convictions. During the on-site visit, it appeared that Luxembourg authorities may have difficulties qualifying non-trial resolutions, where there is an admission of guilt, as "convictions". A legal person that has concluded a non-trial resolution of this nature abroad would therefore not be covered. Finally, it appears that an exclusion decision handed down by an international financial institution (such as a development bank) is not taken into account when awarding contracts. During the on-site visit, a representative of the Ministry of Public Works explained that the contracting authorities do not consult the debarment lists of international financial institutions. They only ask operators to provide a copy of their criminal record. Luxembourg has therefore not complied with Recommendation 9(b) of Phase 3, which called on it to: "Take the steps necessary to ensure that public procurement authorities impose stricter enforcement of existing provisions to bolster the integrity of public procurement, and especially of those excluding bids [...] appearing on the development banks' exclusion lists" (see Section A4).

Commentary

The lead examiners noted that the maximum fines for legal persons (except in the more exceptional case of repeat offenders) are low and insufficiently dissuasive, especially for large companies. As stated in Section B6 on sanctions, they also note with concern that the almost automatic practice of "reclassifying" financial offences could significantly weaken the deterrent effect of the penalties applicable to legal persons for the offence of foreign bribery. The lead examiners therefore recommend that, as soon as possible, Luxembourg raise the maximum fines available for legal persons to a level that is proportionate, effective and dissuasive, including when the offence is "reclassified", i.e. prosecuted as a misdemeanour.

Given the apparently limited attention paid to internal compliance programmes, the lead examiners recommend that Luxembourg encourage law enforcement authorities, in the context of prosecuting foreign bribery and related offences, to consider measures to incentivise companies to develop internal control, ethics, and compliance programmes or measures, including by making such programmes or measures a possible mitigating factor. Luxembourg should nevertheless ensure that the mere existence of such programmes or measures cannot exonerate a legal person, that the final review of such programmes or measures is the sole responsibility of the judicial, law enforcement, or other public authorities, and that sanctions remain effective, proportionate, and dissuasive, in accordance with article 3 of the Anti-Bribery Convention.

As far as public procurement and concession contracts are concerned, the lead examiners note that there are significant gaps in the relevant rules. Luxembourg should clarify that final convictions for foreign bribery, including bribery of judges, are covered by the rules on exclusion from award procedures. The lead examiners also recommend that Luxembourg take steps to ensure that, when awarding contracts, contracting authorities can take into account foreign non-trial resolutions that find an operator guilty of foreign bribery, without prejudice to the rules allowing economic operators to prove their "reliability" (including by considering mitigating factors such as the adoption and improvement of internal control, ethics, and compliance programmes), consider exclusion decisions by international financial institutions, and check these institutions' exclusion lists.

C3. Jurisdiction for prosecuting legal persons

236. Provisions on jurisdiction based on the principles of territoriality and nationality are the same for natural and legal persons (articles 3 and 4 CC, articles 5 et seq. CCP). Luxembourg has broad extraterritorial jurisdiction. Since 2011, articles 246 to 252 CC on bribery have been included in the list of offences committed abroad by a Luxembourg citizen, a person habitually resident in Luxembourg, or a person staying in Luxembourg, which can be prosecuted even if the act is not punishable under the law of the country where it was committed (article 5-11 CC). In their answers to the Phase 4 questionnaires, the Luxembourg authorities stated that "*jurisdiction over legal persons is assessed independently of any jurisdiction that the investigating and prosecuting authorities may have over natural persons*". However, they did not provide a source. Nor did they indicate how the rules on jurisdiction would be applied in practice to legal persons, particularly as regards the nationality and habitual residence criteria. During the on-site visit, prosecutors explained that registration and/or establishment of a registered office in Luxembourg are normally used to determine whether these criteria apply to legal persons. Since residence is a factual concept, this criterion could be applied if effective control of the entity is exercised in the country. As mentioned above, foreign companies involved in foreign bribery may have set up holding companies or other corporate structures, including shell companies, in Luxembourg (see, for example, several of the allegations in Annex 1). It would therefore be important that law enforcement authorities examine all available jurisdictional bases in their investigations and prosecutions, to enable them to pursue entities potentially involved in foreign bribery schemes.

Commentary

The lead examiners recommend that law enforcement authorities explore all available jurisdictional bases in their investigations and prosecutions to establish their competence, where appropriate, based on the principle of territoriality or on the criteria of legal persons' nationality and habitual residence in Luxembourg, to prosecute entities potentially involved in foreign bribery schemes.

C4. Enforcement of corporate liability by the courts

237. During Phase 3, the Luxembourg authorities indicated that they did not yet have any practical experience of applying the provisions on the criminal liability of legal persons in the context of a bribery offence (domestic or foreign). The Working Group was aware of the recent entry into force (in 2010) of this liability regime. It nevertheless noted its limited enforcement and encouraged the Luxembourg authorities to take any appropriate measures to draw the attention of the Public Prosecutor's Office to the importance of also prosecuting legal persons in all foreign bribery cases in which they are likely to be involved.

238. To date, no legal persons have been convicted of foreign bribery. Proceedings like those in *Case I* are often limited to related offences, however. This case is part of what appears to be a general trend of pursuing alternative offences to bribery of public officials, in particular trading in influence. This could be due to a narrow interpretation of certain elements of the offence of foreign bribery. However, this raises issues for compliance with the Convention, in terms of both the foreign bribery offences that should be covered and the applicable sanctions, as discussed in Section B1. As far as legal persons are concerned, recourse to the alternative offence of trading in influence undermines in particular the deterrent effect of the applicable sanctions. Trading in influence is not included on the list of offences for which the maximum fine is multiplied by five for legal persons (article 37 CC, see Section C2). Consequently, the maximum fine for trading in influence involving public officials (article 247 CC) is EUR 1 500 000. Trading in influence

between private individuals (article 248 CC) is a misdemeanour.[162] It carries even less severe penalties (articles 36 and 248 CC), in particular, a maximum fine of EUR 250 000.

239. In their answers to the Phase 4 questionnaires, the Luxembourg authorities also state that prosecutions and convictions for failure to comply with professional obligations concerning money laundering and terrorist financing (amended law of 12 November 2004) "make it possible to pursue legal persons that participate in or at least facilitate bribery". As already noted, the use of alternative charges to foreign bribery is welcome when it allows complex foreign bribery schemes to be sanctioned to the fullest extent possible. However, it would be preferable for legal persons to also be prosecuted for the felony offence of foreign bribery in all cases in which they are likely to be involved as a perpetrator or accomplice (see Section C1 on the use of provisions on complicity in offences). Other alternative or related offences may be alleged as additional or subsidiary offences. Prosecution of the offence of foreign bribery, where appropriate, would also have the positive effect of giving more visibility the offence and raising awareness within the private sector of the risks of foreign bribery to which Luxembourg companies are clearly exposed.

240. Regarding the enforcement of corporate liability more generally, the Luxembourg authorities have indicated that no legal persons have been prosecuted for, or convicted of, active bribery (articles 247, 249(2) or 250(2) CC) since this liability regime came into force in 2010. Between 2018 and 2022, 49 legal persons were prosecuted for, and 20 were convicted of, economic crimes.[163] The prosecution rate for legal persons seems low, even taking into account the small size of the country, particularly given that Luxembourg is a major financial centre. Furthermore, it is unclear whether, since the law on the liability of legal persons came into force in 2010, judges and prosecutors have received any training in this area, including on the challenges involved in prosecuting companies in cases with a transnational component.

Commentary

The lead examiners are pleased to note the first prosecution of a legal person in a foreign bribery case. They note with concern, however, that the prosecutors had to pursue the alternative offence of trading in influence between private individuals, which carries considerably less severe penalties than foreign bribery. Recommendations on the offence of foreign bribery and the use of alternative offences are covered in Section B1. The lead examiners also note that the rate of prosecution of legal persons for economic crimes appears to be low.

