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Evaluation Report on Luxembourg on "Incriminations" (ETS 173 and 191, GPC 2)

(Theme I)

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I. INTRODUCTION

1. Luxembourg has been a member of GRECO since 1999. GRECO adopted its first round evaluation report on Luxembourg (Greco Eval I Rep (2001) 2F) at its 5th meeting (Strasbourg, 11-15 June 2001) and the second round evaluation report (Greco Eval II Rep (2003) 5F) at its 18th meeting (Strasbourg, 10-14 May 2004). These, and the corresponding compliance reports, are available on the GRECO web site (http://www.coe.int/greco).

2. The current Third Evaluation Round, which started on 1 January 2007, covers the following themes:

   - **Theme I – Incriminations:** articles 1a and 1b, 2-12, 15-17 and 19 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173), articles 1-6 of its Additional Protocol (ETS 191)[1] and Guiding Principle 2 (GPC 2) (incrimination of corruption).

   - **Theme II - Transparency of Political Party Funding:** articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on common rules against corruption in the funding of political parties and electoral campaigns and – more generally – Guiding Principle 15 on financing of political parties and election campaigns.

3. The GRECO evaluation team (hereafter the "GET") that visited Luxembourg from 22 to 26 October 2007 in connection with theme I comprised Mr Jean-Marie LEQUESNE (divisional commissioner of the economic and financial crime directorate of the Belgian federal police) and Mrs Claire MORICE, legal affairs directorate of the Ministry of Foreign Affairs, France. The GET was assisted by MM Michael JANSSEN and Christophe SPECKBACHER of the GRECO secretariat. Before the visit, the GET experts received the country's replies to the evaluation questionnaire (Greco Eval III (2007) 3F, theme I) and relevant legislation.

4. The GET met representatives of the following state institutions: the Ministry of Justice, the state prosecution service and the Diekirch district prosecutor, investigating judges, the criminal division of the Luxembourg city court, the prevention of corruption committee (COPRECO) and the criminal police. The GET also met representatives of the chamber of commerce, the bar association, the academic world (faculty of law, economics and finance) and the written press.

5. The current report on theme I of GRECO's 3rd evaluation round – corruption offences – is based on answers to the questionnaire and information supplied during the on-site visit. The main objective of the report is to assess the measures adopted by Luxembourg to comply with the provisions referred to in paragraph 2. The report presents a description of the situation, followed by a critical analysis. The conclusions include a list of recommendations adopted by GRECO and addressed to Luxembourg on how to improve compliance with the provisions under consideration.

6. The report on theme II – transparency of political party funding – appears in Greco Eval III Rep (2007) 6F-Theme II.

[1] Luxembourg ratified the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191) on 13 July 2005. The two instruments came into force in Luxembourg on 1 November 2005. A reservation has been entered concerning Article 17 of the Convention.

I. OFFENCES

a. Description of the situation

7. Luxembourg ratified the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191) on 13 July 2005. The two instruments came into force in Luxembourg on 1 November 2005. A reservation has been entered concerning Article 17 of the Convention[2].

8. Bribery and trading in influence are offences under articles 246-252 of the criminal code. Other provisions establish offences of misappropriation of money or securities, extortion by public officials and unlawful receipt or acceptance of an interest.

Bribery of national public officials (ETS 173, articles 1-3 and 19)

Definition of the offence

9. Articles 247, 249.2 and 250.2 of the criminal code establish the offence of giving bribes (active bribery) and articles 246, 249.1 and 250.1 that of receiving bribes (passive bribery):

> Art. 246. (L. 15 January 2001) Persons exercising public authority and other public officials, law enforcement officials and persons performing public duties or holding elective public office who unlawfully request or accept, directly or indirectly, for themselves or others, benefits, promises, donations, gifts or other advantages:
> 1. either to perform or refrain from performing actions in connection with or facilitated by their duties, functions or office;
> 2. or to abuse their real or supposed influence to obtain from a public authority or department distinctions, employment, contracts or any form of favourable decision;
> shall be punishable by imprisonment of five to ten years and a fine of EUR 500 to 187 500.

> Art. 247. (L. 15 January 2001) Persons who unlawfully offer or grant, directly or indirectly, benefits, promises, donations, gifts or other advantages to persons exercising public authority and other public officials, law enforcement officials and persons performing public duties or holding elective public office, for themselves or others, to induce them:
> 1. either to perform or refrain from performing actions in connection with or facilitated by their duties, functions or office;
> 2. or to abuse their real or supposed influence to obtain from a public authority or department distinctions, employment, contracts or any form of favourable decision;
> shall be punishable by imprisonment of five to ten years and a fine of EUR 500 to 187 500.

> Art. 249. (L. 15 January 2001) Persons exercising public authority and other public officials, law enforcement officials and persons performing public duties or holding elective public office who unlawfully request or accept, directly or indirectly, for themselves or others, benefits, promises, donations, gifts or other advantages in exchange for performing or refraining from performing actions in connection with or facilitated by their duties, functions or office, from persons who have benefited from the performance of or failure to perform those actions shall be punishable by imprisonment of five to ten years and a fine of EUR 500 to 187 500.
> The same penalties shall apply to persons who, in the circumstances specified in the first paragraph, comply with such requests from persons exercising public authority and other public officials, law enforcement officials and persons performing public duties or holding elective public office or offer them benefits, promises, donations, gifts or other advantages, for themselves or others.

