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Second Evaluation Round

Evaluation Report on Luxembourg

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I. INTRODUCTION

1. Luxembourg was the fifth GRECO member to be examined in the second evaluation round. A GRECO evaluation team (hereafter "the GET") visited the country from 24 to 28 November 2003. The GET was composed of Mr Erwin FRANCIS, Director of the Central Seizure and Confiscation Office (Belgium), Mr Claude MATHON, Head of the Central Interministerial Department for the Prevention of Corruption within the Ministry of Justice (France) and Mr Antonio Francisco CLUNY, Deputy State Prosecutor in the Court of Auditors (Portugal), and was accompanied by a member of the Council of Europe Secretariat. Prior to the visit, the GET received comprehensive replies to the evaluation questionnaire [Greco Eval II (2003) 4F], the documents it had requested and extracts from the relevant legislation.

2. The GET met the Minister for Justice and Minister for the Treasury and the Budget, Mr Luc FRIEDEN. It also met representatives of the Ministry of Justice, the General State Prosecutor's Office, the Office of the State Prosecutor of the Court of the City of Luxembourg (including the Financial Intelligence Unit), the Office of the State Prosecutor of the Court of Diekirch, the Ministry of the Interior, the Police of the Grand Duchy (including the General Inspectorate of the Police), the Ministry of Defence, the Ministry for Foreign Affairs (Directorate for Cooperation in Development), the Ministry of Health, the Ministry of Middle Classes, the Ministry of Finance, the Ministry of Public Works, the Ministry for the Civil Service and Administrative Reform, the Court of Auditors, and the Financial Sector Surveillance Commission. The evaluators also met representatives of the Association of Luxembourg Journalists, the Chamber of Commerce, the Institute of Company Auditors, the Order of Chartered Accountants and the General Confederation of the Civil Service.

3. It is recalled that, at its tenth meeting (July 2002), GRECO decided that the second evaluation round would deal with the following themes:

   - **Theme I – Proceeds of corruption:** guiding principles 4 (seizure and confiscation of proceeds of corruption) and 19 (connections between corruption and money laundering/organised crime), in conjunction, for members having ratified the Criminal Law Convention on Corruption (ETS 173), with Articles 19. 3, 13 and 23 of the Convention;
   - **Theme II – Public administration and corruption:** guiding principles 9 (public administration) and 10 (public officials);
   - **Theme III – Legal persons and corruption:** guiding principles 5 (legal persons) and 8 (fiscal legislation), in conjunction, for members having ratified the Criminal Law Convention on Corruption (ETS 173), with Articles 14, 18 and 19.2 of the Convention

4. This report is based on the answers to the questionnaire and information supplied during the on-site visit. The main aim is to assess the effectiveness of the measures taken by the Luxembourg authorities in order to comply with the requirements deriving from the provisions referred to in paragraph 3. For each theme, the report contains a description of the situation, followed by a critical analysis. The conclusions include a list of recommendations adopted by GRECO and addressed to Luxembourg in order to improve its level of compliance with the provisions under consideration.

5. Luxembourg signed the Criminal Law Convention on Corruption (ETS 173) on 27 January 1999. In November 2003, the Government approved draft legislation to ratify the Convention. The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) was ratified in 2001 and came into force in Luxembourg on 1 January 2002.

II. THEME I – PROCEEDS OF CORRUPTION

a. Description of the situation

Seizure and inquiries

6. Seizure of the proceeds of corruption is covered by Article 31.3 of the Code of Criminal Investigation (CCI – Appendix I). This authorises police officers to seize "*objects, documents and effects that are used to commit an offence; are intended for use to commit an offence; are the subject of the offence; appear to be the product of an offence; generally speaking, might contribute to revealing the truth; if used, might hinder the progress of a judicial investigation; or are liable to be confiscated or can be restored*". Under Article 66 of the Code, this power is vested in investigating judges following the opening of a judicial investigation procedure, and this includes urgent cases. Any registers or documents, whether or not they are subject to professional confidentiality, may also be seized as part of a criminal investigation if it is considered that they could help to reveal the truth.

7. There are no systematic special investigations to identify, locate and freeze the proceeds of crime when a corruption offence is detected. Where appropriate, and if this is justified by the nature of the facts and reliable evidence, an inquiry to establish the economic benefits arising from the offence forms part of the investigation into the facts and into the instigators of the principal offence and their accomplices. There are no specific regulations governing the management of property seized or frozen in the course of criminal proceedings. However, legislation on this subject is currently being drawn up. Such management would become the responsibility of the Bank for Official Deposits.

8. The anti-laundering department of the Luxembourg district court prosecutor's office serves as the Financial Intelligence Unit (FIU)[1]. Persons and institutions with a special duty of care under the anti-laundering legislation[2] are required to report and refrain from carrying out suspicious transactions. The State Prosecutor may issue instructions not to carry out a transaction. Section 40.3 of the Financial Sector Act of 5 April 1993 empowers the prosecutor to block specific transactions, without setting any time limits. This power can be used in anticipation of court-ordered seizure to avoid the disappearance of funds or in response to an imminent international request for the seizure of an account. However, it is not totally clear what the effects of such blocking are in terms of the Financial Intelligence Unit's responsibilities. The unit seems reluctant to use this option (the proportion of suspect transactions blocked fell from 11.4% in 1998 to 3.3% in 2002).

9. Since 1995, the prosecution authorities have maintained a database on suspicious transactions. Moreover, since 2002 the State Prosecutor's Office has produced annual statistics on the detection, prosecution and punishment of the main corruption offences. The Luxembourg authorities said that there were no corruption proceedings pending in connection with which assets had been seized. However, the GET was informed during the visit of a judgment handed

[1] At the time of the visit, the police organised crime section analysed reports of suspicious transactions. Since then, the police have set up a specialist anti-laundering department and investigations are undertaken jointly by the police and the financial intelligence unit. The latter analyses and collates suspicious transaction reports, with the assistance of the new police anti-laundering department, which investigates cases referred to it by the unit.

[2] 1. Financial sector: banks; investment undertakings (commission agents, private portfolio managers, distributors of investment fund units and underwriters); financial advisers; brokers; market makers; custodians of securities and other financial instruments and currency dealers. 2. Life insurance and insurance brokers. 3. Notaries; auditors, company accountants; domiciliation agents. 4. Casinos and other gambling undertakings.

down in March 2003 concerning a senior public official who had been charged with corruption. The suspicious funds that were seized had not been confiscated because they had been judged to be unrelated to the offences in question. The number of suspicious transaction reports concerning corruption is low and has tended to decrease in recent years (1998: 4.7%, 1999: 10.5%, 2000: 11.1%, 2001: 5.9%, 2002 (part year): 0.7%).

10. Turning to special investigation techniques, the technical surveillance of all forms of communication may be authorised in cases involving suspicion of corruption. There are no regulations on the use of undercover agents. However, this is not an obstacle for international cooperation.

Confiscation

11. Confiscation is governed by articles 31 (general conditions), 32 and 32.1 (special conditions) of the Criminal Code (Appendix II). At least in the last three years, no confiscation orders have been issued in connection with corruption cases. Under the general conditions, confiscation applies to the object, the instrument (when the property belongs to the offender) and the proceeds of the offence and the assets acquired with these proceeds (in other words derived or converted proceeds). In principle, confiscation is in addition to the main penalties of imprisonment and/or a fine. A subsidiary fine must be imposed if the confiscation order cannot be implemented. Article 32-1, introduced by the Act of 14 June 2001, is specifically concerned with the offence of laundering the proceeds of corruption, since all the corruption offences, apart from corruption in the private sector, are predicate offences for money laundering[3]. Confiscation then applies to assets of all sorts, whether physical or intangible, movable or immovable, and to documents attesting to ownership of or entitlement to the subject matter or proceeds, direct or indirect, of a predicate offence giving rise to laundering, or any financial benefit whatever arising from the offence, including income from these assets. Expenditure incurred, particularly directly, on the commissioning of an offence is deemed to form part of the unlawful conduct and cannot be deducted. The direct confiscation of an equivalent security is only permitted if it relates to a convicted person's own assets and is only applicable to drug or predicate laundering offences. However, it is planned to extend the power of equivalent confiscation. In principle, the proceeds of crime may only be confiscated once a conviction has been secured. In the case of laundering offences though, confiscation of the object or proceeds of a predicate offence or of any pecuniary benefit arising from such an offence, including the income from the assets concerned, may be ordered even in the event of acquittal, exemption from sentence, lapse of proceedings or expiry of the time limit for prosecution (Article 32-1 of the Criminal Code; Section 18 of the amended Act of 19 February 1973).

12. Confiscation is mandatory in the case of serious offences (punishable by at least five years' imprisonment)[4] and optional in the case of lesser offences (punishable by up to five years' imprisonment)[5], subject to any legal exceptions. The State Prosecutor applies to the trial court for confiscation, which is required to rule, even of its own motion, if pecuniary assets and other objects liable to confiscation have been seized, and even in the absence of prior seizure. The prosecutor is also required to submit to the court any lawful evidence and calculations that make it possible to identify the proceeds of corruption and the value of any pecuniary benefit arising from such an offence. The court has full discretion to assess the evidence submitted, according to

[3] Including ones committed outside Luxembourg territory (Article 506-3 of the Criminal Code).

[4] Examples include embezzlement, the destruction of certificates and official documents, extortion by public officials with the aid of threats or violence, corruption and trading in influence (Article 248).

[5] Examples include extortion by public officials, taking unlawful advantage of an interest and trading in influence (Article 248).

its personal conviction in the light of all the evidence available. Confiscation may only be ordered in criminal proceedings on the merits of cases concerning one or more specific offences and brought against one or more persons. Execution of confiscation orders becomes irrevocable and is the responsibility of the State Prosecutor's Office, through the agency of the land registry and state property office.

13. Whereas any instruments confiscated must be the property of the convicted person, confiscation of the proceeds of corruption from the assets of third parties or family members is authorised if it can be established that these assets are indeed the direct or indirect proceeds of a crime or lesser offence. Under civil law, it is not possible to confiscate assets acquired lawfully and in good faith from a trader or by public tender. Under Article 32-1 of the Criminal Code third parties claiming entitlement to confiscated assets may apply for their restitution. If these claims are found to be lawful and justified the court will order their restitution.

14. In the case of laundering offences (Article 31-1, sub-paragraph 3 of the Criminal Code) confiscated assets may be awarded to the party claiming damages (the person filing a formal complaint of damage suffered as a result of the offence and requesting compensation) if the court orders confiscation on the grounds that the assets concerned are substitutes for the assets belonging the complainant or equivalent in value. Public law bodies suffering from the fraudulent behaviour of a corrupting agent may apply to the civil or administrative courts for a private or public contract to be set aside, and for associated reimbursement and damages. The scope of the liability of legal persons is limited. There is no criminal liability for legal persons[6].