The lead examiners therefore recommend that Luxembourg continue its efforts by taking a proactive approach to the investigation and prosecution of legal persons for foreign bribery, including by ensuring that the competent authorities: (i) receive appropriate training and guidance on effective methods of detecting and investigating foreign bribery, and on the relevant rules on the liability of legal persons; and (ii) are provided with sufficient resources to conduct such investigations and prosecutions, as discussed in Section B.2.

C5. Mobilising the private sector

241. For the two-year written follow-up report in 2013, the Working Group had commended Luxembourg on having made significant awareness-raising efforts, including in relation to the 2010 law on the liability

[162] Trading in influence between private individuals (article 248 of the Criminal Code), covers bribes offered to a private individual to exert their influence to obtain benefits from a public authority or administration.

[163] These 20 convictions were for the following offences: 10 for aggravated tax evasion (as well as related money laundering in some cases); 4 for forgery and use of forgeries (as well as fraud and money laundering in some cases); 3 for environmental offences and related money laundering; 1 for concealment; 1 for infringements of the law governing company domiciliation; and 1 for money laundering of drug trafficking profits.

of legal persons and the OECD *Good Practice Guidance*.[164] The Working Group had therefore considered as fully implemented the Phase 3 recommendation asking Luxembourg to promote, jointly with the relevant professional associations, internal control, ethics, and compliance programmes or measures in the financial sector and businesses involved in commercial transactions abroad (Recommendation 6(d)).

242. It is apparent, however, that awareness-raising efforts have not continued. As mentioned above and already observed by the Working Group in Phase 3, tackling money laundering is given priority, leaving foreign bribery outside the scope of law enforcement efforts. In the area of anti-money laundering, the Luxembourg authorities have stepped up their efforts to raise awareness, deployed resources and mobilised the relevant actors, which is consistent with the vulnerabilities affecting the financial sector identified in the National Risk Assessment (see Introduction). On the other hand, it appears that the authorities have made no effort since Phase 3 to raise awareness in the private sector specifically in the area of foreign bribery. Responses to the Phase 4 questionnaire mention that "the subject of bribery was briefly addressed" by the FIU at conferences organised in 2022 and 2023 by the CSSF. The other responses also mention several awareness-raising efforts concerning anti-money laundering and audits, but none make any reference to companies nor to foreign bribery. Similarly, the Chamber of Commerce reported several guidance and training initiatives run between 2017 and 2022, all focused on tackling money laundering, and addressing the risks of bribery only marginally.[165]

243. As for the general level of awareness among Luxembourg companies, there does not seem to have been any significant improvement compared to the situation described in the Phase 3 report, particularly among companies in non-financial sectors. Large companies generally seem to be aware of foreign bribery and the risks to which they are exposed by their international activities and foreign legislation, such as the US Foreign Corrupt Practices Act (FCPA). However, there was no evidence that SMEs have any awareness or knowledge of the offence, despite being exposed to the risks of foreign bribery (see Introduction). During the on-site visit, it was not possible to meet any SMEs, as the Ministry of the Economy's General Directorate for SMEs considers it difficult to identify SMEs that are active on foreign markets or involved in international trade. This inability to identify businesses in this segment makes it impossible to deliver any awareness-raising initiatives. Nevertheless, one representative of a large company met during the on-site visit confirmed that there is generally little awareness of the risk of foreign bribery among companies in Luxembourg. When recruiting and training staff, this company has found that bribery is more often perceived as an imported phenomenon and one that needs to be tackled as part of anti-money laundering efforts.

244. Internal control, ethics and compliance measures, for their part, seem to be widespread among large companies. The main reason for this is that most of these companies comply with anti-bribery legislation in the United States and the United Kingdom. Civil society representatives met during the on-site visit consider that other Luxembourg companies are lagging behind when it comes to bribery prevention. In Luxembourg, companies are not obliged or incentivised to adopt adequate internal control, ethics, and compliance programmes. A representative of a large company pointed out that these weaknesses are even more pronounced among SMEs.

245. The Working Group also notes that Luxembourg has not yet considered fostering, facilitating, engaging, or participating in anti-bribery collective action initiatives with private and public-sector representatives, as well as civil society organisations, aiming to address foreign bribery and bribe solicitation, as referred to in the 2021 Recommendation.

Commentary

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[164] OECD Working Group (2013), Luxembourg: Follow-up to the Phase 3 Report & Recommendations, para. 3.

[165] The list of training courses includes only two on bribery and money laundering: E-learning "Bribery and Corruption Luxembourg - Banking" and E-learning "(National and International) AML Extortion and Bribery".

The lead examiners are seriously concerned by the absence of initiatives to raise awareness of foreign bribery in the private sector. Since Phase 3, Luxembourg has stepped up its efforts to raise awareness, deployed resources, and mobilised various actors with the aim of tackling money laundering. These developments are extremely important in view of the risks to which Luxembourg is exposed as a financial centre. However, while it is true that bribery is addressed as a predicate offence of money laundering, this is not enough to make the private sector aware of the risks of foreign bribery.

The lead examiners therefore recommend that Luxembourg take a proactive approach to: (i) raise awareness of the risk of foreign bribery and the offence of bribery of foreign public officials among Luxembourg companies operating abroad, including SMEs; and (ii) foster, facilitate, engage, or participate in anti-bribery collective action initiatives. They also recommend that Luxembourg take concrete steps to: (i) encourage companies, including public companies, to develop and adopt adequate internal control, ethics, and compliance programmes or measures to prevent and detect foreign bribery, taking into account the OECD Good Practice Guidance, and (ii) support employer and professional associations in their efforts to encourage and assist companies, particularly SMEs, to develop such programmes or measures.

CONCLUSION

Luxembourg has introduced significant legislative and institutional changes since the Phase 3 evaluation in 2011. Luxembourg must now consolidate these recent achievements, which are undermined by structural resource issues that impact the entire criminal justice system, and commit to better identifying the foreign bribery risks facing its companies. The very weak enforcement of the offence of foreign bribery since the Convention entered into force in Luxembourg is another cause for concern. The Working Group is particularly concerned about the low level of investigations and lack of prosecutions of legal persons have been convicted of foreign bribery. It is also concerned that the level of the fines applicable to natural and legal persons is insufficiently dissuasive, particularly in view of the seriousness of the offence of foreign bribery. Finally, despite tangible efforts and results in providing mutual legal assistance, Luxembourg is not yet making sufficient and appropriate use of the available range of international co-operation instruments, particularly in terms of participating in the resolution of multi-jurisdictional foreign bribery cases.

Regarding the implementation of the Phase 3 recommendations, Luxembourg has fully implemented Recommendations 1(i) (offence and notion of “without right”) and 1(ii) (offence and criteria of a “corruption pact”); 2(a) (conditions for the liability of legal persons) and 7(b) (international exchange of information on tax matters).

Limited progress has been made on implementing the other Phase 3 recommendations, which are therefore incorporated into the Working Group’s Phase 4 recommendations for Luxembourg below. The recommendations that have only been partially implemented are: 2(b) (liability of legal persons); 4(b) (police investigative powers); 4(c) (police resources); 5(b) (accounting professions); 7(a) and 7(c) (detection by tax authorities); 9(a), 9(b) and 9(c) (public advantages). Finally, the recommendations that remain unimplemented are: 4(a) (investigations and prosecutions); 4(d) (criminal policy); 6(a) (article 8 of the Convention); 6(b) and 6(c) (auditors’ obligations); and 7(d) (sanctions to discourage tax deductibility).

Based on the findings of this report, the Working Group acknowledges the good practices and positive achievements set out in Part 1 below and makes the recommendations set out in Part 2 below. The Working Group will also follow up on the issues identified in Part 3 below. It invites Luxembourg to submit a written report on the implementation of all recommendations and follow-up issues in two years’ time (i.e. March 2026). The Working Group also invites Luxembourg to provide detailed information on its enforcement of the offence of foreign bribery when it submits this report.

Good practices and positive achievements

This report has identified several good practices and positive achievements in Luxembourg’s implementation of the Convention and related instruments that may be effective in combating foreign bribery and strengthening enforcement.