> *Bribery of judges*
> Art. 250. (L. 15 January 2001) Judges and any other persons sitting on judicial bodies and arbitrators or experts appointed by a court or by one of the parties who unlawfully request or accept, directly or indirectly, for themselves or others, benefits, promises, donations, gifts or other advantages to perform or refrain from performing actions in connection with their duties shall be punishable by imprisonment of ten to fifteen years and a fine of EUR 2 500 to 250 000.
> The same penalties shall apply to persons who comply with such requests from persons specified in the first paragraph or offer them benefits, promises, donations, gifts or other advantages, for themselves or others, to perform or refrain from performing actions in connection with their duties.

[2] In accordance with Article 17, paragraph 2 of the Criminal Law Convention on Corruption, the Government of the Grand Duchy of Luxembourg declares that, except in cases covered by paragraph 1, subparagraph a of Article 17 of this Convention, it will apply the jurisdiction rules laid down in Article 17, paragraph 1, subparagraphs b and c, only if the offender has the Luxembourgish nationality.

Elements of the offence

"National public officials"

10. The term "public official" as such does not appear in Luxembourg legislation, which refers to persons exercising public authority and other public officials, law enforcement officials and persons performing public duties or holding elective public office (articles 246, 247, 249). Judges, who also include prosecutors, are specifically covered in article 250. The scope of the terms used in the new legislation is specified in detail in the explanatory memorandum[3], and includes, in particular, civil servants, mayors and ministers. Contractual staff and those with a special status who do not necessarily exercise so-called public authority are covered by the same provisions, under the heading "government officials" (agents de l'autorité).

"Promising, offering or giving (active bribery)"

11. Luxembourg has adopted a dual approach. First, article 247 – and article 250 in the specific case of the judiciary – refers to persons who "*offer or grant...benefits, promises*...". According to the authorities, this is new because hitherto the traditional approach required the offence to be completed, which meant that there had to be a corrupt agreement[4]. On the other hand, there are

[3] In accordance with French legal theory, the notion of "persons exercising public authority" (*dépositaire de l'autorité publique*) concerns persons who have the power to make enforceable decisions concerning individuals and objects. This power may be associated with the exercise of permanent or temporary duties and is vested in those concerned by delegation from the sovereign authority (JCL Pénal, loc. cit. No 55). This completely general notion includes the representatives of the state and local authorities (ministers, mayors and deputy mayors), civil servants/public officials (other than judges, who are specifically covered by the new article 249), persons making officially recorded documents, such as notaries and bailiffs, and all other persons undertaking public duties, such as chairmen and assessors of polling stations. Persons holding elective public office are a sub-category of the first group, since they exercise public authority (op. cit. loc. cit., No 55). The use of the term is not therefore logically essential, but shows that the drafters of the legislation wished to ensure that this group of persons was explicitly covered by the relevant sections, thus making the law totally clear and understandable in this regard. Those concerned are members of parliament and municipal councillors. The terms used might also be applicable to the chairs and members of occupational chambers (see the amended Act of 4 April 1924 establishing elective occupational chambers) (op. cit., loc. cit., No55). The expression "persons exercising public authority" refers to those who have been charged with the execution of acts or a function which consists in providing a service in the general interest, although they have not been granted decision-making power or a leading position in connection with the exercise of public authority. Those concerned include:
- Court-appointed liquidators of commercial companies and members of officially established committees with responsibility for advising the authorities or deciding themselves on applications, cases or proposals requiring official authorisation (op. cit., loc. cit., No 71), such as members of the advisory committee on immigration matters (regulation of 28 March 1972), the joint ministerial committee on regional planning (regulation of 14 April 1992) or the tenders committee (amended legislation of 4 April 1974 on the arrangements for tendering for public works and supplies);
- officials of public bodies that are not public authorities as understood in administrative law but state and local authority bodies with varying degrees of management autonomy taking various legal forms (op.cit., loc. cit., No 72). This very varied category includes the Luxembourg hospital (established under the amended legislation of 10 December 1975), the *del credere* office (established under the amended legislation of 15 November 1961), the national consolidation of smallholdings office (established under the amended legislation of 25 May 1964) and the viniculture office (established under the legislation of 29 August 1976). The terms used are not significantly different from those in the current legislation but do clarify certain points, particularly regarding the explicit and unambiguous inclusion of persons holding elective public office.

[4] The Luxembourg authorities explain that treating proposals as well as completed corruption as an offence is a new feature of Luxembourg law. The latter applies the notion of "corrupt agreement", that is between the corruptor and the corruptor. Hitherto, as long as such an agreement did not exist neither of the two offences had been concluded, since the code referred to "those who have bribed" a public official. Where attempts to secure such an agreement were unsuccessful, the only possible offence was that of attempted bribery. In this regard, Luxembourg legislation was not compatible with the Convention. Finally the term "comply (*cède*) with such requests" appears in the definitions of the offences of post hoc bribery and bribery of judges in articles 249 and 250. In such cases, individuals comply with persons exercising authority who solicit offers in exchange for an act of commission or omission. This situation was recognised in legal theory and case-law, but was not formally reflected in the wording of the law, as it now stands.

provisions which incriminate those cases where the corruptor gives in to the public officials' demands (article 249.2 CC), referred to in Luxembourg as *post hoc* bribery (*corruption postérieure*).