International cooperation

15. To secure international cooperation, the State Prosecutor's Office, which is responsible for the execution of court judgments, transmits a formal request, with a certified copy of the court decision ordering confiscation of assets located abroad, via the Ministry of Justice, to the State Party to the relevant international instrument where the confiscated asset is located. Luxembourg currently executes confiscation orders issued by foreign courts applicable to its territory and accepts applications to its courts to order confiscation under the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the Convention ETS No. 141. Mutual assistance is only granted in the case of predicate laundering offences under Luxembourg law, which include corruption offences other than private corruption. Formal requests from the competent authorities of applicant States, with the required documentation, are transmitted to the State Prosecutor's Office, and then to the State Prosecutor for the area where the confiscated or would-be confiscated assets are located. The latter then refers the matter to the relevant criminal court. Convicted persons and any other beneficiaries are ordered to appear in person or be represented by a lawyer for a hearing on the merits of the application, which can only be granted if it satisfies the requirements of Section 6 of the Act of 14 June 2001 approving Convention ETS No. 141, in connection with which Luxembourg has entered a reservation whereby Section 6 only applies to paragraph 1 of Section 8-1 of the Sale of Medicines and Anti-Drug Addiction Act of 19 February 1973 and paragraph 1 of Article 506-1 of the Criminal Code.

16. Within the framework of the first evaluation round, the Luxembourg authorities acknowledged that there was a risk of the proceeds of corruption being introduced from abroad into their local financial markets[7]. Any request for international judicial assistance in another country for the application of a seizure measure must be issued by an investigating judge, with reference to the

[6] However, the GET was informed during its visit of draft legislation on this subject.
[7] Greco Eval I Rep (2001) 2F, paragraph 58

international instrument on which the application is based. Such judges are also responsible for responding to requests for mutual assistance. Having established the lawfulness of the request, the judge concerned issues an order referring to the seizure and the applicable instrument. Such orders are then transmitted to the police, who report back on their application. Requests for assistance are first received by the State Prosecutor's Office. Before forwarding them to the investigating judge, the prosecution service assesses the expedience of such requests from the standpoint of their impact on the sovereignty, security, public order and other essential interests of the Grand Duchy, any political or related offences, and any tax offences, subject to the requirements laid down in conventions. Luxembourg has ratified the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its Additional Protocol (ETS No. 99) on fiscal offences, but with a reservation[8].

17. The anti-laundering service of the State Prosecutor's Office cooperates with other countries' financial intelligence units and can ask for and transmit information that can help to identify the proceeds of corruption to its international partners on the basis of the anti-laundering legislation and relevant international treaties and agreements, particularly Convention No. 141. The Luxembourg Financial Intelligence Unit is a member of the Egmont Group.

b. Analysis

18. As noted above, there are two sets of confiscation arrangements: general ones and special ones for combating what are considered to be the most important offences, which are listed exhaustively as predicate offences for money laundering. The confiscation of assets to the equivalent value of the proceeds of a corruption offence is only authorised in the latter case, as long as it does not concern private corruption and can only apply to a convicted person's own assets. The absence of any provision for the confiscation of equivalent assets under the general arrangements often makes it impossible to confiscate the proceeds of crime. Article 31.2 of the Criminal Code requires courts to impose fines less than or equal to the value of the confiscated item, if the confiscation order cannot be executed. This is a valuable provision but cannot be viewed as a substitute for an equivalent confiscation order and in practice is not used as such. Without exception, under both sets of arrangements confiscation is viewed as an accessory punishment. Although there is no ownership requirement – other than for the instrument of the offence – confiscation cannot be imposed on third parties, namely persons who have not been found guilty of the offence. This means that fraudulently acquired assets can only be confiscated if the third parties concerned cannot establish any legal claims to them. **The GET recommends that the law be changed to permit, where appropriate, the confiscation of assets of an equivalent value to the proceeds of any corruption offence, including private corruption, and that this be encouraged in judicial practice.**

19. Anything liable for confiscation may be seized (Article 31 of the Code of Criminal Investigation). In the event of confiscation by equivalent, which is authorised for laundering offences, provision should also be made for equivalent seizure to ensure that the power of confiscation can be applied effectively. **The GET recommends that the law be changed to permit, where appropriate, the seizure of assets of an equivalent value to the proceeds of corruption and that this be encouraged in judicial practice.**

[8] Luxembourg reserve itself the right to accept Chapter I of this Protocol only if the criminal fiscal offence constitutes a tax fraud within the meaning of paragraph 396, sub-paragraph 5, of the General Taxation Act, or of Section 29, sub-paragraph 1, of the Act of 28 January 1948 on the correct and fair collection of registration and inheritance duties.

20. Although confiscation may be ordered without prior seizure, the courts seem reluctant in practice to order confiscation when the assets concerned have not previously been seized. The fact that confiscation is optional for lesser offences and only mandatory for serious ones, including a number of forms of corruption, has also contributed to this reluctance. Finally only investigating judges can order seizure, other than in the somewhat exceptional case of serious offences uncovered in the act of their commission. This means that seizure, and therefore also confiscation, are often confined to the most serious cases under judicial investigation. During the visit, the authorities referred to investigations of the assets of persons suspected of corruption and of the need for sufficient expertise if the assets of such persons and their families were to be properly analysed. Coupled with the fairly limited powers of confiscation, these factors point to the conclusion that there is no tradition or policy based on the confiscation of the benefits of criminal activities. Bearing in mind the importance of an effective penal policy on the identification, seizure and confiscation of any unreasonable benefits derived from corruption and the increasing complexity of the associated proceeds, transactions and financial packages, often extending across international borders, **the GET recommends the establishment of appropriate training programmes for the relevant authorities on the identification, seizure and confiscation of the instruments and proceeds of corruption or of assets of equivalent value.**

21. Under the special arrangements in the third paragraph of Article 32.1 of the Criminal Code, confiscation of the object or directly identifiable product of laundering or of any pecuniary benefit arising from such an offence may be ordered even in the event of acquittal, exemption from sentence, lapse of proceedings or expiry of the time limit for prosecution. *The GET observed that steps should be taken to ensure that any confiscation ordered in the event of acquittal, exemption from sentence, lapse of proceedings or expiry of the time limit for prosecution meets the requirements of Article 6.2 of the ECHR and the case law of the European Court of Human Rights.*

22. The limited scope of liability of legal persons is a significant obstacle to an effective policy on the proceeds of crime. In certain circumstances, the power to confiscate the instruments or proceeds of corruption, even if they are not the property of the perpetrator of the offence, could make it possible to confiscate assets belonging to a legal person, even though the latter cannot itself be criminally liable. However, in the absence of such criminal liability it is not always possible to confiscate assets belonging solely to a legal person. A link has to be established between the assets earmarked for confiscation and the offence. The courts would have to determine the role of third parties acting in good faith.

23. Under Article 506.1 of the Criminal Code, corruption and serious and other offences associated with organised crime or a criminal association are predicate offences for the offence of laundering; they are therefore all covered by the special arrangements governing extended confiscation. Financial institutions and related professionals have a duty to disclose predicate offences to the Luxembourg Financial Intelligence Unit. The difficulties experienced by the prosecution authorities in establishing a link between predicate offences and criminal assets impede prosecutions based on the proceeds of crime in cases involving serious and organised crime. T**he GET recommends to consider establishing an appropriate balance in the burden of proof, in connection with a conviction, to assist the court in identifying corruption proceeds liable to confiscation in suitable cases.**

24. In the case of binding investigation measures such as seizures and searches, the Luxembourg judicial authorities accord foreign judicial authorities full judicial assistance using all the legal means at their own disposal, subject to the normal provisions concerning public order, the

essential interests of the State and so on (International Mutual Assistance in Criminal Matters Act of 8 August 2000, as amended by the Act of 14 June 2001). Luxembourg is one of the world's leading financial centres, with a particular emphasis on discretion relating to taxation. Applicant authorities must clearly demonstrate, setting out both the facts and the charges, that requests for judicial assistance are unconnected with any purely tax-related inquiries. Data supplied must not be used for any purposes other than those indicated in the request for assistance (Section 12). Moreover, the requested measure must be one that is available under domestic law for use by the Luxembourg judicial authorities when investigating and prosecuting analogous domestic cases. Since the grounds for seizure are limited to those applicable to confiscation the aforementioned restrictions on confiscation apply equally to foreign authorities applying for judicial assistance[9].

25. With regard to the execution of foreign confiscation orders, judicial assistance is limited to offences for money laundering (for example Article 506.1 of the Criminal Code) and to assets referred to in Article 32.1 of the Criminal Code – Section 6 of the Act of 14 June 2001). This means that Luxembourg is unable to cooperate with applicant authorities if the primary offence abroad is the equivalent of the offences of private corruption, misuse of public assets or trading in influence , or relates to the assets of a legal person. Finally, with regard to Luxembourg's refusal to grant legal assistance if the grounds for a request amount to a tax offence, it should be noted that the reservation does not apply if the applicant authorities can show that the request relates to tax frauds such as VAT carousels or the tax swindles described in the Act of 22 December 1993, namely a fraud deriving from the systematic use of fraudulent manoeuvres in order to conceal relevant facts vis-à-vis the tax authorities or to persuade them of incorrect facts and relating to a significant amount of tax, either in general terms or in terms of the annual tax payable.

III. THEME II – PUBLIC ADMINISTRATION AND CORRUPTION

a. Current situation

Public administration

26. The notion of public administration is generally taken to encompass all the public services – legislative, judicial, administrative and governmental – concerned with meeting the public's collective needs on a permanent and regular basis, always bearing in mind the general interest. Such services are provided by central government, local and regional authorities and other statutory bodies. Luxembourg comprises 118 municipalities (*communes*), divided into three districts, 12 cantons and 60 groupings of municipalities. The executive power is responsible for the organisation, functioning and supervision of public administration. However, the establishment of public bodies or departments requires legislative approval. There are around 60 public institutions (*établissements publics*)[10].

[9] The constraints relating to confiscations, and more specifically the application of foreign confiscation orders at the request of a foreign authority, are not applicable as such to seizures, where the burden of proof is limited to adducing evidence. But if it is established at the outset that the assets that are the subject of a foreign authority's request for seizure are not eligible for confiscation under Luxembourg law the seizure will not be authorised. For example, a request for the seizure of assets of equal value to the proceeds of an offence such as private corruption that is not classified as a predicate laundering offence will not be granted because under Luxembourg law such an offence does not qualify for equivalent confiscation, that is the obligation to pay a sum of money from a convicted person's assets corresponding to the benefits derived directly from the offence.

[10] Source: study of the criteria governing the establishment of public institutions in Luxembourg – October 2001.