The Working Group welcomes several positive achievements. Firstly, an ambitious law has established a general protection regime for whistleblowers, which draws extensively on international standards and incorporates a number of best practices in this area into Luxembourg law. In recent years, Luxembourg has also adopted a number of legislative amendments aimed at extending the confiscation regime and implementing it more effectively. Amendments to the Criminal Code have both reorganised existing provisions and introduced new ones extending the scope of confiscation. The Working Group is also encouraged by Luxembourg's adoption of a "plea bargaining" procedure, addressing the recognised need to shorten procedural timeframes in complex financial cases.

In terms of good practices, the Working Group welcomes the introduction of new tools and other registers (including the bank accounts register) that offer interesting opportunities for investigating and prosecuting authorities to access financial and banking information. The Working Group also commends the effective co-operation between, on the one hand, the investigating and prosecuting authorities competent in foreign bribery and, on the other, the FIU and government agencies that might detect allegations of foreign bribery, as well as the measures that have helped to strengthen this co-operation since Phase 3. Finally, the Working Group notes with satisfaction the Luxembourg authorities' recent recognition of the need for a more proactive approach to using foreign mutual assistance requests as a way to detect bribery in Luxembourg, which is now reflected in the criminal policy promoted by the Public Prosecutor's Office.

Recommendations of the Working Group

Recommendations regarding detection of foreign bribery

1. Regarding **detection of foreign bribery**, the Working Group recommends that Luxembourg:

   a. Develop a strategic approach involving the Corruption Prevention Committee (COPRECO) to tackling foreign bribery based on: (i) understanding the specific foreign bribery risks faced by Luxembourg; and (ii) drawing up an ambitious, cross-cutting and cross-sectoral plan to raise awareness of foreign bribery [2021 Recommendation III and IV].

   b. Regarding the reporting obligations of public officials, (i) ensure that the threshold for reporting credible allegations of foreign bribery to the Public Prosecutor's Office is understood in a uniform and harmonised manner by all the administrations concerned; (ii) clarify the relationship between public officials' reporting obligations under article 23(2) CCP and the reporting channels open to them under the Act of 16 May 2023 on the protection of whistleblowers; and (iii) reinforce its efforts to raise awareness among its public officials of their reporting obligation in relation to the detection of foreign bribery offences, including through training campaigns and practical guides [2021 Recommendation XXI.i, .ii, .iii, and .vi].

   c. (i) Continue and intensify awareness-raising initiatives (including training, case studies, indicators and other guidelines) for the FIU, supervisory authorities and regulated professions on the risks of foreign bribery and money laundering predicated on this offence; and (ii) provide the FIU with sufficient capacity and resources to handle the growing number of incoming transaction reports [articles 5 and 7 of the Convention; 2021 Recommendation IV.i and .ii and VII].

   d. With regard to the tax authorities, (i) step up measures to raise awareness among officials of the need to detect illicit transactions linked to foreign bribery, including through clear and dedicated guidelines; (ii) reconsider tax auditing practices, with a view to adopting a more proactive policy to help detect illicit transactions linked to foreign bribery; and (iii) ensure that tax authorities have human and material resources commensurate with the challenges involved in checking and detecting allegations likely to fall within the scope of foreign bribery [Phase 3

Recommendations 7(a) and 7(c), 2009 Recommendations on Tax Measures I.ii, I.iii, II, III.iii and 2021 Recommendation XXI.iii].

e. For Luxembourg diplomatic and consular missions, (i) adopt targeted training and awareness-raising measures for Ministry of Foreign and European Affairs staff on their role in detecting foreign bribery offences and raising awareness among Luxembourg companies operating abroad; (ii) establish clear and easily accessible internal reporting channels for Ministry of Foreign and European Affairs staff; and (iii) encourage proactive detection ensure by diplomatic and consular officials posted abroad, including through media monitoring and alerts concerning acts of foreign bribery [2021 Recommendation, XXI.i, .ii, .iii, .iv and .vi].

f. As regards development aid, (i) take the necessary steps to ensure that public procurement authorities, including in the context of ODA, enforce existing provisions more strictly to bolster the integrity of public procurement and in particular those relating to the exclusion of bids, when appropriate, of economic operators who are found guilty of foreign bribery, while taking into account mitigating factors (such as the implementation or improvement of integrity and compliance measures), or appear on the exclusion lists of all multilateral development banks for foreign bribery offences; and (ii) adopt targeted measures to raise awareness among LuxDev staff and partners, particularly those posted abroad, of their role in detecting and reporting foreign bribery offences [Phase 3 Recommendation 9(a), 2021 Recommendation IV.i and XXI.vi.; 2016 Recommendation for the Development Co-operation Actors on Managing the Risk of Corruption, 6.i and .iv].

g. In the context of export credits, (i) ensure that the Office du Ducroire has satisfactory access to information on companies sanctioned for foreign bribery in Luxembourg; (ii) examine the possibility of taking measures so that, when deciding to grant contracts and other public benefits, the relevant agencies would use the existence of internal control, ethics and compliance measures as a criterion for those decisions; and (iii) adopt targeted measures to raise awareness and train Office du Ducroire staff on their role of detecting and reporting foreign bribery offences [Phase 3 Recommendations 9(b) and 9(c), 2021 Recommendation XXIV.ii and .iii, XXIV.i and .v, IV.i and XXI.vi; 2019 Recommendation on Bribery and Officially Supported Export Credits].

h. (i) Clarify through appropriate guidance the competing and potentially contradictory obligations of company (i.e. external) auditors who uncover suspected acts of bribery of foreign public officials to inform the company's management and, where relevant, its supervisory bodies; (ii) consider requiring external auditors to report any suspicion of bribery of foreign public officials to the law enforcement authorities; and (iii) adopt targeted measures to raise awareness within the accounting and auditing professions of their role in detecting and reporting the foreign bribery offence [Phase 3 Recommendations 5(b), 6(b) and 6(c), 2021 Recommendation XXIII B.iii and .v, IV.ii, XXIII.A and .B].

i. Regarding self-reporting, consider measures to encourage voluntary disclosures and reporting by persons who have participated in or been implicated in the commission of foreign bribery to provide relevant information to the competent law enforcement authorities, and also ensure that appropriate mechanisms are in place to apply these measures in foreign bribery investigations and prosecutions [2021 Recommendation XV.ii.a and X.iii].

j. Regarding the media, (i) ensure that more investigations are opened on the basis of credible allegations of foreign bribery reported in the national and foreign press, particularly when these allegations involve major Luxembourg companies; (ii) ensure that sufficient resources are allocated to prosecuting authorities in their efforts to monitor the national and international press; and (iii) ensure that the conditions for requests to access official documents enable the media and civil society to detect and report allegations of foreign bribery [2021 Recommendation VIII and XXI.iv].

2. Regarding **the protection of whistleblowers**, the Working Group recommends that Luxembourg:

a. (i) Clarify that a whistleblower's personal motivation (including their good faith) is irrelevant for the application of protections under the law and ensure that reporting persons are not subject to disciplinary proceedings and liability, including criminal liability, solely on the basis of making reports that qualify for protection; and (ii) ensure that interim measures pending the resolution of legal proceedings are available to whistleblowers as remedial measures [2021 Recommendation XXII, XXII.vii and XXII.x].

b. Extend the scope of the law to cases of retaliation that occur outside the workplace, and ensure that sanctions against those who retaliate against whistleblowers are effective, proportionate and dissuasive [2021 Recommendation XXII.vi and XXII.viii].

c. Ensure that regulations and laws prohibiting the transmission of economic or commercial information do not unduly hinder whistleblowing and whistleblower protection under the conditions set out by the law [2021 Recommendation XXII.xiv].

d. Ensure that the whistleblowing office and all other competent authorities responsible for implementing the legal framework for whistleblower protection have sufficient resources and are adequately trained to carry out the tasks set out by the law [2021 Recommendation XXII.i].

e. Continue and extend its awareness-raising efforts to ensure that the law is properly applied, particularly by developing recommendations, guidelines and practical guides on the existence and function of reporting channels, and on whistleblower protection mechanisms in both the public and private sectors [2021 Recommendation XXII.xii].

f. Consider introducing incentives for making reports that qualify for protection [2021 Recommendation, XXII.xi].