"Requesting, receiving or accepting benefits or promises (passive bribery)"

12. Articles 246, 249 CC and – in the case of judges – 250 CC make it an offence to "*request or accept... benefits, promises*". The mere receipt (of an undue advantage) is not explicitly mentioned.

"Undue advantages of any sort"

13. The various articles on active and passive bribery, including those concerning the judiciary, all use the terms "donations, gifts or other advantages". The first two refer to material considerations whereas the latter covers non-material benefits of all sorts, intellectual, social and so on, including recommendations, favourable interventions, votes and sexual favours.

14. According to the authorities, the new articles of the criminal code on corruption do not include the term "undue". This means that small so-called facilitation payments are offences under Luxembourg law, whereas if the word "undue" were included these would be acceptable. Instead, articles 246, 247, 249.1 - and 250.1 CC for the judiciary – use the term "unlawful" (*sans droit*). This excludes from the scope of the relevant articles all salaries, payments, remuneration, allowances and other benefits legally due, in other words formally provided for in legislation. But this exclusion cannot apply to advantages that do not meet this criterion, even if they are accepted by a hierarchical superior. The term "unlawful" does not appear in articles 249.2 and 250.2 CC.

"Directly or indirectly"

15. These notions (and thus, for example, corruption through intermediaries) are explicitly referred to in articles 246, 247, 249.1 and 250.1 CC, but not in the case of *post hoc* bribery, in articles 249.2 and 250.2 CC. According to the Luxembourg authorities, whether or not the term is used directly or indirectly, corruption through intermediaries is covered in practice. There is no requirement for the latter to be close to either public official or corruptor, or for either of them to be aware of the latter's role. Intermediaries may also be prosecuted as accomplices.

"For themselves or others"

16. In the various cases covered by articles 246, 247, 249 and 250 CC, corruption occurs whether the corruptor offers advantages for the individual concerned or for others. This takes account of cases where the advantage goes not to the bribed person himself, but to someone else, such as a political party, and the former does not seek personal gain. Nor need any link be established between the public official and the third party, and it is of little importance whether the advantage goes to the third party directly or through the intermediation of the corrupt official. Moreover, third party beneficiaries may be prosecuted as accomplices, if they have instigated the events leading up to the offence, or as handlers of objects obtained with the aid of an offence.

"To perform or refrain from performing actions in the exercise of their duties"

17. Luxembourg legislation covers positive (performance) and negative (failure to perform) actions. More specifically, it concerns actions in connection with or facilitated by public officials' duties,

functions or office (articles 246, 247, 249 and 250), using the same wording as French law. Under Luxembourg legislation, trading in influence involving a public official is also an offence, under article 247, paragraph 2.

18. According to the Luxembourg authorities, actions in connection with public officials' duties, functions or office means actions that they are required to take or not to take under the legislation or regulations governing those duties, functions or offices. This includes actions that form part of individuals' express powers and authority, even if these are not explicitly laid down in legislation but form part of an unwritten but clearly understood code of ethics. It is largely irrelevant whether or not appointed or elected officials have the power themselves to perform the actions they have agreed to deal with, so long as they have contributed, against payment, in a collective decision. Nor does it matter whether officials have the power to perform the actions for which they accept bribes if their duties require them to perform some of the preparatory steps prior to the action in question. The legislation makes no distinction between officials' discretionary powers and situations where they have no discretion – both circumstances are covered.

"Committed intentionally"

19. The legislation on corruption makes no reference to any moral/intentional element of the offence. However, intention to commit an offence is always required under Luxembourg law and is one of the very conditions of an offence, even if not explicitly stipulated in the legislation, unless dispensed with by a formal provision of the legislation or because of the very nature of the offence. The notions of negligence or putting at risk are not applicable in corruption cases.

Penalties

20. Luxembourg law distinguishes between serious, lesser and petty offences, punishable respectively by 5-30 years' imprisonment, up to 5 years' imprisonment and fines only. The system of penalties provides for suspended sentences, attenuating circumstances and deferment of sentence.

21. All the corruption offences in articles 246, 247, 249, and 250 CC are serious offences that carry sentences of 5 to 10 or 10 to 15 years, as well as fines of € 500 to 125 000, 175 000 or 187 500, or € 2 500 to 250 000. Under article 10 of the criminal code, sentences of imprisonment are automatically accompanied by loss of all public posts, offices and duties. Under article 11, in the event of imprisonment of more than ten years the loss of such functions is final, and provision is also made for other consequences.

22. By way of comparison, misappropriation of public or private funds carries a prison sentence of 5-10 years and embezzlement, fraud and abuse of power up to 5 years.

Decisions of the courts

23. The replies to the questionnaire do not show whether any judgments have so far been handed down by the courts on the basis of corruption offences, and if so how many. One decision has been reported[5].

[5] In December 2005 an employee of a department offering information and advice on over-indebtedness in a voluntary medical organisation, which was recognised as working for a public service body, received a suspended sentence of ten months' imprisonment (the offence was reduced to the status of lesser offence) for offering to supply a journalist with individual computerised records in exchange for € 5000.

Bribery of members of domestic public assemblies (ETS 173, article 4)

24. As noted earlier, articles 246, 247 and 249 include references to persons holding elective public office. Those concerned are mainly members of parliament and municipal councillors. The terms used also cover elected chairmen and members of occupational chambers. The previously described provisions and penalties therefore apply to these categories of persons and there are no exceptions. According to the Luxembourg authorities there is no case-law on the subject.