27. Government activities are subject to internal and external oversight and controls. All expenditure requires prior authorisation by internal financial controllers. The Court of Auditors monitors *post hoc* the regularity and propriety of expenditure and receipts and compliance with the principles of good financial management. It reports solely to parliament on any findings likely to lead to criminal proceedings. Such information is not published. It has very limited powers of control over bodies governed by public law other than the State, or over physical and legal persons governed by private law that have received public funding[11]. Luxembourg does not have an ombudsman[12]. Local authority accounts are audited by the local audit authority, which has functional autonomy and forms part of the Ministry of the Interior. The central tenders commission in the Ministry of Pubic Works monitors all decisions on the awarding of public contracts and issues non-binding and non-public advice to contracting authorities. Local authority contracts are awarded by a board of mayors and aldermen, answerable to the Grand Duke.

28. Administrative decisions are subject to appeals to the authority that took the decision and to the courts. In the former case the decisions are suspended for the time required to lodge an appeal in the courts. The administrative courts rule on appeals lodged on grounds of incompetence, action *ultra vires*, misuse of power, infringement of the law or action taken to protect private interests, and against any administrative decision for which no other remedy is available under the relevant law or regulations. When an administrative court becomes aware in the course of proceedings of facts or situations likely to lead to criminal proceedings and in the absence of any criminal court intervention in the administrative proceedings, it should report the facts directly to the relevant public prosecutor[13]. In addition, if the criminal aspects of a case could impinge on the administrative court's decision, the latter may decide to suspend the case.

Transparency

29. The rules governing transparency in the administrative field are set out in the Act of 1 December 1978 on non-contentious administrative proceedings and the Grand Ducal regulation of 8 June 1979 on the procedure to be followed by central government and local authority departments and agencies (Appendix IV). They cover such topics as the need to offer written explanations of administrative decisions, citizens' right of access to official documents in which they have an interest, albeit limited to the aspects directly related to the decision, and access for those concerned to relevant personal data held by government. However, there is no specific legislation on access to all official documents. The law sometimes requires consultative committees to be consulted before administrative decisions are taken, failing which the decision will not be valid. Examples include committees on planning, schools and foreign nationals. In addition to such formal requirements government may choose to consult bodies, such as buildings committees, that appear to be particularly qualified. Section 4 of the Grand Ducal regulation of 8 June 1979 requires consultative bodies to state the reasons for their opinion.

30. Luxembourg has not established a specific anti-corruption strategy for the public service. Few departments or sectors are considered to be particularly vulnerable to or affected by corruption, nevertheless, there are some aspects that appear to render Luxembourg vulnerable to a certain degree to corrupt practices developing in the future, which requires that civil servants be informed, especially those most likely to come into contact with corrupt practices, about the need

[11] Greco Eval I Rep (2001) 2F, paragraph 43 and 44.

[12] The legislation to establish an ombudsman was enacted after the evaluation visit and came into force on 1 December 2003. This service was operational on 1 May 2004.

[13] Though this has not in fact happened since the establishment of the administrative court system in 1997.

to remain vigilant, report serious suspicions in accordance with agreed procedures and contribute to the efforts of law-enforcement authorities to detect corruption offences".

Public officials

31. Government is staffed by 13 579 civil servants (71.1% more than in 1970), 3765 other white-collar staff (304.4% more than 1970) and 2310 manual staff (13.7% more than 1970). Civil servants are subject to general rules laid down in the amended Act of 16 April 1979, as most recently amended in the Act of 19 May 2003. They are recruited by competitive examination. To be admitted to the recruitment examination, candidates must present bulletin no. 3 of the criminal records office, which records any convictions of imprisonment handed down by a Luxembourg court for which a suspended sentence, with or without probation, was not granted or was withdrawn. In addition, government departments receiving applications for public employment may ask for bulletin no. 2, which records criminal convictions handed down in absentia, final convictions for criminal and lesser offences and convictions for breaches of the road traffic regulations[14]. Local authorities have full powers to recruit their own staff. There are also three categories of staff: established local government officers (about 70% of the total), other local authority staff (20%) and private employees working for municipalities (10%). Established local government officers' status is governed by the Act of 24 December 1985, as most recently amended by the Act of 23 February 2001.

32. Trainee civil servants receive training from the National Institute of Public Administration, which includes courses on the general status of civil servants as well as ones on the machinery of state, of local authorities and of other public bodies and agencies. The Institute also plans to offer specific courses in the future on administration and corruption, as part of its in-service training programme. Other categories of staff only receive training if they wish to advance their careers. The local authority section of the Ministry of the Interior monitors the promotion of local authority employees.

33. There is no systematic rotation of persons in public posts considered to be potentially vulnerable to corruption. However, under the Act of 16 April 1979, as amended in 19 May 2003, which establishes the general status of civil servants, any civil servant may be transferred to a new post, function or department in the interests of the service. There are no legal provisions governing the case of persons who after working in government service transfer to the private sector, where they can use their networks of relationships and knowledge of the administrative and decision-making process. There are occasional examples of tax officials moving into the private sector, for example to work for trusts, but civil servants' current pay generally acts as a brake on such transfers.

34. The Act of 16 April 1979 also contains provisions on conflicts of interest and incompatibilities (Appendix V). In particular, it covers measures to be taken in response to erroneous or criminal decisions or orders, the need to maintain the dignity of one's post and the right to carry out one's duties and ancillary occupations[15]. Without the prior approval of the Minister concerned and the Minister for the Civil Service, civil servants may not, directly or indirectly, solicit, accept or seek the promise of material benefits whose acceptance could be incompatible with their statutory obligations; have interests in undertakings supervised by or related to their agency or department that could compromise their independence; undertake a commercial, craft, industrial or

[14] See amended Grand Ducal regulation of 14 December 1976 on the reorganisation of criminal records.

[15] Any paid work or service undertaken by civil servants outside their normal duties on behalf of the State, a local authority, a group of local authorities, a national or international public institution, a private undertaking or an individual.

independent professional activity or a ancillary activity paid by the private sector[16]; take part in the management, administration or supervision of a commercial undertaking or an industrial or financial establishment; undertake a paid ancillary occupation in the national or international public sector. Civil servants who, in the course of their duties, are required to rule on cases in which they may have a personal interest that could compromise their independence must inform their hierarchical superiors of this fact. They must notify the Civil Service Minister of any paid occupation undertaken by their spouse other than ones carried out in the service of the State. If this occupation is incompatible with the civil servant's duties and the latter cannot guarantee that it will be terminated within a certain period, the appointing authority must decide whether the official concerned should remain in his or her post, change residence, change department, duties or posting, with or without a change of residence, or resign. The law on civil servants prohibits the exercise of certain activities that are considered incompatible with their status. These prohibitions can be easily overcome because of the many loopholes in the rules that try to limit the extent to which civil servants can exercise effective control over legal persons.

35. Article 23.2 of the Code of Criminal Investigation requires all public officials or civil servants who acquire knowledge of a criminal offence in the course of their duties to inform the State Prosecutor and supply him with all relevant information and documentation (Appendix VI). However, there are no criminal sanctions for failure to comply.

36. Luxembourg has no codes of conduct applicable to government service, because the amended Act of 16 April 1979 is considered to lay down adequate rules of conduct and duties for civil servants and other state employees (see Appendix V). That said, drafts on these matters are under preparation in certain sectors.

37. There are no explicit rules governing the acceptance of gifts. However, under Article 10 of the general civil service statute, officials may not, directly or indirectly, solicit, accept or seek the promise of material benefits whose acceptance could be incompatible with their obligations and protection under existing law and regulations, and particularly this statute. Breach of this duty may entail disciplinary proceedings.

38. The Government commission responsible for disciplinary investigations was established under the Reform of Civil Servants' Status Act of 19 May 2003. It is answerable to the Minister for the Civil Service and is responsible for the whole of the public service. Before the commission was set up, disciplinary investigations were carried out by the hierarchical superiors of the officials concerned. Disciplinary and criminal proceedings are not directly and sequentially related, so there is nothing to prevent the disciplinary council from ruling before or even in parallel with the courts. A series of disciplinary measures are laid down in Articles 48 and 49 of the civil service statute, including the power to suspend civil servants subject to criminal or administrative proceedings until the final decision (Appendix III). Such suspension is automatic in cases specified by law. Public officials convicted of deliberate offences and sentenced to at least one year's imprisonment without suspension or to the loss of all or some of the rights specified in Article 11 of the Criminal Code are automatically liable to the loss of their employment, status and pension rights. However, the Luxembourg authorities have not reported any such cases for convictions for corruption.

39. Under the statute, the disciplinary sanctions for breach of duties include warnings, reprimands, fines, transfers, suspension of two-yearly salary increments, delays in promotion or career

[16] Civil servants may be employed, even on a paid basis, in scientific research, the publication of works or articles, the arts or trade union activities.

advancement, demotion, temporary exclusion from duties, compulsory retirement for professional or moral unsuitability and, finally, dismissal. Disciplinary sanctions are currently proposed by the disciplinary council, after investigation, to the authority vested with disciplinary powers, which can apply the proposed sanction, apply one that is less severe or refer the official concerned for prosecution. It should be noted that the disciplinary procedure has recently been reformed to make the disciplinary council a decision-making body (the reform came into force after 1 July 2003), with the investigation being undertaken by a government commissioner with that specific responsibility.. The administrative court hears appeals against disciplinary decisions, and can set aside the contested decision and substitute a less severe penalty if it considers that the original one was unnecessarily harsh. For each case, the names of the members of the council, the name and status of the accused, a brief summary of the facts of the case and the council's conclusions are recorded in a register of the proceedings, but no specific statistics are produced.

b. Analysis

40. According to those who the team met, the Luxembourg public service presents so few problems of corruption that the phenomenon is deemed to be marginal, to the extent that no statistics are drawn up. Admittedly the GET came away from its visit with a very favourable impression[17]. However, this must not mask the existence, as in other countries, of real risks of corruption and of shortcomings that must not be ignored, particularly as in the absence of clearly identified victims this is an insidious problem that is not necessarily confined to major cases with lots of media coverage. While the latter create a strong awareness of corruption, lesser cases must not be ignored, since they make corruption an everyday matter, which becomes almost normal and invisible. The often cited small size of the country, the fact that everyone knows everyone else (thus encouraging self-regulation) and the high level of incomes cannot therefore be taken to be a sufficient safeguard and could even have the opposite effect, with everyone sheltering behind a complicit silence rather than running the risk of being considered indelicate. Preventive precautions must be taken at all levels of the public service.

41. Public officials are generally subject to the civil service statute. This sets out their rights and duties but although it has been amended on several occasions, most recently in the Act of 19 May 2003, it nowhere contains the word "corruption". The same goes for the general statute of local government officers, most recently modified by the Act of 23 February 2001.