Recommendations regarding enforcement of the foreign bribery offence

3. Regarding the **foreign bribery offence**, the Working Group recommends that Luxembourg:

a. Clarify, by any appropriate means, that for the purposes of foreign bribery: (i) it is not necessary to prove that a foreign public official is in fact in a position to influence the matter for which the bribe was paid [Convention article 1].

b. Examine the potential causes for the tendency to use alternative offences instead of the foreign bribery offence, and on the basis of this analysis consider either criminalising foreign bribery in a sufficiently broad manner, or extending the offence of trading in influence so that the constituent elements of the offence and the applicable sanctions conform with the Convention [Convention articles 1 and 3].

4. Regarding **the means, resources, expertise and training** of investigators, prosecutors, investigative judges and trial judges, the Working Group urges Luxembourg to promptly take the necessary measures to:

a. (i) Clearly define economic and financial crime, including the investigation and prosecution of the offence of foreign bribery, as a criminal policy priority; and (ii) urgently carry out a comprehensive review of how economic and financial crime is organised and the resources it is allocated in order to improve its effectiveness and performance [article 5 of the Convention].

b. Ensure that: (i) sufficient resources are allocated to all investigative, prosecutorial and adjudication services, and to COPRECO; (ii) these services can be staffed by the necessary personnel with expertise in handling foreign bribery cases effectively and within a reasonable time limit; and (iii) these services likewise have the necessary training to handle these cases effectively [Phase 3 Recommendations 4(c) and (d), Convention article 5; 2021 Recommendation VI.iii and VII].

5. Regarding **sanctions and confiscation**, the Working Group recommends that Luxembourg:

    a. Increase as soon as possible (i) the maximum fines available for natural persons to a level that is proportionate, effective, and dissuasive; and (ii) the maximum fines available for legal persons to a level that is proportionate, effective and dissuasive, including when the offence is “reclassified”, i.e. reduced to a misdemeanour (“*correctionnalisation*”) [Convention article 3(1)].

    b. Review the practice of “reclassification” (“*correctionnalisation*”) to make its use and consequences clearer and more predictable, including the corresponding level of fines applicable to natural and legal persons [Convention article 3(1)].

    c. Ensure that the framework governing self-reporting leads to effective, proportionate and dissuasive sanctions [Convention article 3(1)].

    d. Encourage law enforcement authorities, in the context of prosecuting foreign bribery and related offences, to consider measures to incentivise companies to develop internal control, ethics and compliance programmes or measures, including by making such programmes or measures a possible mitigating factor in line with the conditions set out in the 2021 Recommendation [Convention article 3, 2021 Recommendation XXIII.D].

    e. (i) Clarify that final convictions for foreign bribery, including bribery of judges, are covered by the rules on exclusion from award procedures; and (ii) take steps to ensure that, when awarding contracts, contracting authorities can take into account foreign non-trial resolutions that find an operator guilty of foreign bribery, without prejudice to the rules allowing economic operators to prove their “reliability” (including by considering mitigating factors such as the adoption and improvement of internal control, ethics, and compliance programmes), consider exclusion decisions by international financial institutions and check these institutions’ exclusion lists [2021 Recommendation XXIV].

    f. Clarify, by any appropriate means, that special confiscation should also be mandatory, where applicable, in foreign bribery cases where the offence has been reclassified (i.e. prosecuted as a misdemeanour) [Convention article 3(3)].

    g. (i) Further raise awareness among investigating and prosecuting authorities of the importance of carrying out thorough financial investigations in order to detect, recover, and confiscate (including by equivalent), the bribe and proceeds of foreign bribery; (ii) consider adopting and disseminating to these same authorities guidelines specifically aimed at identifying, quantifying, and confiscating the bribe and proceeds of foreign bribery; (iii) ensure that the Asset Management Office is able to identify, in its statistics, seizures and confiscations carried out in connection with foreign bribery cases, regarding both the bribe and the proceeds of bribery obtained by bribers; and (iv) ensure that the Asset Management Office and the Asset Recovery Office have resources and means commensurate with their mandates [Convention article 3(3); 2021 Recommendation XVI.iii and (iv)].

6. Regarding **investigations and prosecutions**, the Working Group recommends that Luxembourg:

    a. Take a proactive approach to the investigation and prosecution of bribery of foreign public officials, with respect to both natural and legal persons. [2021 Recommendation, VI.iii].

    b. (i) 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; (ii) consider extending the investigative powers of the police in order to strengthen its means and methods of investigation to gather sufficient evidence of bribery of foreign public officials at the preliminary investigation stage [Phase 3 Recommendations 4(a) and 4(b), Convention article 5, 2021 Recommendation V and Annex I.D].

c. (i) Take any appropriate measures to enforce the offence of money laundering in foreign bribery cases more effectively, and raise awareness among, and provide the necessary training on this matter to, law enforcement authorities; and (ii) take measures to enforce accounting offences in foreign bribery cases more effectively and maintain detailed statistics on investigations, prosecutions, convictions and sanctions against natural and legal persons for false accounting, including data on whether foreign bribery is the predicate offence [Convention articles 5 and 7; 2021 Recommendation VI and Phase 3 Recommendation 6(a), Convention article 8; 2021 Recommendation XXIII].

d. Raise awareness among tax authorities regarding the importance of making rigorous use of all the sanctions available under the tax legislation to deter any attempt on the part of taxpayers to pass off bribes paid abroad as deductible charges [Phase 3 Recommendation 7(d), 2009 Recommendation on tax measures].

e. Ensure the tax authorities: (i) collect information on the implementation of the principle of non-tax deductibility of bribes paid to foreign public officials; (ii) adopt a more proactive approach towards implementing the non-tax deductibility of bribes; and (iii) set up information exchange mechanisms enabling them to stay informed of convictions handed down by the courts in cases of foreign bribery, and to systematically review the tax situation of companies convicted, where appropriate, of foreign bribery [2009 Recommendation on Tax Measures, 2021 Recommendation XX, Phase 3 Recommendations 7(c) and 7(d)].

7. Regarding **the closure of foreign bribery cases**, the Working Group recommends that Luxembourg:

a. (i) Continue its efforts to digitise its case files, which should provide access to relevant statistical data; and (ii) collect statistics on sanctions applied in practice for bribery offences, including for bribery of foreign public officials [Convention article 3(1) and 2021 Recommendation XV.i and .iii].

b. Take any appropriate measures to raise awareness among judges of the importance of imposing sanctions for foreign bribery that are sufficiently transparent, effective, proportionate, and dissuasive, including by explaining in greater detail in judgments the factors taken into account during sentencing [Convention article 3(1) and 2021 Recommendation XV.i and .iii].

8. Regarding **judgments upon agreement as means of obtaining plea bargaining**, the Working Group recommends that Luxembourg:

a. Clarify the criteria governing the use of such agreements, including the expected degree of co-operation with law enforcement authorities [2021 Recommendation XVII and XVIII].

b. (i) Make public, via clear and publicly accessible information, the benefits that the defendant may obtain from entering into such an agreement; (ii) consider taking into account, for the purpose of judgments upon agreement, appropriate remedial measures, including the adoption or improvement of internal controls and anti-corruption compliance programmes; and (iii) examine the application of judgment upon agreement for financial offences to determine the effectiveness of this tool, including in terms of sanctions, and to identify best practices [2021 Recommendation XVII and XVIII].