Corruption of foreign public officials (ETS 173, article 5)

25. The aforementioned provisions also apply to various categories of foreign public officials, in accordance with article 252 of the criminal code:

> **Art. 252.** (L. 15 January 2001) 1) (23 May 2005) Articles 246 to 251 shall also apply to offences involving
> - persons exercising public authority and other public officials, law enforcement officials and persons performing public duties or holding elective public office of another state;
> - persons sitting on a judicial body of another state, even as a non-professional member of a collegial body responsible for ruling on the outcome of a dispute, or acting as arbitrator in accordance with the rules on arbitration of another state or of a public international organisation;
> - Community officials and members of the Commission of the European Communities, the European Parliament, the Court of Justice and the Court of Auditors of the European Communities, with due regard to the relevant provisions of the treaties instituting the European Communities, the protocol on privileges and immunities of the European Communities and the Statute of the Court of Justice, and their implementing regulations, with regard to the lifting of immunity;
> - established and other officials of other public international organisations, members of parliamentary assemblies of public international organisations and persons exercising judicial or registry functions in other international courts whose jurisdiction is recognised by Luxembourg, with due regard to the statutes of these international organisations, assemblies or courts and their implementing regulations, with regard to the lifting of immunity.
> 2. The term Community official in the previous paragraph shall refer to:
> - person with the status of officials or other contractual staff as defined in the Staff Regulations of officials and the conditions of employment of other servants of the European Communities;
> - persons seconded to the European Communities by member states or by public or private bodies performing equivalent duties to those of officials or other staff of the European Communities.
> The members of bodies established in accordance with the treaties instituting the European Communities and the staff of these bodies shall be treated as Community officials when the Staff Regulations of officials and the conditions of employment of other servants of the European Communities do not apply to them.

26. The definition of a foreign public official is the same as that of a national one. The legal arrangements, including sanctions, are the same. There is no case-law on the subject.

Bribery of members of foreign public assemblies (ETS 173, article 6)

27. Article 252 of the criminal code extends the scope of the articles on corruption to persons holding elective public office in another state. The legal arrangements, including sanctions, are the same. There is no case-law on the subject.

Bribery in the private sector (STE 173, art. 7 and 8)

Definition of the offence

28. Bribery in the private sector is an offence under articles 310 and 310-1 of the criminal code. As with public sector corruption these articles explicitly include acts of commission and omission.

> **Art. 310.** (L. 23 May 2005) Persons acting as director, manager, representative or employee of a legal person or individual who request or accept, directly or through the intermediation of other persons, for themselves or others, benefits, promises or advantages of any nature, in exchange for performing or refraining from performing actions in connection with their duties, unbeknown to and without the authorisation of their board of directors or annual general meeting, their principal or

their employer, shall be punishable by imprisonment of one month to five years and a fine of EUR 251 to 30 000.

Art. 310-1. (L. 23 May 2005) The same penalties shall apply to persons who offer, directly or through the intermediation of other persons, benefits, promises or advantages of any nature to persons acting as director, manager, representative or employee of a legal person or individual, for themselves or others, in exchange for performing or refraining from performing actions in connection with their duties, unbeknown to and without the authorisation of their board of directors or annual general meeting, their principal or their employer.

"Persons who direct or work for private sector entities"

29. Articles 310 and 310-1 CC both refer to persons acting as director, manager, representative or employee of a legal person or individual to indicate the recipients of bribes.

"Promising, offering or giving (active bribery)"

30. Article 310-1 CC, which makes active bribery in the private sector a criminal offence speaks of offering benefits, promises or advantages. The language is slightly different to that used in connection with the active bribery of public officials.

"Soliciting, receiving or accepting benefits or promises (passive bribery)"

31. Article 310 CC, which makes passive bribery in the private sector a criminal offence speaks of requesting or accepting benefits, promises or advantages. The language reflects that of active bribery in the private sector and again is slightly different to that used in connection with the passive bribery of public officials. However, it is no longer confined simply to "receiving".

"Any undue advantage"

32. The two articles on private sector bribery refer to "advantages of any nature". However there is no reference to their being "undue", or even to giving or receiving "unlawfully", as in the case of corruption in the public sector.

"Directly or indirectly"

33. The two articles use the term "directly or through the intermediation of other persons", whereas the offence of bribery in the public sector uses exactly the same term – "directly or indirectly" – as the Convention.

"For themselves or others"

34. This aspect appears in the two articles on private sector corruption, with reference to the person bribed or a third party.

"In the course of business activity, in breach of their duties"

35. Articles 310 and 310-1 CC concern more than just business, or profit-making, activities. The scope of these provisions is therefore, in theory, broader than that of articles 7 and 8 of the Criminal Law Convention and includes situations involving associations, charitable organisations, independent professions and political parties, aside from cases involving elected members.

36. With regard to the breach of duties element, the approach adopted in the two articles is to make bribery an offence once the transaction takes place unbeknown to and without the authorisation of the board of directors or annual general meeting, the principal or the employer.

"Committed intentionally"

37. As in the case of the public sector, articles 310 and 310-1 CC do not require private sector bribery to be intentional. As already noted, in principle this is a general requirement of Luxembourg law.

Penalties

38. Active and passive bribery in the private sector is punishable by imprisonment of one month to five years and a fine of EUR 251 to 30 000.