42. Nor has any code of conduct on corruption been drawn up on the lines of the one produced by the Council of Europe, even to coincide with the publication of the new civil service statute. Given the right format to make them readily accessible, such documents provide a formal opportunity to restate the case against corruption and are generally written in less legal language than official texts to make them more comprehensible. The absence of any explicit reference to corruption in the civil service statute makes such a code all the more necessary. However, it should be noted that a code of conduct for the police is about to be finalised and that another code or set of guidelines for the particularly sensitive area of public contracts is planned. The GET welcomed the fact that this suggests that the idea has not been rejected and could even appeal to other parts of government where there might be a risk of corruption. Elsewhere, in the health professions the code of ethics has binding force. The proposed guidelines on public contracts make no reference to the risk of corruption, whereas Article 6 of the draft police code of conduct states that police officers of the Grand Duchy must be incorruptible. The GET notes with satisfaction that this was the only explicit reference to corruption that it observed in an official

[17] See also the generally positive assessment of a European Central Bank study of the effectiveness of the Luxembourg public sector: "*Public sector efficiency: an international comparison*", July 2003, doc. No. 242.

document during its visit. **The GET recommends that explicit references to the risk of corruption be added in an appropriate manner to the civil service statute and that codes of conduct concerning the risks of corruption be introduced, at least in potentially vulnerable areas of government.**

43. Certain comments must be made about recruitment and training. At both national and local levels, the public service contains various categories of staff. The significant increase over 33 years in the number of public officials[18] means that many of them have received training from the National Institute of Public Administration. Given the projected scale of retirement in coming years, reflecting Europe's well-testified age imbalance, this movement is likely to continue. The Institute's training activities are therefore of major importance. Under its statute, the latter is mainly concerned with the general principles governing civil servants' rights and duties and offers no training modules on corruption. Moreover, the training only extends to established public officials. Other non-manual staff take part on a purely voluntary basis while manual employees receive no training at all from the Institute. As a result, numerous government employees are excluded from all training and therefore learn nothing about their rights and duties. The same applies to in-service training, which cannot therefore serve to fill the gaps left by initial training. Nor are all the staff of formally recognised public institutions necessarily covered by the civil service statute. This depends on the particular legislation under which each institution was set up, the staff of recently established public institutions being subject to private law. This lack of uniformity does not encourage awareness of the risks of corruption. **The GET recommends that training be extended to all established public officials and other public employees, including specific training on the risks of corruption.**

44. The comments on training will inevitably have a critical influence on the workings of government, of which the GET gained an excellent impression. Nevertheless, officials still face the risk of conflict of interest, which is fundamental to the problem of corruption. This concerns in particular incompatibilities, employment in an ancillary activity, staff rotation, refusal of gifts, movement from the public to the private sector and the rules governing transparency in the conduct of activities.

45. Incompatibilities are covered by Articles 14 to 17 of the civil service statute. Article 17 makes the status of civil servant incompatible with that of Member of Parliament, which means that it *is* compatible with all other elective offices. Yet there may be significant risks of conflict of interest when a public official's geographical area of responsibility overlaps with the local authority for which he or she is an elected member. The size of the country undoubtedly does not lend itself to the introduction of geographical incompatibilities and it would not be in the interests of the country itself to deny government employees access to elective office. *However, the GET observes that at the very least the exercise of such functions should be subject to authorisation involving a mandatory examination of the risk of conflict of interests and that checks should be made to establish any additional income received.*

46. Article 14 first reminds civil servants that their posts entail the duties of readiness to work as and when required, independence and neutrality, and then provides for the possibility of a single ancillary occupation, unless the interests of the service forbid this. Such occupations are defined as any paid service or work on behalf of the State, a local authority, a group of local authorities, a national or international public institution, a private undertaking or an individual. The following activities require the prior approval of the relevant minister (with the agreement of the Minister for the Civil Service and Administrative Reform):

[18] Source: 2002 Report of the Ministry of the Civil Service and Administrative Reform.

- ? paid employment in the private sector (commercial, craft, industrial or professional);
- ? the management, administration or oversight or supervision of a commercial undertaking or an industrial or financial establishment;
- ? paid activity in the national or international public sector, which implies that paid activity in the local public sector does not require authorisation.

47. No authorisation is required for unpaid activities, even though this does not exclude the risk of conflict of interests. The occupation of an official's spouse, whether or not paid, must first be assessed by the Minister for the Civil Service and in the event of incompatibility the appointing authority must decide whether the official concerned should remain in his or her post, change residence, change department, duties or posting, with or without a change of residence, or resign. This provision shows that steps can be taken to avoid any risk of conflict of interest. The risk is also exacerbated by the absence of any reference to staff rotation in the civil service code. Yet exercising the same functions in the same place over an extended period, or even throughout their career, undoubtedly exposes officials to the risk of collusion, particularly if the duties involve activities, such as the issuing of permits, that lend themselves to corruption. The risks are real, even though under Article 10.3 of the statute officials may not, directly or indirectly, solicit, accept or seek the promise of material benefits whose acceptance could be incompatible with their obligations and protection under existing law and regulations, and particularly this statute. The GET had the impression that, even though the term was not explicitly mentioned in the statute, gifts were forbidden. Practical solutions are found when such gifts are received.. Nevertheless the wording of the text suggests that gifts are allowed since only ones that might lead to a conflict of interest are forbidden. The representatives of the Luxembourg authorities stated that the sections of the Criminal Code relating to corruption included gifts, of whatever value, among the benefits concerned. The GET considers that the Criminal Code is general in nature and that a provision concerning gifts should be explicitly included in the civil service statute. This could be based on the relevant provisions of Council of Europe Recommendation (2000) 10 on codes of conducts for public officials. Finally there are no regulations, where necessary accompanied by criminal penalties, to control the movement of public officials to the private sector. This clearly creates a risk of conflict of interest, although one that may be less dangerous in Luxembourg than in other countries because of the high level of remuneration in the public sector and a certain security of employment. In the light of the foregoing remarks, **the GET recommends that conflicts of interest be subject to stricter regulation, by limiting or, where appropriate, completely withdrawing the right to be engaged in an ancillary occupation, and possibly by organising the rotation of staff who are most exposed to the risk of corruption; that there should also be clearer regulation of gifts to officials, whose statute should draw particular attention to the risks they incur in accepting gifts and the relevant criminal sanctions, and finally regulate, in order to prohibit, "pantouflage" (i.e. the improper movement of public officials to the private sector).**

48. The rules governing administrative transparency set out in the non-contentious administrative procedure [19] are particularly relevant to combating corruption. They establish obligations concerning the publication of decisions and the communication of the entire case file and relevant information. The institution of ombudsman certainly exists, under the Act of 22 August 2003, and the appointment was being made at the time of the GET's visit. However, there is no body responsible for access to administrative documents to facilitate the application of the transparency rules and while there are proposals to establish one it was made clear that this was not possible in the next few years because of other priorities. Once again, the size of the country and the fact that "everyone knows each other" are cited, but administrative transparency and

[19] Act of 1 December 1978 and Grand Ducal regulation of 8 June 1979

access to public documents are key aspects of the fight against corruption that require specific legislation and training[20]. **The GET recommends that the rules governing the transparency of administrative activities be extended, involving in particular, guaranteed access to public documents, and that responsibility for monitoring compliance with these rules be assigned to an appropriate authority.**

49. Transparency also requires public officials to challenge irregular decisions and orders and inform the State Prosecutor of any criminal offences of which they might become aware in the course of their duties, in accordance with Article 23 of the Code of Criminal Investigation. However, this article requires officials to be actually aware of an unlawful act and is not accompanied by any criminal penalties. It also emerged during the GET's visit that opinions varied as to the implications of this provision and the possible administrative consequences of failure to comply. Officials might also find themselves in a difficult situation on account of an apparent contradiction between this obligation and Article 11 of the civil service statute, which prohibits officials from disclosing facts of which they become aware in the course of their duties and which are confidential, either in nature or because their hierarchical superiors have so ruled, unless they are exempted from this requirement by their minister[21]. **The GET recommends to provide public officials with information concerning the implications of Article 23 of the Code of Criminal Investigation, which would assist the fight against corruption, and the consequences in cases of non-compliance.**

50. The team also considered the operations of certain bodies. Whereas the activities of the public tenders commission, answerable to the Ministry of Public Works, seemed very satisfactory. The lack of time prevented the GET from paying closer attention to local authority tenders boards, or to their planning committees, which appear to be composed of citizen volunteers appointed by the relevant council and which in the absence of such volunteers do not exist.

51. Finally, the arrangements for monitoring and inspection appear to be satisfactory. Prior checks are carried out by financial controllers answerable, via their financial control directorate, to the minister responsible for that particular budget, after which the Court of Auditors undertakes *post hoc* monitoring of the regularity and propriety of expenditure and receipts and compliance with the principles of good financial management, based on the necessary supporting documentation. However, the Court has no judicial status and apart from an annual report on the state accounts its reports and opinions are submitted to the Chamber of Deputies. The court has authority to audit only fifteen public institutions, where this is provided for in their founding legislation. **The GET recommends to extend the range of public institutions that can be audited by the Court of Auditors.**

52. The appointment on 1 November 2003 of a government commissioner for disciplinary investigations is seen by the GET as a very positive step, though the relevant legislation contains no particular reference to fighting corruption. The role therefore needs to be expanded so that,

[20] However, Parliament has granted extensive access to administrative information on the environment in the Freedom of Access to Environmental Information Act of 10 August 1992.

[21] However, the Luxembourg authorities have stated that Article 11 of the civil service statute refers to Article 458 of the Criminal Code, which concerns professional confidentiality in general, and according to which physicians, surgeons, health officers, pharmacists, midwives and any one else in whom confidential information is confided on account of their status or profession who disclose such information, other than when required to give evidence in court or to disclose this information by law, are liable to between eight days' and six months' imprisonment and a fine of between 500 and 5000 euros. Article 23 of the Code of Criminal Investigation creates an exception to this rule of confidentiality and is specifically concerned with cases where public officials are obliged to report offences of which they have become aware. However, Article 11 of the statute makes no explicit reference to Article 458 of the Criminal Code.

given the necessary means to carry out his role, which is not currently the case, he/she will not be confined to purely disciplinary matters but become a genuine inspector of administration. Such a function already exists in the police and its effectiveness has been attested by the GET. **The GET therefore recommends the expansion of the role of the existing administrative inspection services.**

IV. THEME III – LEGAL PERSONS AND CORRUPTION

a. Current situation

Definition of legal persons

53. There are several types of legal person under Luxembourg law, in particular commercial companies, associations, civil societies, economic interest groupings and public law corporations.

54. Section 1 of the Commercial Companies Act of 10 August 1915, as amended, defines commercial companies as ones whose purpose is to engage in commerce. There are several types of commercial company: partnerships (commercial partnerships and limited partnerships), limited partnerships with shares and public limited companies, and hybrid companies (limited liability companies and cooperative societies). Each has a legal status distinct from that of its partners or members. In the case of *de facto* companies the courts apply a theory which categorises them as commercial partnerships, in which the partners have unlimited joint liability.

55. Under legislation of 21 April 1928, associations are divided into two forms of groupings: those with "idealistic" goals, sub-divided into non-profit making associations and foundations, and ones with vested interests, or commercial associations, sub-divided into transitory commercial associations[22] and joint venture commercial associations[23]. In the latter two groups, the members agree among themselves on the objectives, form of organisation, share of the interests and other conditions. They have no legal personality and therefore have no separate legal status from that of their members.