9. Regarding **mutual legal assistance**, the Working Group recommends that Luxembourg:

a. Urgently take any appropriate measures to strengthen the resources of all the authorities involved in executing and issuing requests for mutual assistance, including those relating to seizure and confiscation [Convention article 9, 2021 Recommendation XIX.A.viii].

b. Equip their generic software tool for managing requests with new functionalities enabling statistics on incoming and outgoing requests for mutual legal assistance relating to allegations of foreign

bribery to be collected separately, and outgoing requests for mutual legal assistance to be monitored and disaggregated [2021 Recommendation XIX.A.viii and .ix].

c. Make better use of networks of contacts with foreign counterparts to initiate the spontaneous transmission of information, without prejudice to investigations and proceedings carried out in Luxembourg and in accordance with national law [2021 Recommendation XIX.A.i, B.i and ii].

d. (i) Consider creating a joint or parallel investigation team when conducting investigations and prosecutions for bribery of foreign public officials that may require co-ordinated and concerted action with one or more Parties to the Convention, in conformity with their national laws and relevant treaties and arrangements. [2021 Recommendation XIX.C.v].

Recommendations concerning the liability of legal persons

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

a. Ensure that the criterion of the "interest" of the legal person does not exclude certain cases of foreign bribery where a bribe is paid without the aim of obtaining a profit or pecuniary advantage or is paid only in the partial interest of the enterprise or in the interest of another legal person, possibly linked to the first [Phase 3 Recommendation 2(b), Convention articles 1 and 2].

b. Ensure that law enforcement authorities: (i) systematically examine the involvement of Luxembourg entities in foreign bribery schemes; (ii) assess the possibility of prosecuting, where appropriate, entities that may have acted as accomplices or used intermediaries, including related entities, to commit foreign bribery or related offences; and (iii) receive appropriate training and guidance on effective methods of detecting and investigating foreign bribery, and on the relevant rules on the liability of legal persons [Convention articles 1(2), 2, 7 and 8, 2021 Recommendation VI.iii and VII, Annex I.C.1].

c. Adopt any appropriate measures to ensure that legal persons cannot avoid liability or related sanctions by restructuring, merging, being acquired, or otherwise altering their corporate identity [Convention article 2, 2021 Recommendation, Annex I.B.5].

11. Regarding the **enforcement of corporate liability**, the Working Group recommends that Luxembourg ensure that law enforcement authorities explore all available jurisdictional bases in their investigations and prosecutions to establish their competence, where appropriate, based on the principle of territoriality or on the criteria of legal persons' nationality and habitual residence in Luxembourg, to prosecute entities potentially involved in foreign bribery schemes [2021 Recommendation, Annex 1.B.4].

12. Regarding promoting the development of **corporate compliance programmes**, the Working Group recommends that Luxembourg:

a. Take a proactive approach to: (i) raise awareness of the risk of foreign bribery and the offence of bribery of foreign public officials among Luxembourg companies operating abroad, including SMEs; and (ii) foster, facilitate, engage, or participate in anti-bribery collective action initiatives [2021 Recommendation IV.ii].

b. Take concrete steps to: (i) encourage companies, including public companies, to develop and adopt adequate internal control, ethics, and compliance programmes or measures to prevent and detect foreign bribery, taking into account the OECD *Good Practice Guidance*; and (ii) support employer and professional associations in their efforts to encourage and assist companies, particularly SMEs, to develop such programmes or measures [2021 Recommendation XXIII.C.i, .ii and Annex II].

Follow-up by the Working Group

13. The Working Group will follow up on the following issues as case law and practice develop:

a. (i) The implementation of reporting, including to the 22 competent authorities, given the relatively complex architecture introduced by the new law; (ii) the articulation of existing protection regimes in practice, namely those introduced by the new law and those already established by pre-existing special regimes; and (iii) any developments in case law regarding the application of the non-liability conditions for whistleblowers under article 27 of the new law on whistleblower protection.

b. The use in practice of foreign mutual assistance requests as a source to detect foreign bribery.

c. The Office du Ducroire's implementation of its obligations under the Act of 16 May 2023 on whistleblower protection.

d. How the provisions of the Act of 16 May 2023 on whistleblower protection are applied to the auditing profession in practice.

e. Regarding the implementation of article 1: (i) whether courts still require proof of a corruption pact; (ii) whether the foreign bribery offence covers any employee of a foreign public enterprise and whether the definition of "person entrusted with a public function" is autonomous (i.e. does not require proof of the foreign law); (iii) the extent to which it is necessary to identify the public official to whom the bribe is destined, especially in corruption cases involving intermediaries; and (iv) whether the foreign bribery offence can be established through the intent element of *dolus eventualis*.

f. How the European Delegated Prosecutors stationed in Luxembourg handle the foreign bribery offence when Luxembourg natural or legal persons are involved. The Working Group should verify in particular whether they have the necessary resources and independence to manage these cases in accordance with the Convention, and ascertain how these Delegated Prosecutors co-ordinate, where appropriate, with the Luxembourg authorities during joint investigations.

g. Regarding the constitutional reform strengthening and modernising the status of judges and prosecutors, (i) how the principle of the independence of the judiciary, newly enshrined in the Constitution, is applied in practice; (ii) how the right of positive injunction within the Public Prosecutor's Office and reporting to the State Prosecutor and State Prosecutor General in foreign bribery cases are applied in practice; (iii) the use of criminal policy directives; and (iv) whether the factors prohibited by article 5 of the Convention are likely to influence investigations and prosecutions.

h. The impact of data protection regulations on foreign bribery investigations and prosecutions, including in particular where companies and the Public Prosecutor's Office co-operate in concluding a judgment upon agreement.

i. The application of the approaches described in the 2021 Recommendation concerning the level of managerial authority and the type of act that may cause liability to be incurred.

j. The application of the principle that the liability of legal persons is not limited to cases in which the natural person or persons who committed the offence are prosecuted or convicted.

ANNEX 1: SUMMARY OF CASES MENTIONED IN THE REPORT

1. Convictions for foreign bribery or trading in the influence of foreign public officials

False Certificates

In this case, which involves both domestic and foreign bribery, several (almost exclusively) Portuguese nationals residing in Luxembourg paid bribes to a Portuguese public official between 2000 and 2007 for this official to issue documents falsely certifying the fulfilment of conditions for exercising various liberal professions, which were required to obtain Luxembourg business permits. These business permits were themselves obtained in exchange for bribes paid to a Luxembourg official via a network of Luxembourg and Portuguese intermediaries. Several investigations were launched in connection with this case from 2007 onward. The prosecutions resulted in the conviction of dozens of individuals acting as intermediaries or clients of the foreign public official. Eight of these people were convicted of foreign bribery and other charges between 2013 and 2018 (date of the last judgment on appeal). Three were acquitted of the foreign bribery charge (but convicted of others) in 2017, given that the alleged acts predated the entry into force of the offence (in 2001). The others were convicted on other charges, including domestic bribery, trading in influence, and forgery.

European Official I

In this case, in 2009 a national of a European Union member state offered money to an official of an EU body responsible for credit applications for national infrastructure projects. The official refused the money and reported the events. The judgment sets out that the individual accused was a personal advisor to a transport minister in their home country. The official to whom the bribe was offered was responsible for processing credit applications and for liaising with the country in question, among others. The individual was prosecuted by the Luxembourg authorities for foreign bribery and, as a subsidiary offence, for trading in the influence of foreign public officials. He was initially acquitted by the court of first instance in 2012, but then convicted by the Court of Appeal in 2013, which upheld the charge of trading in the influence of foreign public officials. It is unclear whether the allegations of this case fall within the definition of foreign bribery under the Convention, as it is not entirely clear whether the bribe was offered to obtain benefits for private companies, or whether the aim was simply to obtain funding for the state in question.

2. Prosecutions and investigations for foreign bribery and related offences

Case I

A company is suspected of being involved in the bribery of foreign public officials. The case initially concerned the suspected bribery of public officials in several countries. The only offences covered are the

misdemeanours of trading in influence between private individuals and money laundering. Prosecutions were only brought against the company.

Case II

The Luxembourg authorities reported an investigation involving a company suspected of having collaborated in the payment of bribes to foreign public officials.

3. Discontinued and dismissed investigations into foreign bribery and related offences

Donation of Vehicles

Three individuals were suspected of active bribery of foreign public officials for having made “donations”, in particular in the form of 100 pick-up trucks delivered to a foreign state, which were in fact intended for officials of that state. An investigation was launched in 2011. In 2015, the Chambre du Conseil dismissed the case on the grounds that the Luxembourg authorities had no territorial jurisdiction under the provisions applicable at the time. (The court concluded that the acts had been committed outside the national territory by persons who were neither Luxembourg nationals nor residents.)