Decisions of the courts

39. The courts have not handed down any judgments based on articles 251 and 251-1 of the criminal code.

Bribery of officials of international organisations (ETS 173, article 9)

40. The bribery of officials of international organisations is covered by Article 252 of the criminal code, described above. By analogy, the rules applicable to public officials also apply here. Article 252 explicitly covers various categories of persons working for the European Communities, while the fourth sub-paragraph deals with other organisations, but without specifying the types of employment.

41. The legal arrangements and penalties are the same as for internal public sector corruption. There is no case-law on the bribery of international officials.

Bribery of members of international parliamentary assemblies (ETS 173, article 10)

42. The bribery of members of international parliamentary assemblies is also covered by article 252 CC, so by analogy, the rules applicable to public officials also apply here. Article 252.1 CC refers explicitly to members of the European Parliament. The fourth sub-paragraph refers more generally to members of parliamentary assemblies of public international organisations.

43. The legal arrangements and penalties are the same as for internal public sector corruption. There is no case-law on the subject.

Bribery of judges and officials of international courts (ETS 173, article 11)

44. Under article 252, articles 246-251 CC are applicable to members and officials of the Court of Justice and the Court of Auditors of the European Communities and persons exercising judicial or registry functions in other international courts whose jurisdiction is recognised by Luxembourg. In this regard Luxembourg law seems to go further than the Convention, which may not cover non-established officials (*non fonctionnaires* in French). By analogy, the rules applicable to public officials also apply here.

45. The legal arrangements and penalties are the same as for internal public sector corruption. There is no case-law on the subject.

Trading in influence (ETS 173, article 12)

Definition of the offence

46. Trading in influence is covered by three provisions of the criminal code. Article 248 CC deals exclusively with passive trading in influence (paragraph 1) and trading in influence in those cases where it is offered and accepted (paragraph 2). Articles 246 and 247 CC on active and passive bribery respectively, also comprise each a paragraph on trading in influence.

> **Art. 248.** (L. 15 January 2001) Persons who request or accept, directly or indirectly, for themselves or others, benefits, promises, donations, gifts or other advantages in exchange for using their influence, real or supposed, to obtain from a public authority or department distinctions, employment, contracts or any form of favourable decision shall be punishable by imprisonment of six months to five years and a fine of EUR 500 to 125 000.
>
> The same penalties shall apply to persons who agree to the requests specified in the first paragraph or who, directly or indirectly, unlawfully offer other persons benefits, promises, donations, gifts or other advantages for themselves or third parties in exchange for using their influence, real or supposed, to obtain from a public authority or department distinctions, employment, contracts or any form of favourable decision.
>
> **Art. 246.2 (passive bribery)**: [Persons exercising public authority and other public officials, law enforcement officials and persons performing public duties or holding elective public office who unlawfully request or accept, directly or indirectly, for themselves or others, benefits, promises, donations, gifts or other advantages.... to abuse their real or supposed influence to obtain from a public authority or department distinctions, employment, contracts or any form of favourable decision shall be punishable by imprisonment of five to ten years and a fine of EUR 500 to 187 500.]
>
> **Art. 247.2 (active bribery)**: [Persons who unlawfully offer or grant, directly or indirectly, benefits, promises, donations, gifts or other advantages to persons exercising public authority and other public officials, law enforcement officials and persons performing public duties or holding elective public office, for themselves or others, to induce them... to abuse their real or supposed influence to obtain from a public authority or department distinctions, employment, contracts or any form of favourable decision shall be punishable by imprisonment of five to ten years and a fine of EUR 500 to 187 500.

47. According to the Luxembourg authorities, articles 246 and 247 CC are concerned with trading in influence involving persons exercising public authority, performing public duties or holding elective public office, and article 248 CC with trading in influence involving other individuals.

48. The latter concerns cases where an ordinary person offers some form of recompense to another private individual, for example the friend of a policemen or judge, to persuade the latter to overlook some form of penalty or parking fine. In other words, the contact is not directly with the public official but with another individual whose relationship with that official might enable him or her to exercise influence.

"Anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making, whether or not the influence is exerted or the supposed influence leads to the intended result"

49. The Luxembourg criminal code uses the same wording in all its provisions on trading in influence: "to abuse their real or supposed influence to obtain from a public authority or department distinctions, employment, contracts or any form of favourable decision". This covers cases of hypothetical or real influence, though not in as much detail as the Convention.

50. It lists types of advantage that might be concerned, but the list is not exhaustive, in accordance with Article 12 of the Convention. Moreover, like the latter, the Luxembourg legislation excludes influence in the private sector

"Promising, offering or giving; requesting, receiving or accepting the offer or the promise"

51. Article 248.2 CC makes it an offence to offer benefits or promises, and article 247 CC to offer or grant benefits or promises. Article 248.1 CC also makes it an offence to request or accept benefits, promises and so on, and exactly the same terms are used in article 246 CC.

Other aspects

52. To recap, in Luxembourg law, intentionality is an implicit component of the various offences. The direct or indirect nature of the intermediation is explicitly specified. Various articles specify the consideration concerned: donations, gifts or other advantages. There is no explicit reference to the "undue" nature of the advantage, unless it is considered that the term "unlawful" (*sans droit*) used in articles 246, 247 and 248.1 – though not 248.2 CC – also covers the undue nature of the advantage and not just the legitimate nature of the request for or offer of intermediation. According to the various provisions concerned, the beneficiary of the undue advantage may be the intermediary him or herself or a third party, as the Convention requires.