Constitution

56. Other than in the case of single person companies and cooperative societies companies generally require at least two members. To form a public limited company, at least two members are required, (one of whom is the founding member) and a capital of at least EUR 30 986.69 (the same applies to limited partnerships with shares). The capital must be fully subscribed and each share, (whose value may not be less than EUR 1.5) must be paid up at least 25% in cash or by contributions other than in cash. Private limited companies are restricted to a maximum of forty members, though this figure may be exceeded in the event of transmission of shares following death or break up of marriage. The minimum capital is EUR 12 394.68, and it must be fully subscribed. Shares have a minimum value of EUR 25. No specific conditions are set regarding the nationality of the partners of commercial companies. Subsidiaries and branches of foreign companies are constituted in the form of commercial companies under Luxembourg law. Associations are not subject to any particular conditions regarding the number of persons or members, or nationality.

[22] Transitory commercial associations have no business name and are established to undertake one or more specific commercial operations. The members are jointly and severally liable towards third parties with whom they have dealings.
[23] Joint venture commercial partnerships are ones in which one or more persons are concerned in operations managed by one or more other persons in their own name. The managers are jointly and severally liable towards third parties.

Registration

57. With regard to the registration system, the formation of collective partnerships, ordinary limited partnerships, companies and civil societies is recorded in officially notarised documents or private documents, in the absence of which they are deemed null and void. For civil societies and cooperatives only two originals are required. The constituting documents may be published in extract form. Such extracts must contain the precise identity of the partners with joint and several liability, the trade or business name, its objectives and the location of its headquarters, its managers/directors and the nature and limits of their powers, the authorised capital and value of shares paid up or to be paid up by the members, together with the form in which they are paid or promised, the precise identity of the limited partners providing securities, with an indication of each one's obligations, when the enterprise will start operations and when it will cease. The formation of public limited companies, limited partnerships with shares and private limited companies is recorded in officially notarised documents, in the absence of which they are deemed null and void. The formation of associations and economic interest groupings is recorded in officially notarised documents or private documents. Associations are not required to make a declaration to any other public authority but must submit their statutes to the register of commerce. Foundations are formed by officially recorded instrument or by will. National and European economic interest groupings must deposit an extract of their founding contract in accordance with the Act of 25 March 1991.

Transparency, accounting obligations

58. As a general principle, all official documents must be deposited with the commercial and company register. Once these documents have been published in the relevant official journal for companies and associations[24], they can be challenged by third parties. Commercial companies must make a formal request for registration in the register of commerce. The registrar of commerce and companies will then check whether registration is in accordance with the law. Companies derive their legal personality not from inclusion on the register but by contractual choice, unilateral transaction (in the case of a one person business) or the wording of the founding instrument (other than for non-profit making and agricultural associations, which acquire this status when their statutes are published in the relevant official journal).

59. In the interests of transparency, companies must publish their annual accounts, once these have been approved by the meeting of members or shareholders. Partnerships are not required to publish their accounts. Failure to secure approval of or publish annual accounts is considered to be a serious breach of the law, for which the courts may wind up the company. The directors/managers may also be held liable for such an omission. Resident tax payers are required to declare their income from both Luxembourg and abroad, and their worldwide assets. In response to the tax authorities, they must also provide any documentation or other information necessary for tax assessment purposes (section 2 and sections 166 ff of the general tax legislation). The accounts of medium-sized and large companies must be audited by an auditor (*réviseur d'entreprise*) appointed by the shareholders' meeting. Small companies are audited by a *commissaire aux comptes*[25]. Anonymous bank accounts do not exist in Luxembourg, but there are numbered accounts. The financial sector is monitored by a financial sector surveillance

[24] The *Mémorial*.

[25] In principle, audit by a *commissaire aux comptes* is mandatory, other than for companies where the law requires it to be performed by a *réviseur d'entreprise* and certain other statutorily defined exceptions (in particular, in the case of private companies, Article 200 only requires audit by a *commissaire aux comptes* for ones with more than twenty-five members).

commission, established under the Financial Sector Act of 5 April 1993, as amended, and the insurance sector by an insurance commission.

Limitation on exercising professional activities, integrity

60. The courts may disqualify any bankrupt person or the legal or *de facto* managers of an insolvent company whose grave misconduct has contributed to the insolvency, whether or not they were in post when the insolvency was declared, from directly or indirectly engaging in a commercial activity, acting as director, manager or auditor or performing any function conferring the power to commit a company, whether or not they are members of the company and whether they are operating openly or in secret and in a paid or unpaid capacity. Such disqualification may last from one to twenty years. Under Article 444.1 of the Commercial Code, disqualification is recorded in the register of commerce and industry throughout its period in force. In the event of the insolvency of a company, any legal or *de facto* managers, whether they are operating openly or in secret, in a paid or unpaid capacity and as individuals or a legal person, may be declared personally bankrupt if, using the company to conceal their activities, they have undertaken commercial transactions in their personal interest, made personal use of company assets or unjustifiably operated at a loss in their own interest and in such a way as to lead inevitably to the legal person ceasing payments (Article 495 of the Commercial Code). When the insolvency of a company reveals insufficient assets, the courts may decide, on the application of the administrator, that the legal or *de facto* managers whose grave misconduct has been shown to have contributed to the insolvency, whether they were operating openly or in secret and in a paid or unpaid capacity, shall be jointly or severally liable, in whole or on part, for the debt (Article 495-1 of the Commercial Code).

61. The managers of lending institutions, whether as individuals or, in the case of legal persons, as directors, managers, members of supervisory bodies, shareholders or members, must establish proof of their professional integrity. In assessing integrity account will be taken of any criminal record and all the factors necessary to vouch for an individual's good reputation and unimpeachable conduct (Financial Sector Act of 5 April 1993, as amended).

62. Moreover, in order to operate, commercial companies must also receive authorisation from the Ministry of Middle Classes or other relevant ministry. Before such authorisation is granted, checks are carried out on the integrity of the managers. Under Section 3 of the Act of 28 December 1988 governing access to craft, commercial and industrial activities and to certain professions, integrity is assessed on the basis of any criminal record and the results of administrative inquiries. Any prior criminal conviction or administrative sanction will be grounds for refusing authorisation if the surrounding facts are sufficiently relevant and serious.

Liability of legal persons

63. The liability of legal persons is governed by Sections 203 and 203-1 of the Commercial Companies Act of 10 August 1915, as amended (Appendix VII). The courts may order the winding up of any Luxembourg company or foreign company operating in Luxembourg whose activities are in breach of the criminal law, including the offences of active corruption (active bribery), trading in influence and money laundering. However, the GET has been informed of legislation in preparation that would introduce the principle of criminal liability for legal persons to the Criminal Code. The proposed legislation would include such criminal sanctions as fines, temporary or permanent closure, disqualification and so on.

64. The measures laid down in Sections 203 and 203-1 of the 1915 Act apply to any legal person undertaking activities in breach of the criminal law, whether or not any profit has been made and whether it was the absence of any oversight or supervision by an individual exercising managerial authority within the enterprise that allowed the offences to take place, and even if no individual has been prosecuted or identified. The liability of legal persons does not exclude criminal proceedings against individuals for perpetrating, instigating or being accessories to active corruption, trading in influence or money laundering.

65. In the light of the above, the liability of legal persons under Sections 203 and 203-1 is therefore established in different legal proceedings from those brought against the individual perpetrators of an offence, though it may result from the latter.

Tax deductibility

66. The Act of 15 January 2001 approving the OECD Convention of 21 November 1997 on Combating Bribery of Foreign Public Officials makes it illegal to offset "facilitation" payments, bribes and other corruption-related expenditure against taxes.

Tax authorities and accounting offences

67. Cooperation between the tax authorities and the State Prosecutor's Office is limited to the transfer of documents when the former consider that there has been a criminal offence under Article 23.2 of the Code of Criminal Investigation. However, this obligation, which requires all public officials or civil servants who acquire knowledge of a criminal offence in the course of their duties to inform the State Prosecutor and supply him with all relevant information and documentation, is not accompanied by any specific penalties. Enforcement agencies have no direct access to tax declarations. Where such access is necessary an investigating judge has to issue a search or seizure warrant.

68. Accounting documents are the subject of Part II of the Commercial Code. Under Article 8, all traders are required to keep accounts. The Luxembourg authorities interpret this as including any individual or legal person engaging in a commercial activity, and thus all commercial companies. Accounting documents must be retained for ten years from the end of the accounting year to which they pertain. Failure to comply with these obligations may result in the winding up of the company or the cessation of trading.

69. Non-profit making associations must also prepare a budget and accounts for approval by their general meeting. Similarly the administrators of foundations prepare budgets and accounts, which are submitted to the Ministry of Justice and published in the official journal for companies and associations.

70. Forgery and making use of forged documents are general offences under the Criminal Code (Articles 193 ff). More specifically, the 1915 Act as amended makes it a criminal offence (punishable by imprisonment and a fine of from EUR 5 000 to 250 000) to forge company balance sheets or profit and loss accounts required by law or the company statutes, with fraudulent intent, by counterfeiting signatures, forging or altering documents or signatures, forging agreements, provisions, obligations or discharges or inserting them retrospectively into balance sheets or profit and loss accounts by adding or altering clauses, declarations or facts that these documents are intended to record and vouch for (Section 169). Finally, bankrupts whose balance sheets falsely show them to be liable for sums that they do not owe shall be declared fraudulently bankrupt

(Article 577 of the Commercial Code). The penalties attached to fraudulent bankruptcy also apply to bankrupt traders who have suppressed the accounts or fraudulently removed, deleted or altered the content (Article 577 of the Commercial Code).

71. Auditors and company accountants are not required to report suspected offences to the prosecution authorities. However, under the anti-laundering legislation they are required to file a declaration of suspicion with the Luxembourg State Prosecutor's Office in the case of predicate laundering offences (Act of 11 August 1998). This obligation will be extended to the legal professions in draft legislation to be presented to the Chamber of Deputies (Bill No. 5165).

72. The Luxembourg authorities told the GET that professional organisations representing accountants, auditors and other advisers organise regular training days and seminars attended by prosecution officials to draw their professions' attention to policies concerned with detecting and reporting accounting offences and the non-declaration of offences, particularly corruption and laundering. Bill No. 5165 will require all the professions concerned to offer their staff appropriate training on combating laundering. In addition, a pilot committee on laundering was set up in 2002 to enable the main professions concerned (auditors, accountants, notaries, lawyers, banks, insurance companies and so on) to liaise with relevant public authorities (Ministries of Justice and Finance, financial and insurance sector supervisory bodies and the State Prosecutor) to coordinate anti-laundering activities and advise the Government on its laundering policy.

b. Analysis

73. Private law legal persons are essentially covered by two pieces of legislation: the Commercial Companies Act of 10 August 1915, as amended, and the Non-Profit Making Associations and Foundations Act of 21 April 1928, as amended. This general presentation of the current situation and the applicable rules for preventing and combating corruption are complicated by the continued existence in Luxembourg of certain "hybrid" legal persons such as commercial associations, though these are gradually disappearing, and *de facto* legal persons (companies and associations). As already noted, in the case of *de facto* legal persons the courts apply a theory which categorises them as commercial partnerships, in which the partners have unlimited joint liability.