European Official II

A foreign national living in Luxembourg was suspected of having paid bribes to an official of an EU body in exchange for the acquisition of real estate. An investigation was opened in 2013, but the Public Prosecutor’s Office decided not to prosecute due to a lack of sufficient evidence. The Luxembourg authorities were unable to provide any information on this case, because the file has been archived and is no longer accessible under the rules governing the protection of personal data.

Supply of Arms

A joint venture of two companies from an EU member state (one of them state-owned) is suspected of having paid bribes to secure public contracts in a country that is not a WGB member. In 2008, these companies signed a contract to supply arms and other equipment to the police. The contract price was allegedly inflated and part of it used to bribe foreign public officials. An investigation that had been opened in Luxembourg was reported to the authorities of another EU member state, who opened proceedings following an international mutual legal assistance request from Luxembourg.

4. Foreign bribery allegations that have not led to an investigation

Medical Devices

Companies belonging to an American group manufacturing orthopaedic and dental implants have been prosecuted in the United States for, among other things, paying bribes to public officials in Mexico between 2010 and 2013. A Luxembourg company, an indirect subsidiary of the group, was implicated in connection with the actions of its wholly-owned Mexican subsidiary, which was suspected of paying bribes to Mexican customs officials to facilitate the import of certain products. In 2017, the group’s parent company entered into a Deferred Prosecution Agreement with the US Department of Justice and agreed to pay a criminal sanction of USD 17.4 million for violating the internal control provisions of the FCPA. The company also reached a non-trial settlement on the same charges with the US Securities and Exchange Commission. The Luxembourg company agreed to plead guilty to one count of violating the FCPA books and records provisions in relation to the activities of its Mexican subsidiary.

Telecommunications Group

A large company providing telecoms services in emerging Latin American markets, which has its registered office in Luxembourg, was suspected of involvement in foreign bribery on two occasions. Firstly, the company was suspected of paying bribes on behalf of its joint venture to Guatemalan parliamentarians for

them to, among other things, approve legislation that would benefit a local subsidiary. The company self-reported these suspicions to the American and Swedish law enforcement authorities, who then reportedly closed their investigations without further action, in 2016 and 2018 respectively. Secondly, in 2022 the company publicly stated that it had received a request for information from the US Department of Justice in connection with the purchase of its former joint venture partner's stake in 2021, as well as its contact with Guatemalan government officials.

Mining Group

In April 2013, the UK Serious Fraud Office opened an investigation (still ongoing) against a multinational natural resource mining company listed on the London Stock Exchange, for alleged bribery of public officials in Kazakhstan and African states. In November 2013, the company delisted from the London Stock Exchange and was subsequently acquired by a group created in May 2013 in Luxembourg, where the company set up its registered office.

Steel Producer Group

An Italian-Swiss steel producer group whose parent company has its registered office in Luxembourg is suspected of having secured contracts in the Democratic Republic of Congo (DRC) through a former Belgian minister. This former minister allegedly funnelled bribes to DRC officials, including a former prime minister, to help the company to, among other things, secure the rights to mine a mineral deposit. In addition, the intermediary allegedly used an account with a Swiss bank, to which one of the group's subsidiaries paid commissions under the guise of "consultancy fees". The intermediary then allegedly withdrew the money in cash via a subsidiary of the bank in Luxembourg. A judicial inquiry was opened in Belgium in 2014. In 2023, the intermediary was convicted by a Belgian court of bribery of DRC political and corporate agents, and money laundering. As regards the company and two of its directors, the court declared certain charges time-barred and acquitted the defendants of the others.

Iron and Steel Industry Group I

The Luxembourg holding company of an Italian-Argentinian multinational group is suspected of having authorised or at least tolerated the payment of bribes to officials of a Brazilian state-owned enterprise between 2009 and 2013, to secure contracts for a local subsidiary controlled by another company in the group. The funds allegedly used to pay the bribes were said to be profits from the Luxembourg company, transferred through Uruguayan companies. These allegations were the subject of proceedings in Italy and the United States. The Luxembourg company and its directors were prosecuted in Italy, but in May 2022 the court of first instance ruled that it did not have jurisdiction. This decision is not final. In June 2022, an Italian company in the group reached a non-trial resolution on the same allegations with the US Securities and Exchange Commission, for violation of the FCPA anti-bribery, books and records, and internal control provisions. The company agreed to pay a civil penalty of USD 25 million, and disgorgement and prejudgment interest of USD 53 million.

Iron and Steel Industry Group II

Another subsidiary of the aforementioned group is also suspected of having paid bribes to other Brazilian public officials. The Brazilian subsidiary was part of a consortium that allegedly paid bribes in 2012-2013 to win two contracts to build nuclear power plants commissioned by a Brazilian state-owned company. An investigation is ongoing in Argentina.

Iron and Steel Industry Group III

Around 2006-2007, a company in the aforementioned group allegedly paid bribes to Uzbek officials during four tenders to supply and maintain oil and gas pipelines. In 2011, the company entered into a Deferred Prosecution Agreement with the US Securities and Exchange Commission under which it agreed to pay USD 5.4 million in disgorgement and prejudgment interest. The company also entered into a Non-Prosecution Agreement with the US Department of Justice, under which it agreed to pay a criminal fine of USD 3.5 million.

Iron and Steel Industry Group IV

Companies in the aforementioned group are also suspected of having paid bribes to public officials in Argentina (2005-2015) and Peru (2001-2015). According to press reports, investigations into these allegations were opened in Argentina and Peru. These investigations may still be ongoing.

Engineering and Construction

A Luxembourg-registered engineering and construction company headquartered in London is suspected of having paid bribes to Brazilian public officials. The company was created in January 2011 from two companies listed on the Oslo Stock Exchange. The company is suspected of having paid bribes to officials of a Brazilian state-owned company. Brazilian authorities have reportedly prosecuted contractors with links to this company in the context of the Operation Car Wash (*Lava Jato*) investigation.

Plantations I

A group working in the development and management of oil palm and rubber plantations is suspected of bribing public officials in West Africa. The group's holding company has its registered office in Luxembourg. The group is controlled by a Belgian businessman and a French group. In 2011, a subsidiary of the group allegedly paid bribes to town leaders in the Malen region of Sierra Leone to sign agreements authorising farmland to be leased for an oil palm plantation.

Plantations II

A subsidiary of the aforementioned group is also suspected of having paid bribes to Guinean officials to eliminate its competition and win contracts in Guinea. Senior executives of the group have been prosecuted in Belgium for active bribery. Despite a conviction by the court of first instance, some rulings were overturned on appeal. The case is still ongoing.

Arms Manufacturer

An American arms manufacturer is suspected of having paid bribes to public officials in several foreign countries around 2010. Among other things, the company allegedly bribed Belgian federal police officials to secure the sale of 20 000 pistols. The payments were allegedly made via an intermediary who is resident in Luxembourg. Two Belgian police officers, a company representative and the Luxembourg-based intermediary were prosecuted in Belgium.

Forest Resources

Foreign companies are suspected of having paid bribes to the head of Ukraine's Forest Resources Agency between 2011 and 2014 in exchange for the opportunity to buy timber from Ukrainian state-owned forestry companies. The bribes were allegedly paid in the form of consultancy or agent fees to British shell companies with bank accounts in Latvia. According to documents submitted at the trial, a Luxembourg company also paid an undisclosed sum of money to these shell companies. In 2023, Ukraine's High Anti-Corruption Court convicted an intermediary as an accomplice in the bribery scheme allegedly organised by the agency's director.

Pharmaceutical Company

Between 2004 and 2013, multinational pharmaceutical companies allegedly paid bribes to Iraqi officials from the Ministry of Health and a state-owned import company to secure contracts to supply medical products. One of these companies had subsidiaries in Luxembourg.