Penalties and case-law

53. The penalties vary, with the result that offences under article 248 CC, carrying a sentence of 6 months to 5 years' imprisonment, constitute lesser offences, while those under articles 246 and 247 CC (5 to 10 years' imprisonment) are serious offences. There are also slight variations in the fines incurred, which in every case are additional: € 500 to 187 500 for articles 246 and 247 CC, and € 500 to 125 000 for article 248 CC. There is currently no case-law on trading in influence.

Bribery of national and foreign arbitrators (ETS 191, article 1 par. 1 and 2, articles 2 to 4)

54. The active and passive bribery of national arbitrators is an offence under article 250 of the criminal code (bribery of judges), which applies to arbitrators or experts appointed by a court or by one of the parties. Active bribery is covered under accepted requests for bribes and in other cases.

55. The previous comments concerning the bribery of international public officials and judges of international courts also apply here. The penalties laid down in article 250 CC are higher than for any other corruption offences: 10 to 15 years' imprisonment and fine of € 2 500 to 250 000.

56. The active and passive bribery of foreign arbitrators is an offence under the combined effects of articles 250 and 252 CC. Sub-section 2 of the latter applies to persons acting as arbitrator in accordance with the rules on arbitration of another state or of a public international organisation.
57. There is no case-law on the bribery of national or foreign arbitrators.

Bribery of national and foreign jurors (ETS 191, article 1 paras 3 and 5, article 4)

58. According to the Luxembourg authorities, article 250 of the criminal code, which applies to anyone sitting in a judicial body, undoubtedly includes the "assessors", or non-presiding judges, who are an integral part of the Luxembourg judicial system. The broad wording of this provision might well also cover persons sitting on juries, although this institution was abolished in Luxembourg in 1814. The country does not therefore require a criminal offence of bribing national jurors. However, one is required to cover the bribery of foreign jurors and here again the offence results from the combined effects of articles 250 and 252 CC. Under sub-paragraph of the latter,

article 250 also applies to persons sitting on a judicial body of another state, even as a non-professional member of a collegial body responsible for ruling on the outcome of a dispute.

59. The earlier comments on article 250 CC also apply here and the penalties incurred are those laid down in that article. There is no case-law on the bribery of jurors.

Other aspects

Participatory acts

60. According to article 66 of the criminal code, the perpetrators of serious and lesser offences include (i) those who have committed them or have participated directly in their commission; (ii) those who, in whatever manner, have provided assistance for the commission of offences without which they could not have been committed; (iii) those who, by means of gifts, promises, threats, abuse of authority or power, or other unlawful means, have directly incited the commission of offences; (iv) those who, by means of statements made in meetings or public places, posters, or printed or non-printed material sold or distributed, have directly incited the commission of offences, subject to last two provisions of section 22 of the Law of 8 June 2004 on freedom of expression in the media.

61. According to article 67 of the criminal code, the accomplices of serious and lesser offences include (i) those who have given instructions for their commission; (ii) those who have obtained arms, instruments or other means for use in offences, in the knowledge that they will be used for that purpose; (iii) those who, apart from cases specified in article 66.3, have knowingly aided or assisted the perpetrators of offences in ways that have prepared for or facilitated them or contributed to their completion. According to the Luxembourg authorities, incitement and authorisation are covered by these provisions.

62. Joint perpetrators are liable to the same sentences as perpetrators (article 66 CC) while accomplices to serious offences are liable to the sentence immediately below the one they would have received if they had been the perpetrators (article 69 CC), which means at least three months' imprisonment in the case of "traditional" or *post hoc* bribery and 5 to 10 years for bribery of a judge. Persons can be found guilty of complicity, even if the offence has not been completed.

Jurisdiction

Territorial jurisdiction

63. The principle of the country's general jurisdiction regarding offences committed in its territory, irrespective of the perpetrator's nationality, stems from article 3 of the criminal code ("offences committed by nationals and foreigners on the territory of the Grand Duchy are punished according to the laws of Luxembourg."). Furthermore, according to article 7ter of the code of criminal investigation, if any of the ingredients of an offence took place in Luxembourg then that offence is deemed to have been committed in the territory of the Grand Duchy. This would apply, for example, in cases of fraud where the events and the victims were in another country but the funds are deposited in a Luxembourg bank. Moreover, according to the ubiquity theory, the location of offences need not be related to where they took place or where the effects were felt.

Jurisdiction based on nationality

64. Article 4 of the criminal code contains the basic provision ("Offences committed by nationals and foreigners outside of Luxembourg territory of the Grand Duchy are punishable only in those cases determined by law"). Under article 5 of the code of criminal investigation, any Luxembourg citizen who has committed an offence outside of Luxembourg territory which is also an offence under Luxembourg law may be prosecuted for that offence in the Grand Duchy. Prosecutions under article 5 will only take place if the individual concerned is in Luxembourg or the government secures his or her extradition (final sub-paragraph of article 5).

65. Dual criminality is required in the case of lesser offences committed abroad by Luxembourg nationals (and thus in cases where serious offences are reduced to lesser offences because of attenuating circumstances – article 5.2 of the code of criminal investigation).

66. The Luxembourg courts' jurisdiction extends to the foreign joint perpetrators and accomplices of Luxembourg nationals.

Reservation

67. Luxembourg has entered the following reservation to Article 17 of the Criminal Law Convention: "In accordance with Article 17, paragraph 2 of the Criminal Law Convention on Corruption, the Government of the Grand Duchy of Luxembourg declares that, except in cases covered by paragraph 1, subparagraph a of Article 17of this Convention, it will apply the jurisdiction rules laid down in Article 17, paragraph 1, subparagraphs b and c, only if the offender has the Luxembourgish nationality."