74. Supervision of the establishment and objectives of non-profit making companies and associations is mainly the responsibility of, respectively, notaries and the register of commerce. According to information received, this supervision is mainly formal and confined to scrutinising the objectives in the social agreement and the statutes. Companies acquire legal personality by contract between the parties or in an officially notarised document and not by registration with the registrar of commerce. Similarly, associations acquire legal personality simply by publishing the fact in the relevant official journal. There was only one declaration of suspicion by notary to the Financial Intelligence Unit in 2003. The possibility of swiftly setting up companies and associations is one of the incentives for foreign companies to register in Luxembourg. Moreover, there are also companies whose purpose is to help companies to set up in Luxembourg. They advertise the speed with which this can be carried out and the associated fiscal benefits. Accountants acting as trustees can easily set up companies and represent them. In theory, front companies do not exist, but the problem of letter box companies was raised at several of the GET's meetings. A number of reported cases highlight the need for measures to deal with this problem. The number of

inactive companies that are wound up or closed also raises questions about their real nature and purpose[26].

75. Checks on the character and integrity of company directors form part of the process of authorising the establishment of businesses operated by the Ministry of Middle Classes. In any case, the register of commerce includes a register of persons who are barred from company activities on account of bankruptcy or for other correlated professional reasons. Companies may be wound up by court order – *inter alia* at the State Prosecutor's request – if they are not pursuing their stated objectives or are engaged in unlawful activities.

76. The system for auditing the accounts of non-profit making companies and associations appears to resemble that in other European countries. Company accounts are filed with the register of commerce and published in the relevant official journal. However, the recent computerisation of the register should facilitate the rapid transfer of files on insolvent companies to the State Prosecutor. Although in theory the functions of accountant (for drawing up and managing company accounts) and auditor are separate, the same audit company can carry out both, on condition that a certain functional independence is maintained. Moreover, Luxembourg does not impose any compulsory rotation of company auditors. The debate about conflicts of interest between accountants and auditors has been fuelled by a number of major European and international cases. One possible solution to the problem might be for companies to contribute to a joint fund. The fund would then be responsible for appointing and paying company auditors. In this context, *the GET observed that the Luxembourg authorities should consider whether to establish a system for resolving the conflict of interests between auditors and accountants with the companies concerned.*

77. There is a closely guarded tradition of tax secrecy. However, representatives of the tax authorities showed clear awareness of the attendant risks and negative consequences in terms of corruption. Tax officials are required to report any evidence of an offence that comes to their attention to the State Prosecutor. Suspicions, even serious ones, are not covered by this provision. But, as it has already been noted in this report, the relationship between this obligation and the terms of Article 11 of the civil service statute (which prohibits officials from disclosing facts of which they become aware in the course of their duties and which are confidential, either in nature or because their hierarchical superiors have so ruled, unless they are exempted from this requirement by their minister) are not always clearly understood. Finally, the representatives of the tax authorities whom the team met were only vaguely aware of the safeguards and procedures attached to declarations of suspicion to the Financial Intelligence Unit (see also paragraph 49 above).

78. Chamber of Deputies Bill No. 5165, tabled on 16 June 2003, is designed to strengthen the existing anti-laundering armoury and the obligations of those concerned to report suspected offences, including offences of corruption. The new law should implement the pertinent provisions of the Criminal Law Convention on Corruption concerning laundering of the proceeds and instruments of corruption and the equivalent value of these proceeds. The growing sophistication of financial offences, particularly corruption and the laundering of its proceeds, calls for more stringent and more effective checks by those responsible for supervising the financial sector and

[26] However, the Luxembourg authorities have stated that a bill to amend the 1988 legislation on the right of establishment should soon be enacted under which all individuals and legal persons required to seek authority to establish a business must have a place of business in the country. This additional condition for those seeking authorisation to establish a business will make it easier to carry out *ex ante* checks to weed out letter box or similar companies and *ex post* checks to enable the authorities to ensure at any time that the company's activities are indeed the ones for which authorisation was granted.

closer cooperation from those required to exercise all due diligence. In practice, there are many ways of transferring and investing assets inside the country and beyond it, including tax havens. Nor are the instruments of corruption always visible – for example, persons are encouraged to buy shares on the stock exchange whose values are then artificially inflated. Despite the rules in Circular CSSF 01/40, *the GET observed that directives could be drawn up to make the surveillance commission's supervision of the finance and banking sector and the detection of corruption offences more effective.* Moreover, accountants and auditors are unaware of the importance of more proactive collaboration with the judicial authorities in identifying signs of corruption and money laundering. **The GET therefore recommends that current legislative developments be accompanied by guidelines for accountants and auditors on how to identify signs of corruption and its proceeds as part of their professional activities and to report their findings.**

79. The absence of proportionate sanctions or measures, including the absence of monetary sanctions at the time of the GET's visit, was a major deficiency in the liability of legal persons for criminal offences. Under Sections 203 and 203.1 of the Act of 10 August 1915, commercial companies may be wound up at the request of the State Prosecutor, but this measure, ordered by a district court sitting as a commercial court, cannot be considered an adequate sanction or measure. Current closures or winding-up orders (approximately 500 a year) are often imposed for failure to file accounts or serve to clear out undertakings that are no longer active (around 5000 are created annually). **The GET recommends to introduce an adequate system of liability of legal persons for acts of corruption, with adequate sanctions or measures for the associated offences.**

V. CONCLUSIONS

80. As a whole, Luxembourg is considered to have an effective and reputable public service. Corruption is perceived as a marginal problem. However, it is an insidious phenomenon, with no clearly identified victims. Lack of interest or failure to comply with certain fundamental rules may make government and its officials more vulnerable, thus trivialising the problem and making it quasi-normal and invisible.

81. A series of initiatives proposed in this report or currently being drawn up by the relevant Luxembourg authorities would help to compensate for the apparent absence of a genuine penal policy focusing on the proceeds of crime. Genuine confiscation of the proceeds and instruments of crime or of any assets of equivalent value would make an effective contribution to preventing and combating corruption.

82. GRECO urges the introduction of a proper system of liability for legal persons, accompanied by dissuasive penalties, which would permit the confiscation of their criminally acquired assets. The tax authorities, auditors and accountants have a fundamental role to play in reporting accounting offences and corruption to the police and other enforcement agencies.

83. In view of the above, GRECO addresses the following recommendations to Luxembourg:

i. **that the law be changed to permit, where appropriate, the confiscation of assets of an equivalent value to the proceeds of any corruption offence, including private corruption, and that this be encouraged in judicial practice;**

ii. **that the law be changed to permit, where appropriate, the seizure of assets of an equivalent value to the proceeds of corruption and that this be encouraged in judicial practice;**

iii. **that appropriate training programmes be established for the relevant authorities on the identification, seizure and confiscation of the instruments and proceeds of corruption or of assets of equivalent value;**

iv. **to consider establishing an appropriate balance in the burden of proof, in connection with a conviction, to assist the court in identifying corruption proceeds liable to confiscation in suitable cases;**

v. **that explicit references to the risk of corruption be added in an appropriate manner to the civil service statute and that codes of conduct concerning the risks of corruption be introduced, at least in potentially vulnerable areas of government;**

vi. **that training be extended to all established public officials and other public employees, including specific training on the risks of corruption;**

vii. **that conflicts of interest be subject to stricter regulation, by limiting or, where appropriate, completely withdrawing the right to be engaged in an ancillary occupation, and possibly by organising the rotation of staff who are most exposed to the risk of corruption; That there should also be clearer regulation of gifts to officials, whose statute should draw particular attention to the risks they incur in accepting gifts and the relevant criminal sanctions, and finally regulate, in order to prohibit, "pantouflage" (i.e. the improper movement of public officials to the private sector);**

viii. **that the rules governing the transparency of administrative activities be extended, involving in particular, guaranteed access to public documents, and that responsibility for monitoring compliance with these rules be assigned to an appropriate authority;**

ix. **to provide public officials with information concerning the implications of Article 23 of the Code of Criminal Investigation, which would assist the fight against corruption, and the consequences in cases of non-compliance;**

x. **to extend the range of public institutions that can be audited by the Court of Auditors;**

xi. **the expansion of the role of the existing administrative inspection services;**

xii. **that current legislative developments be accompanied by guidelines for accountants and auditors on how to identify signs of corruption and its proceeds as part of their professional activities and to report their findings;**

xiii. **to introduce an adequate system of liability of legal persons for acts of corruption, with adequate sanctions or measures for the associated offences.**

84. GRECO also invites the Luxembourg authorities to take account of the experts' observations in the analytical parts of this report.

85. Finally, in accordance with Rule 30.2 of its Rules of Procedure GRECO invites the Luxembourg authorities to report back to it not later than 30 November 2005 on its implementation of the above recommendations.

APPENDIX I

Code of Criminal Investigation
(Provisional measures)

Article 31 (Act of 16 June 1989)
(1) Where an offence is discovered while it is being committed, the senior police officer who is informed of it shall immediately advise the state prosecutor, immediately visit the scene of the offence and make all necessary investigations.
(2) He shall preserve any evidence at risk of disappearance which might help to reveal the truth.
(3) (Act of 17 March 1992) He shall seize the objects, documents and effects that have been used to commit the offence or were intended for use to commit the offence or are the subject of the offence, together with anything that appears to be the product of an offence, generally speaking, might contribute to revealing the truth, if used, might hinder the progress of a judicial investigation, or is liable to be confiscated or can be restored.
(4) He shall present the objects seized, for the purposes of recognition, to the persons who appear to have participated in the offence, if they are present.

1. Under Article 52 of the Code of Criminal Investigation, which authorises the state prosecutor to delegate part of his authority to act to a senior police officer and whose provisions are applicable by extension to an investigating judge, the latter can only delegate this authority to senior police officers and not to ordinary officers, whatever their rank or function in the police force. Although the presence of such an officer during a measure of investigation performed by a senior police officer to whom the duty has been delegated does not necessarily constitute a sufficiently serious infringement of the rights of the defence to invalidate the proceedings, such invalidation is the consequence of the breach of the law itself, which in this case must be considered essential and thus mandatory. *Ch. des mises* 31 December 1979, 24, 373.

2. The presence of an unauthorised third party during a measure of investigation, whether officially or unofficially, and more specifically during a delegated measure of investigation, is a substantive and therefore serious infringement of the rights of the defence and, where relevant, the rights of the prosecution, which renders the measures in question invalid. *Ch. des mises* 31 December 1979, 24, 373.