Military Submarines

A state-owned French shipbuilding company is alleged to have paid bribes to Pakistani officials in connection with a contract to sell submarines to Pakistan in 1994. Payments are alleged to have continued until 2008. Two Luxembourg companies were allegedly used to funnel the payments. Some of this money was allegedly returned to France to finance a presidential campaign in 1995. Several individuals have been prosecuted in France in connection with this case. The Luxembourg authorities provided mutual assistance to France following an international rogatory commission. An investigation was opened in Luxembourg in 2015 into violations of the law on commercial companies (failure to file company accounts), resulting in the

conviction of the three directors of a company covered by the request for mutual legal assistance. They were each fined EUR 1 000 for failing to publish balance sheets. The statutory penalty at the time of the offences was a fine of between EUR 500 and EUR 25 000. The two Luxembourg companies involved were liquidated in 2015. They could not have been prosecuted because the offences predated the entry into force of the provisions on the criminal liability of legal persons in 2010.

5. Other cases mentioned in the report

World Bank Case

Between 2014 and 2015, a multinational technology company (the company), headquartered in France, made undue payments to a local subcontractor as part of a project partially funded by the World Bank for the supply of national identity cards. The subcontractor, as an intermediary, facilitated the transfer of part of these payments to a Bangladeshi public official as bribes to secure the contract, which had an estimated value of USD 113 million, for the company. In 2017, the company and the World Bank reached an agreement to exclude the company from World Bank tenders for two and a half years. In 2019, the World Bank also placed the subcontractor and its CEO on its exclusion list for nine and a half and six and a half years respectively for bribery, collusion and obstruction. In addition, all affiliates controlled by the subcontractor and its CEO have also been excluded from World Bank tenders, which placed two Luxembourg-registered companies and one US-registered company on the World Bank's exclusion list. In 2022, the company entered into a Judicial Public Interest Agreement (CJIP) with the National Financial Prosecutor's Office (PNF), which sanctioned the company with a fine of EUR 7 957 822 for bribery of a foreign public official.

Case III

An judicial inquiry was opened in Luxembourg covering a private bank and various companies for charges including money laundering, in a case of suspected bribery and embezzlement.

ANNEX 2: PHASE 3 RECOMMENDATIONS TO LUXEMBOURG AND EVALUATION OF THEIR IMPLEMENTATION BY THE WORKING GROUP IN AUGUST 2013

	PHASE 3 RECOMMENDATIONS JUNE 2011	WRITTEN FOLLOW UP REPORT OF AUGUST 2013
Recommendations to ensure the effectiveness of investigations, prosecutions and sanctions with regard to offences involving the bribery of foreign public officials		
1	With regard to the transnational bribery offence, the Working Group recommends that Luxembourg use any appropriate means to clarify that no element of proof, beyond those stipulated in Article 1 of the Convention, is required to enforce Articles 247ff of the Penal Code, and in particular that (i) the notion of "without right" that is found, inter alia, in Article 247 of the Penal Code, should not be interpreted more restrictively than the notion of "improper advantage" contained in the Convention, and therefore that there is no need to prove that any provision in force in the bribe recipient's country prohibits that recipient from receiving a bribe; and that (ii) the notion of "corruption pact" that was deleted from Article 247 in 2001 does not, in practice, constitute an additional element of proof which prosecuting authorities must seek out in order to prove the offence [Convention, Article 1; 2009 Recommendation, III. ii) and V.].	Not implemented
2	Regarding the liability of legal persons, the Working Group recommends that Luxembourg:	
	a. Ensure by all means that the liability system instituted by the Act of 3 March 2010 adopts one of the two approaches described in Annex 1 B) of the 2009 Recommendation concerning the level of managerial authority and the type of act that	Not implemented

	PHASE 3 RECOMMENDATIONS JUNE 2011	WRITTEN FOLLOW UP REPORT OF AUGUST 2013
	may cause that liability to be incurred [Convention, Article 2; 2009 Recommendation, Annex 1 B)];	
	b. Take all necessary steps to ensure that (i) the system for the liability of legal persons does not limit that liability to cases in which the natural person or persons who committed the offence are prosecuted and found guilty; (ii) the fact that the immediate perpetrator was "coerced" by a foreign public official to pay a bribe in order to win or keep a contract does not cover cases where a bribe is sought and cannot be considered a ground for the non-liability of the legal person; and (iii) the criterion of the "interest" of the legal person does not exclude certain cases of bribery of foreign public officials where a bribe is paid to a foreign public official by a de jure or de facto manager of an enterprise only in the partial interest of the enterprise or in the interest of another legal person, possibly linked to the first [Convention, Articles 1 and 2; 2009 Recommendation, Annex 1 B)].	Partially implemented
3	Regarding <u>sanctions</u> in cases of transnational bribery, the Working Group recommends that Luxembourg re-assesses whether to take the opportunity to (i) amend the law on the liability of legal persons to include exclusion from entitlement to public benefits or aid as a supplementary penalty; and 61 (ii) introduce criminal records for legal persons [Convention, Articles 2 and 3; 2009 Recommendation, III. vii) and XI. i)].	Fully implemented
4	Regarding <u>investigations and prosecutions</u> in cases of transnational bribery, the Working Group recommends that Luxembourg:	
	a. Pursue the efforts made in obtaining information from banks and financial institutions (Act of 27 October 2010) and from tax authorities (Act of 19 December 2008) so that such information can be obtained even in the absence of a formal referral to an investigating magistrate, thus ensuring in particular full implementation of Phase 2bis Recommendation 3 (b) [2009 Recommendation, III. ii), iii) and iv); VIII. and Annex 1, D];	Not implemented
	b. Further evaluate police investigative powers at the preliminary enquiry stage with a view to extending such powers, as the Working Group had recommended in Phase 2 (Recommendation 12), tailoring the available means and methods of investigation to the need to gather sufficient evidence so that prosecution can be initiated in cases involving bribery of foreign public officials [2009 Recommendation, III. ii), V. and Annex 1, D];	Partially implemented
	c. Ensures that the level of resources, training and specialisation provided to the police ensures the effective investigation and prosecution of bribery of foreign public officials [2009 Recommendation, Annex 1, D];	Partially implemented
	d. Take the necessary steps to ensure that Luxembourg's criminal policy (i) clearly identifies the investigation and prosecution of bribery of foreign public officials as a priority; and (ii) emphasises the need to ensure that the appreciation of the level of proof necessary for initiating criminal investigations is not so stringent that it constitutes an obstacle to the investigation of bribery of foreign public officials [Convention, Article V; 2009 Recommendation, Annex 1, D].	Not implemented
Recommendations to ensure effective prevention and detection of transnational bribery		
5	Regarding <u>raising public awareness and reporting</u> transnational bribery, the Working Group recommends that Luxembourg:	
	a. Take the necessary steps to raise employee awareness, in the private and public sectors alike, of the importance of reporting suspicions of bribery of foreign public officials, as well as of new provisions for the protection of whistleblowers [2009 Recommendation, IX. and III. i)];	Fully implemented
	b. Intensify efforts to enhance awareness in the accounting and auditing professions of the importance of detecting and reporting transactions likely to constitute bribery of foreign public officials and related offences, such as accounting offences [2009 Recommendation, III. i), X. A. and X. B.];	Partially implemented