<u>Limitation period for prosecutions</u>

68. As noted earlier, Luxembourg distinguishes between serious, lesser and petty offences. Since most forms of corruption are serious offences, proceedings may be taken up to ten years from the day the offence was committed. This period may be interrupted by measures of investigation or steps in the proceedings. Although theoretically the limitation period can be interrupted indefinitely, as far as possible account is taken of the notion of a reasonable time in Article 6 of the European Convention on Human Rights.

69. Formerly, the courts' practice which consists in treating cases that are reduced from serious to lesser offences because of attenuating circumstances from the outset (in French: *correctionnalisation* or *décriminalisation*), led to a reduction of the limitation period from ten to three years. For offences where the detriment is not immediately apparent and none of those concerned have any interest in disclosing the facts, as in cases of bribery and trading in influence, there may well be a delay in bringing prosecutions. In the past, in cases where the courts considered that the sentences for lesser offences were sufficient and it was not possible to start proceedings within three years, the change in the nature of the offences concerned automatically took them beyond the limitation period. This was changed by legislation of 15 January 2001, under which reducing the offence from a serious to a lesser one does not affect its limitation period anymore.

70. Offences of corruption in the private sector are lesser offences with a limitation period of three years.

Defences

71. According to the authorities, Luxembourg law does not provide for any special grounds of defence. The circumstances of each individual case are taken into account in assessing offences. There is no case-law on the subject.

Data

72. According to the authorities, in 2006 the Luxembourg prosecution service opened three judicial investigations, one of which was from a party claiming damages. No more general statistics have been supplied.

Amendments to legislation

73. There are no amendments to legislation currently in the pipeline, apart from a bill to introduce liability for legal persons.

III. ANALYSIS

74. Luxembourg approved the Criminal Law Convention on Corruption (ETS 173) in legislation dated 23 May 2005. This introduced provisions into the criminal code on the bribery of foreign and international public officials and corruption in the private sector. Although the Luxembourg authorities consider that all the requirements of the Criminal Law Convention and its Protocol (ETS 191) on the bribery of arbitrators and jurors have been transposed into Luxembourg law, the GRECO evaluation team (GET) has identified some provisions where doubts remain as to whether the way the Luxembourg representatives described them to the team is fully consistent with the letter and spirit of the Convention, and whether the level of legal certainty is high enough. Currently, there is still uncertainty about the precise scope of the legislation and there is almost no case-law on corruption. The on-site discussions showed that Luxembourg and its officials draw their inspiration in large measure from their neighbouring countries, which extends to their legal theory and case-law. This makes it possible to clarify certain issues. However, it should be stressed that this practice leads to the adoption of the strengths as well as the weaknesses of the other systems, particularly with regard to the offences of corruption and their definition. It was also noted that the introduction of new criminal legislation was never accompanied by information and guiding measures, nor communications or circulars; the reason for this would be that a dialogue between the authorities exists anyway and that the size of the country makes it easy to exchange information.

75. Luxembourg law is relatively well developed as far as corruption offences are concerned. In addition to the offences described in the descriptive part of this report, there are also offences of extortion by public officials (article 243 of the criminal code) and unlawful receipt or acceptance of an interest (article 245). Generally speaking, the offences established in articles 246-252 (bribery of national and foreign public officials, judges and persons working for international organisations and trading in influence) and 310 and 310-1 (bribery in the private sector) of the Luxembourg criminal code match the requirements of the Criminal Law Convention on Corruption and its Additional Protocol. The current law is the culmination of various amendments since 1998. The GET notes that the legal systems of Luxembourg's neighbouring countries have been a valuable source of inspiration.

76. With regard to the bribery of public officials, the discussions held on site have confirmed, firstly, that the form of words used in various articles – “persons exercising public authority” and “other

public officials, law enforcement officials and persons performing public duties or holding elective public office" – should be interpreted very broadly to include, in particular, mayors and ministers and, secondly, that Luxembourg officials, including judges, are bound by the clarifications contained in the explanatory memorandum to Act 5262 of 23 May 2005 (see footnote 3). Judges and prosecutors are covered by the specific provisions of article 250 of the criminal code, which means that the scope of Luxembourg's legislation on the bribery of public officials is generally consistent with Articles 1a and 1b of the Convention.

77. The various elements of the active and passive bribery of public officials laid down in the Criminal Law Convention are generally reflected in the wording of articles 246, 247, 249 and 250 of the criminal code, which cover the bribery of public officials and judges and – indirectly, by reference to article 252 – of foreign public officials and officials employed by international organisations. It emerged from the on-site discussions that the words "offer or grant...benefits, promises, gifts [and so on]" was often understood in principle simply to mean giving such advantages. Similarly, "request or accept... benefits, promises, gifts [and so on]" is often simply understood to mean receiving them.