3. The provisions of the Code of Criminal Investigation, as amended by the Act of 16 June 1989 modifying Part I of the Code, which restricts the power to carry out seizures to senior police officers, make no changes to the equivalent provisions of the Code applicable before the amendments came into force. The provisions of the Road Traffic Code were already exceptions to the general law before the Act of 16 June 1989 came into force. These provisions, which grant all police and gendarmerie officers powers of seizure pursuant to the Road Traffic Act of 14 February 1955, have not been repealed, either expressly or tacitly, as provisions of a prior special law, by the new provisions of the Code of Criminal Investigation as a subsequent general law. Court 13 June 1990, 28, 106.

Article 66 (Act of 17 March 1992)

(1) The investigating judge shall seize any objects, documents, effects or other items specified in Article 31 (3).
(2) These objects, documents, effects or other items shall be listed in the official report. If there are difficulties listing them on the spot they shall be placed under seal until they are listed, in the presence of the persons who were present during the search.

(3) The official report on the search and seizures shall be signed by the accused, the person at whose address they were carried out and the persons present; in the event of refusal to sign, this shall be recorded in the report. All those concerned shall be left a copy of the report.
(4) The objects, documents, effects or other items shall be deposited with the court registrar or with a custodian of seized goods.

Article 67 (Act of 16 June 1989)
(1) The investigating judge may at any time and of his own motion order the total or partial attachment of items seized.
(2) If the seizures concern cash, ingots, effects or securities whose preservation in their existing state is not necessary to establish the truth or protect the rights of the parties, the investigating judge may authorise the court registrar to deposit them with the bank for official deposits or the state savings bank.
(3) Those concerned may obtain, at their own cost, copies or photocopies of documents seized.
See C. instr. crim., art. 68; 194-1 to 194-7.

APPENDIX II

Criminal Code
(Confiscation)

Section V – special confiscation

Article 31 (Act of 13 June 1994)

(1) Special confiscation applies to:
1. items forming the object of the offence;
2. items that have been used in or are intended for use in the commissioning of the offence, when the property belongs to the accused;
3. items that are the proceeds of the offence or have been acquired with the aid of the proceeds of the offence.

(2) If confiscation is ordered in a judgment and the order cannot be executed, a fine not exceeding the value of the confiscated items shall be imposed. This fine shall be deemed to be a sanction.

1. When the accused have used a motor vehicle and horses to transport the objects that they know were stolen, the courts may order the confiscation of this vehicle and these horses, if they have been seized and are the property of the accused handlers of stolen goods. Court 24 July 1909, P. 8, 293.

2. Although the established principles governing complicity and special confiscation do not apply in the case of a simple fault of omission, this is not the case when the person concerned has expressly and deliberately used a prohibited form of transport; this fact clearly indicates the idea of cooperation and does not in any way exclude the application of the rules governing the confiscation of the item forming the object of the offence. Section 10 of the Livestock Health Act of 29 July 1912 merely stipulates confiscation, without considering the nature of this confiscation and, in particular, whether this measure is imposed as a sanction or as a precautionary measure in the interests of public health; the courts must therefore apply it as a matter of course. 6 October 1916, P. 10, 11.

3. Items that cannot be considered to be the proceeds of an offence brought before the criminal courts are not liable to special confiscation. Court 21 July 1934, P. 13, 312.

4. Lesser offences that are reclassified downwards cannot be treated entirely as petty offences; although recognition of mitigating circumstances reduces the level of guilt and results in a reduced sentence, the offence as defined by law nevertheless remains in all its constituent aspects. As a consequence, the reduction in sentence cannot have any effect on any ancillary penalties, in particular special confiscation, since it is the law that determines the cases to which special confiscation applies and not the nature of the offence as defined by the penalty imposed. For the object that has been used to commit the offence to be confiscated, it is simply necessary for that object to have been used to carry out the offence and for the accused to be the owner; the law does not require the object to have been essential for the perpetration of the offence. Confiscation of an object that has been used to commit an offence is not conditional on prior seizure, since the wording of Article 43 of the Criminal Code imposes no restriction of this type. Cass. 15 May 1952, P. 15, 349.

5. The words "used or intended for use to commit the offence" in Article 42 of the Criminal Code refer to items that have been used in the perpetration of an offence and therefore include things that were used in the preparation of the offence and those used subsequently to its commission to enable the author to reap the expected benefits. This is why it is permitted to order the confiscation of the lorry used by the accused to travel to the scene of the crime and which he used to transport the stolen objects, when their weight and volume would otherwise have prevented him from doing so. Confiscation must also be ordered for the car used by a co-accused when acting as lookout, since this vehicle was intended for use in this act of participation in the offence. For the theft to be completed, the perpetrator who wished to appropriate the objects must have taken real possession of them so that the owner could no longer dispose of them as he wished. The theft was therefore completed when, in order to remove and transport the objects, the thief bound them together or placed them in a basket or a sack. Similarly, the theft of heavy and cumbersome objects is completed not by dismounting, handling and moving them but solely by loading them into a lorry, since this alone infringes the owner's rights by removing the objects from his possession and placing them effectively in those of the accused. Since the lorry served directly in the commissioning of the offence, it is therefore liable to confiscation. Court 26 September 1966, P. 20, 239.

6. In an appeal on points of law in which the accused had been sentenced to a single penalty for several offences, the court declared the argument that the sentence for the main offence had been unlawful inadmissible for lack of legal relevance, because the sentence had been justified by offences of which the trial court had found the accused guilty and which were not challenged in the appeal, particularly as legal grounds had been given for the decisions handed down. The court also found the appeal inadmissible in so far as it challenged the decision to order the confiscation of prohibited arms, even though this decision was only based on one of the offences found by the court and challenged in the appeal, since the confiscation of prohibited arms constituted a security measure and not a criminal sanction and had to be ordered, even when it fell outside the rules governing confiscation in Article 42 of the Criminal Code, subject only to the proviso that the decision was taken in the course of criminal proceedings. The court had therefore been empowered to order the confiscation of prohibited arms when the latter had been seized unlawfully or in the course of an unlawful search, and even if it had been impossible to convict the accused because of the unlawful nature of the search that preceded the seizure or for any other reason. Cass. 10 November 1966, P. 20, 228.

7. Pursuant to Section 12.2.3 of the Road Traffic Act of 14 February 1955, as amended, the special confiscation of a vehicle that has been used to commit an offence must be ordered if the offence was committed while the perpetrator was in a state of inebriation at the wheel before the lapse of one year from the date when a conviction for the same offence took effect. This confiscation must be ordered even if the vehicle formed part of the community of property of the accused and his wife. If the accused was the owner, even if only partly, of the objects or instruments of the offence, the latter must be confiscated, without the need to establish whether or not the accused had a right to dispose of the items in question, since parliament had merely laid down the condition that the accused should be the owner of the confiscated objects, without requiring him to be the exclusive owner. Court 23 July 1981, P. 25, 185.

8. The condition for special confiscation in Article 42.1 of the Criminal Code that the object used to commit the offence must belong to the accused is not met in the case of a vehicle used to commit an offence if the sale of contract concluded by the accused contains a reservation that the vehicle remains the property of the seller until final payment of the agreed selling price and this sum has not been finally settled. Court 1 October 1990, P. 28, 107.

9. The words "items used or intended for use to commit the offence" should be interpreted very broadly to refer to items that have been used in the perpetration of an offence and therefore include things that were used in the preparation of the offence and those used subsequently to its commission to enable the author to reap the expected benefits. Court 19 November 1990, P. 28, 122.

Article 32 (Act of 13 June 1994) Special confiscation shall always be ordered for serious offences (*crimes*) and may be ordered for lesser offences (*délits*). For minor offences (*contraventions*) it shall only be ordered in specific cases specified in law.

See Criminal Code, Articles 64; 552.2; 553.1; 557.3; 561.4; 563.1

Article 32-1 (Act of 14 June 2001) In the case of laundering offences specified in Articles 506-1 to 506-7, special confiscation shall apply:

1. to assets of all sorts, whether physical or intangible, movable or immovable, and to documents attesting to ownership of or entitlement to the subject matter or proceeds, direct or indirect, of one or more of the offences listed in Article 506-1, or any financial benefit whatever arising from the offence, including income from these assets;

2. assets that have been substituted for those specified under 1) of this paragraph including the income from substitute assets;

3. assets belonging to the accused whose monetary value is the same as that of the assets specified under 1) if the latter cannot be found for the purposes of confiscation.

Confiscation of assets specified in paragraphs 1 and 2 shall be ordered even in the event of acquittal, exemption from sentence, lapse of proceedings or expiry of the time limit for prosecution and even if they are not the property of the perpetrator of the offence.

When the assets belong to the party claiming damages they shall be restored to him. Confiscated assets shall also be awarded to the party claiming damages when the court has ordered their confiscation on the grounds that they represent substitute assets for those belonging to that party or when they represent the equivalent value within the meaning of the first paragraph of this article.

Other parties claiming entitlement to confiscated assets may attempt to enforce their claims. Where such claims are recognised to be lawful and justified, the court shall order restitution.

The court that ordered confiscation remains competent to rule on applications for restitution lodged with the state prosecutor or the court, either from the injured party or a third party claiming entitlement to a confiscated asset.

Applications must be lodged within two years of the execution of the confiscation order, after which they are out of time. Applications are also time expired if the confiscated assets have been transferred to an applicant state in execution of an agreement between the two states or of an arrangement between the Luxembourg government and the government of an applicant state.

APPENDIX III

Disciplinary measures in association with criminal or administrative proceedings

(Act of 16 April 1979 establishing the civil service statute)

Section 48

1. Public officials who are the subject of criminal or administrative proceedings may be suspended from office throughout the proceedings until the final decision.

2. Suspension is automatic in the case of officials:

   a. sentenced to imprisonment by a court with no further right of appeal, for the duration of the sentence;
   b. sentenced to imprisonment for an offence that entails loss of employment, once sentence has been passed and until it comes into effect;
   c. detained on remand, for the duration of the detention;
   d. subject to a disciplinary sanction of dismissal or compulsory retirement for professional or moral unsuitability from the time the decision is taken until it comes into effect.

3. The period of suspension provided for in paragraphs 1 and 2 does not count towards periods of service for the purposes of two-yearly salary increments, pay rises and pensions, other than in the case of discharge or acquittal.

4. During periods of imprisonment as referred to in paragraph 1a, public officials are automatically deprived of salary and ancillary benefits.

5. During periods of detention on remand as referred to in paragraph 1c, salary and ancillary benefits are reduced by one half.

Section 49

Public officials convicted of deliberate offences and sentenced to at least one year's imprisonment without suspension or to the loss of some or all of the rights specified in Article 31 of the Criminal Code are automatically liable to the loss of their employment, status and pension rights. Loss of pension rights does not affect any entitlement arising from the retroactive insurance associated with the coordination of pension schemes.