	PHASE 3 RECOMMENDATIONS JUNE 2011	WRITTEN FOLLOW UP REPORT OF AUGUST 2013
	c. Further heighten the awareness of professionals required to report money-laundering suspicions of the predicate offence of bribing foreign public officials [Convention, Article 7; 2009 Recommendation, IX. and III. i)];	Fully implemented
	d. Raise awareness of employees of the Luxembourg development co-operation agency and the Office du Ducroire of the new law on the protection of whistleblowers and, as regards the development co-operation agency, the new reporting requirements to which its staff are subject under Article 23 (1) of the Code of Criminal Procedure [2009 Recommendation IX. iii)].	Fully implemented
6	Regarding accounting standards, external audit and corporate compliance and ethics programmes, the Working Group recommends that Luxembourg:	
	a. Take measures, jointly with the Association of Certified Accountants and the Institute of Company Auditors, to ensure that full use be made of the provisions of Luxembourg legislation implementing Article 8 of the Convention so as to prevent and detect accounting offences relating to the bribery of foreign public officials [Convention, Article 8; 2009 Recommendation, IX., X. and X. A];	Not implemented
	b. Clarify the obligations of external auditors who discover evidence of bribery of foreign public officials so that they inform the company's managers and, where relevant, supervisory bodies [2009 Recommendation, III. i); X. B iii)];	Not implemented
	c. Consider requiring external auditors to report their suspicions of bribery of foreign public officials to the law enforcement authorities and ensure that auditors making such reports reasonably and in good faith are protected from legal action [2009 Recommendation X. B. (v)];	Not implemented
	d. Promote, jointly with the relevant professional associations, internal control, ethics and compliance programmes or measures in the financial sector and businesses involved in commercial transactions abroad, including distribution of Annex 2 of the 2009 Recommendation, Good practice guidance on internal controls, ethics, and compliance [2009 Recommendation, X. C. i); Annex II].	Fully implemented
7	Regarding tax measures to combat bribery, the Working Group recommends that Luxembourg:	
	a. Take appropriate steps to increase the intensity and frequency of on-site inspections by the tax authorities [2009 Recommendation, III. iii); 2009 Recommendation on Tax Measures, I. ii) and II.];	Partially implemented
	b. Facilitate international exchanges of information in accordance with the 2009 Recommendation of the Council on Tax Measures notably by considering including the option provided for in paragraph 12.3 of the Commentary on Article 26 of the OECD Model Tax Convention in their bilateral tax conventions [2009 Recommendation on Tax Measures, I. iii)];	Partially implemented
	c. Do more to raise awareness among its tax authorities of the need to make full use of the new measures made available to them in the 2008 law on inter-agency and judicial co-operation in order to detect illegal transactions linked to bribery of foreign public officials, and to encourage the reporting of such transactions [2009 Recommendation on Tax Measures, I. iii)];	Partially implemented
	d. Raise awareness among the tax authorities of the importance of making more stringent use of the administrative sanctions available to them to discourage tax deductibility of expenses likely to constitute bribes [2009 Recommendation on Tax Measures, I. ii); Phase 2 Recommendation 16].	Not implemented
8	Regarding international judicial co-operation, the Working Group recommends that Luxembourg reconsider its approach to the possibility of initiating prosecution in Luxembourg of transnational bribery offences brought to the attention of the Luxembourg authorities through mutual legal assistance requests, where Luxembourg also has jurisdiction over the offences committed [Convention, Articles 5 and 7; 2009 Recommendation, XIII. i)].	Fully implemented

	PHASE 3 RECOMMENDATIONS JUNE 2011	WRITTEN FOLLOW UP REPORT OF AUGUST 2013
9	Regarding public benefits, the Working Group recommends that Luxembourg:	
	a. Make sure that the integrity code of the Luxembourg development co-operation agency be updated to include an explicit reference to the bribery of foreign public officials, and to the requirement that its staff report any suspicions of such bribery to the prosecuting authorities under Article 23.1 of the Code of Criminal Procedure and the protection of whistleblowers instituted by the new law [2009 Recommendation, IX.];	Partially implemented
	b. Take the steps necessary to ensure that public procurement authorities impose stricter enforcement of existing provisions to bolster the integrity of public procurement, and especially of those excluding bids (i) submitted by economic operators that have been convicted of bribery or (ii) appearing on the development banks' exclusion lists [2009 Recommendation, IX. and XI.];	Partially implemented
	c. Explore the feasibility of taking measures so that, when deciding to grant contracts and other public benefits, the relevant agencies would use the existence of internal control, ethics and compliance measures as a criterion for those decisions [2009 Recommendation, X. C, vi) and XI. i)].	Fully implemented

ANNEX 3: LIST OF ABBREVIATIONS, TERMS AND ACRONYMS

ACA	Association des Compagnies d'Assurance et de Réassurances du Grand-Duché de Luxembourg *Association of Insurance and Reinsurance Companies of Luxembourg*
ACD	Administration des Contributions Directes *Income Tax Administration*
ADA	Administration des Douanes et Accises *Customs and Excise Administration*
AED	Administration de l'Enregistrement, des Domaines et de la TVA *Registration Duties, Estates and VAT Authority*
CAA	Commissariat aux Assurances *Insurance Commission*
CC	Criminal Code
CCP	Code of Criminal Procedure
COPRECO	Comité de Prévention de la Corruption *Corruption Prevention Committee*
CSSF	Commission de Surveillance du Secteur Financier *Financial Sector Supervisory Commission*
EU	European Union
EUR	Euro (currency)
FATF	Financial Action Task Force
FCPA	Foreign Corrupt Practices Act
FDI	Foreign direct investment
FEDIL	Fédération des Industriels du Luxembourg *Federation of Luxembourg Industry*
FIU	Financial Intelligence Unit
GRECO	Groupe d'États contre la corruption *Group of States against Corruption*
IRE	Institut des Réviseurs d'Entreprise *Institute of Company Auditors*
ISA	International Standard on Auditing
ODA	Official development assistance
OEC	Ordre des Experts-Comptables *Association of Certified Accountants*
SMEs	Small and medium-sized enterprises
STRs	Suspicious transaction reports

ANNEX 4: EXCERPTS OF LEGISLATION

Provisions not translated into English. Please refer to the French version of this report: [DAF/WGB(2024)2]

ANNEX 5: LIST OF PARTICIPANTS IN THE ON-SITE VISIT

Government ministries and agencies

- Corruption Prevention Committee (COPRECO)
- Ministry of Justice
- Ministry of Foreign Affairs
- Ministry of Finance
- Ministry of State
- Ministry of Internal Security
- Registration Duties, Estates and VAT Authority (AED)
- Income Tax Administration (ACD)

Parliamentarians

- Committee on Justice of the Chamber of Deputies of the Grand Duchy of Luxembourg

Law enforcement and the judiciary

- Luxembourg Prosecutor General's Office
- Luxembourg Public Prosecutor's Office
- Diekirch Public Prosecutor's Office
- Luxembourg Investigation Office
- Diekirch Investigation Office
- Supreme Court of Justice
- Grand Ducal Police
- General Police Inspectorate
- Financial Intelligence Unit

Regulatory and supervisory authorities

- Insurance Commission (CAA)
- Financial Sector Supervisory Commission (CSSF)
- Luxembourg Business Registers
- Luxembourg Bar Associations
- National Data Protection Commission
- Directorate General of the Middle Classes

Public institutions and entities responsible for official development assistance

- *Banque et Caisse d'Epargne de l'État*
- *Office du Ducroire*
- Lux-Development SA

Accounting and auditing associations

- National Accounting Standards Commission
- Institute of Company Auditors
- Association of Certified Accountants (OEC)
- Deloitte
- Fiduciaire Comptable B+C Sàrl

Employer and professional organisations

- Chamber of Commerce
- House of Training
- Association of Banks and Bankers
- Federation of Luxembourg Industry
- Luxembourg Association of Investment Funds
- Luxembourg Association of Compliance Officers
- Association of Insurance and Reinsurance Companies of Luxembourg (ACA)

Private enterprises

- Banque de Luxembourg
- KPMG
- Foyer
- Wealins SA
- Lombard Odier Funds
- Franklin Templeton International
- BLL Consulting
- Cargolux
- ArcelorMittal
- Rotarex
- Ferrero
- Goodyear
- ArendtServices
- Immo Nord Kartheiser

Legal profession

- Arendt & Medernach law firm
- Linklaters law firm

Civil society and journalists

- Stop Corrupt
- LutCor
- Luxembourg Association of Professional Journalists (Association Luxembourgeoise des Journalistes Professionnels, ALJP)

Academics

- Luxembourg University

Implementing the OECD Anti-Bribery Convention in Luxembourg

PHASE 4 REPORT

This Phase 4 report on Luxembourg by the OECD Working Group on Bribery evaluates and makes recommendations on Luxembourg's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2021 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.

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