However, loss of pension rights only applies to officials covered by the Civil Servants' Pensions Act of 25 May 1954, as amended.

APPENDIX IV

Transparency in public service

1. Section 5 of the Grand Ducal regulation of 8 June 1979 states that when administrative decisions are likely to affect the rights and interests of third parties the administrative authorities must publicise them adequately so that those concerned can present their case. Where possible the administrative authorities must publicise the opening of proceedings culminating in such a decision. Those concerned must be allowed to make their observations. Persons who have presented observations must be informed of the final decision by all appropriate means. When only a single individual is concerned by a decision he or she should ideally be personally informed of the proceedings. When an unknown number of persons might be concerned, the information should be publicised either by notices in the press or on public notice boards.

2. In addition, Section 11 of the Regulation grants all citizens the right to be fully informed of their administrative situation, each time it is affected or likely to be affected by a decision already taken or currently being taken. Section 11 covers all situations where a personal file relating to an individual's administrative situation has been opened. The term "administrative situation" includes any cases where individuals' or legal persons' situation is affected by an administrative legal relationship. When individuals become aware that such files are held by an administrative authority, they are entitled to consult all the information and documents in these files.

3. In a decision of 30 September 2002, concerning the right of access to administrative files, the administrative court ruled that the notion of communication necessarily implied that citizens should be informed of the contents of files in a spirit of greater transparency, dialogue and collaboration between them and the authorities issuing individual administrative decisions, in accordance with the Act of 1 December 1978 and the Grand Ducal regulation of 8 June 1979. The forms of and arrangements for such communication should reflect technological advances so that although in 1979 photocopiers had not been in general use and had been complicated and costly to operate this was no longer the case and this instrument of communication had become standard equipment for all departments.

4. Finally Section 12 of the Regulation also entitles anyone concerned by an administrative decision likely to adversely affect his or her rights or interests to be informed of anything on which the authorities have based or intend to base the decision. This gives citizens the right to consult administrative files on other persons, irrespective of whether the decision has been taken or is currently being prepared. However, third persons' rights to information from administrative files are more limited than those of persons directly concerned. Entitlement is not to all information but only that on which the relevant administrative decision is based. There are currently no arrangements for paying the costs.

APPENDIX V

Provisions on conflicts of interest and incompatibilities between the public and private sectors in the Act of 16 April 1979 on the duties of public officials

Section 9

1. Public officials must comply conscientiously with the legislation and regulations governing the duties associated with their posts.

....

4. Officials who consider that an instruction is unlawful or that its implementation could entail serious disadvantages, must communicate their opinion, in writing and through the relevant hierarchy, to the more senior official issuing the instruction. If the latter confirms the instruction in writing the official concerned must comply with it unless its implementation would involve committing of an offence. If circumstances require, challenges to and confirmation of instructions may be made orally. Each party must then confirm his or her position as soon as possible in writing.

Section 10

1. Both in the exercise of their duties and outside, officials must avoid any conduct that could adversely affect the dignity of their post or their capacity to exercise their duties, lead to scandal or compromise the interests of the public service.

....

3. Officials may not, directly or indirectly, solicit, accept or seek the promise of material benefits whose acceptance could be incompatible with their obligations and protection under existing law and regulations, and particularly this statute.

Section 14

1. Officials are forbidden, either directly or via intermediaries and under whatever title, from having interests likely to compromise their independence in any enterprise monitored or supervised by or related to their department or agency.

2. Officials may not undertake a commercial, craft, industrial or independent professional activity or a ancillary activity paid by the private sector without prior government authorisation. This provision also applies to the activities of estate agent.

The following activities are excluded from the preceding list, even when paid:

- scientific research
- publication of works or articles
- the arts
- trade union activities.

3. Officials may not take part in the management, administration or supervision of a commercial undertaking or an industrial or financial establishment without prior government authorisation.

4. Officials must notify the relevant minister of any paid occupation undertaken by their spouse other than ones carried out in the service of the state. If this occupation is incompatible with the civil servant's duties and the latter cannot guarantee that it will be terminated within a certain period, the appointing authority must decide whether the official concerned should remain in his or her post, change residence, change department, duties or posting, with or without a change of residence, or resign.

The changes provided for in this paragraph shall be in accordance with the conditions laid down in Section 6 of this Act. In the event of resignation from office, individuals with more than fifteen years' service may invoke Section 1.1.6 of the Civil Servants' Pensions Act.

5. Officials may not undertake a paid ancillary occupation in the national or international public sector without prior government authorisation. Officials may not perform two or more simultaneous ancillary occupations, unless this is in the interests of the public service.

6. Decisions to appoint to or authorise an ancillary occupation may be revoked. Each year, officials exercising such activities must declare them to the Government within a time limit and in a form laid down by the minister with responsibility for the civil service. This regulation may exclude some or all of the ancillary occupations in paragraph 5 in government departments and agencies.

7. For the purposes of paragraphs 1 to 5 ancillary occupations are taken to include any paid service or work on behalf of the state, a local authority, a group of local authorities, a national or international public institution, a private undertaking or an individual.

8. Activities within the meaning of this section may not be exercised if they cannot be reconciled with the conscientious and complete exercise of the duties associated with the main post or they are incompatible, *de jure* or *de facto,* with the authority, independence or dignity of the official concerned.

Section 15.

Officials who, in the course of their duties, are required to rule on cases in which they may have a personal interest that could compromise their independence must inform their hierarchical superiors of this fact.

APPENDIX VI

Obligation to report infringements (whistle blowing) (Code of Criminal Investigation)

Section 23 (Act of 16 June 1989)

1. The state prosecutor shall receive all complaints and reports of infringements and decide on what action to take in response.

2. All public officials or civil servants who acquire knowledge of a criminal offence in the course of their duties are required to inform the state prosecutor and supply him with all relevant information and documentation.

APPENDIX VII

Liability of legal persons
Extracts from the Commercial Companies Act of 10 August 1915, as amended

Section 203

1. On the application of the state prosecutor, the district court sitting as a commercial court may order the winding up and liquidation of any company operating under Luxembourg law that engages in activities contrary to the criminal law or that seriously contravene the Commercial Code or the legislation governing commercial companies, including that governing the right of establishment.

2. Applications and procedural documents under this section are served through the court registry. If a company cannot be reached through its legal address in Luxembourg extracts of the application are published in two newspapers printed in the country.

3. When it orders liquidation the court shall appoint a bankruptcy judge and one or more liquidators. It shall determine the method of liquidation. It may order the application, in so far as it deems necessary, of the compulsory liquidation rules. The method of liquidation may be altered subsequently, either of the court's own motion or at the request of the liquidator or liquidators.

4. Extracts of court decisions to wind up and liquidate companies are published in the relevant official journal (the *Mémorial*). As well as publishing details in the country's own newspapers the courts may also order publication in designated foreign newspapers. Publication is the responsibility of the liquidator or liquidators.

5. The courts may decide to make winding up and liquidation immediately enforceable.

6. If the bankruptcy judge finds that there are insufficient or no assets, the court-appointed liquidators' fees shall be met by the state and treated as judicial expenditure.

7. There shall be a five-year time limit, from the publication of the closure of liquidation, on actions brought against the liquidators.

Section 203-1

1. On the application of the state prosecutor, the district court sitting as a commercial court may order the closure of any establishment of a foreign company operating in Luxembourg that engages in activities contrary to the criminal law or in serious contravention of the Commercial Code or the legislation governing commercial companies, including that governing the right of establishment.

2. Applications and procedural documents under this section are served through the court registry. If a company cannot be reached through its legal address in Luxembourg extracts of the application are published in two newspapers printed in the country. The court may also order publication in designated foreign newspapers.

3. Extracts of court decisions to close establishments in Luxembourg are published in the relevant official journal. As well as publishing details in the country's own newspapers the courts may also order publication in designated foreign newspapers. Publication is the responsibility of the state prosecutor.

4. Judgments ordering the closure of establishments of foreign companies in Luxembourg are immediately enforceable.

5. Violation of judicial closure decisions under this section are punishable by eight days' to five years' imprisonment and a fine of fifty thousand to five million francs, or either one of these penalties.

APPENDIX VIII

Commercial Code
(Act of 15 September 1807)

Book I – commerce in general

Part II – Commercial bookkeeping

Article 8 (Act of 22 December 1986) All traders must maintain appropriate records of the nature and scope of their activities, in accordance with the normal rules of double entry bookkeeping. All transactions shall be fully and faithfully recorded immediately, by date order, in a single daybook or in special subsidiary books. In the last-named case, all the data recorded in the special subsidiary books shall be introduced, with an indication of the different accounts affected, through a single central book.

Article 9 (Act of 22 December 1986) Supporting documentation, letters received and copies of letters sent must be retained by date order and methodically classified.

Article 10 (Act of 22 December 1986) In addition all traders must draw up each year a full statement of their assets and liabilities of whatever form. This statement shall be summarised in the form of a balance sheet.

Article 10-1 (Act of 22 December 1986) Exemptions to the requirements of articles 8 and 10 may be authorised in a Grand-Ducal regulation on the advice of the Council of State to assist undertakings operating on a small scale or with limited activities.

Article 11 (Act of 14 August 2000) With the exception of the balance sheet and profit and loss account, the documents and information referred to in Articles 8 to 10 may be retained in the form of copies. These copies shall have the same evidential value as the originals of which, in the absence of evidence to the contrary, they are assumed to be faithful copies, if they have been produced in accordance with a properly supervised management system and satisfy the conditions laid down in the relevant regulations[27].

(Act of 22 December 1986) The documents and information referred to in Articles 8 to 10, whatever their form, shall be retained for ten years from the closure of the financial year to which they pertain.

Banks are required to supply a client's heirs with documents relating to the management of the client's accounts for the ten years preceding the date of the request. Lux. 24 April 1991, 28, 173.

Article 12 Properly maintained commercial accounts may be admitted by the courts as evidence of commercial transactions between traders.

1. Since the contracting of loans does not have to be officially recorded, advances or payments made by a creditor may be established by simple private documents or correspondence between the parties or even, in the case of transactions between traders, through their commercial accounts. Lux. 11 March 1896, 4, 324.

[27] The Grand-Ducal regulation of 22 December 1986 (Mém. 1986, 2748) is still in force on the basis of the Act of 14 August 2000.

2. Although under Article 1329 of the Civil Code, traders cannot present their accounts as authoritative in disputes with non-traders, if they are properly maintained they may be taken as initial evidence and a presumption authorising the court to administer an additional oath to the trader. J.d.P. Lux. 8 July 1896, 4, 165; Lux. 5 March 1902, 6, 314.

3. Although between traders the parties' accounts are evidence of sales recorded in them, this evidence may be disproved by other forms of evidence specified in Article 109, in particular the parties' correspondence. Court 14 February 1884, 2, 353.

4. The fact that it is recorded in the co-contractor's accounts does not establish the regularity of a contested transaction. Court 15 July 1887, 2, 560.