78. However, it emerged from more detailed discussions that these notions sometimes lead to confusion and that the simple fact of giving or receiving was closely associated with other elements that were explicitly referred to and implied that there was a direct link between the bribe and the service rendered, evidence for which probably required the existence of an underlying agreement that would show that both parties accepted the transaction. The descriptions and definitions of active and passive bribery in Articles 2 and 3 of the Convention include these neutral elements of "giving" and "receiving", which are intended to make it easier to prosecute corruption cases. The GET has been told that limiting the elements of passive bribery to the expression "request or accept" (*solliciter ou agréer*) was one of the means used by parliament to explicitly include the notion of intention. However the GET considers that factual objective circumstances, such as concealment or failure to report an event to the authorities or an employer, may also be taken as evidence of an intention to receive an advantage. Moreover, as explained in paragraph 43 of the explanatory report to the Convention, a corrupt pact is not an automatic element of the offence, since a bribe may be requested unilaterally. The same logic applies to the fact of giving. In the absence of sufficient case-law, there is no real way of determining how the relevant provisions will be applied in practice. This is an important issue since the same elements (or gaps) occur in the various provisions on active and passive bribery, including bribery in the private sector (articles 310 and 310-1 of the criminal code). The GET therefore recommends **that the Luxembourg authorities take the appropriate measures to ensure that the various offences of active and passive bribery are understood as including the notions of "giving" and "receiving" (an undue advantage), without involving an automatic requirement for an agreement between the parties.**

79. There are several gaps in the legislation on bribing judges in article 250.2 of the criminal code, which the team was told during the visit reflected oversights by parliament. The current wording does not provide for the advantage to be promised, offered or given "indirectly", even though it appears to be accepted in practice that this possibility is implicit in the wording. Moreover, whereas the other provisions on active bribery make it an offence to "offer" (*proposer*) or grant (*octroyer*) benefits and so on, the second element is missing in article 250.2, as is the term "unlawfully" (*sans droit*). There are similar gaps in the related article 249.2 (agreeing to requests, or *post hoc* bribery, as it is referred to in Luxembourg), but this not appear to have any real consequences since this sub-paragraph refers to the sub-paragraph 1 of the same article, which contains the various elements. Consequently**,** the GET recommends **that, in order to**

harmonise the provisions in this area, the wording of article 250.2 CC be aligned with that of article 250.1 CC by adding the words "indirectly", "grant" and "unlawfully".

80. The notion of undue advantage does not appear as such in the articles on the bribery of public officials (and other categories of persons), which rely on the notion of advantages received or given "unlawfully". The reasons are set out in paragraph 14 of the descriptive part and do not pose any particular problems for the GET.

81. Article 252 of the criminal code extends the articles on public sector corruption and trading in influence to various categories of foreign and international personnel, such as public officials, including elected ones, professional and non-professional judges, the staff of Community institutions and officials and elected members in other international organisations. This is an elegant approach since it ensures the consistency of the legislation and it has a potentially important impact, though subject to the limitations on jurisdiction arising from Luxembourg's reservation to Article 17 of the Criminal Law Convention (see, below, paragraph 89). Generally speaking, the requirements of Articles 4, 5, 6, 9, 10 and 11 of the Convention are met, aside from the inadequacies referred to concerning the underlying arrangements regarding the bribery of national public officials – to which article 252 of the criminal code refers. However, although the second sub-paragraph of article 252 specifies the various categories of Community staff covered, including contractual staff and those seconded by member states, the fourth sub-paragraph does not guarantee that the same categories of staff of other international organisations are covered, as required by Article 9 of the Convention. One way of filling this gap would be, for instance, to make the provision on other international organisations more detailed, as in sub-paragraph 2 of article 252. The GET therefore recommends **that article 252 CC on the bribery of foreign public officials and international staff be extended to include the various categories of staff of international organisations.**

82. Articles 310 and 310-1 of the criminal code on, respectively, passive and active bribery in the private sector reflect fairly closely the provisions of Articles 7 and 8 of the Convention. As noted in the descriptive part of this report, the offences specified in articles 310 and 310-1 CC apply outside the purely commercial sector (in contrast to Articles 7 and 8 of the Convention), which means that a wider range of situations is covered. The notion of "undue" advantage is also absent from articles 310 and 310-1, because of parliament's commitment to avoid any misunderstanding and to exclude any consideration/remuneration, whether or not this is acceptable for other reasons. The principle of advantages received "unlawfully", which appears in the other provisions on corruption, is also absent. This derives from an opinion of the Council of State[6], which saw it as a potential source of conflict with the final phrase of each article: "unbeknown to and without the authorisation of the board of directors or annual general meeting, the principal or the employer".

83. The GET thinks that such an approach might enable a company's or organisation's managing body to "cover" or "validate" *post hoc* an act of corruption committed by one of its employees by claiming, in the event of criminal proceedings, that it was aware of what was happening. Such an eventuality cannot be excluded, assuming that the employer is not the victim and complainant, even if the motive is just to avoid damaging public reputation. Articles 7 and 8 of the Convention refer to persons acting, or refraining from acting, "in breach of their duties". This can ideally be determined with reference to contractual, legal, ethical or other provisions which, in principle, are relatively predictable and clear, whereas it could be difficult for the judicial authorities conducting

[6] According to the Council of State (doc. 4400², p. 7), this would lead to tolerance of facilitation payments and as a result would mean that instead of combating corruption more effectively, parliament would be treating certain practices with more indulgence by acknowledging that, although undesirable, they no longer came within the scope of the law.

corruption proceedings to check the validity of a *post hoc* statement by a company's managing body. The GET recommends **that consideration be given to rewording articles 310 and 310-1 CC on bribery in the private sector to ensure that the requirement that employers not be aware of or approve the criminal behaviour of the employee cannot be misused to enable them to exonerate the prosecuted employee from his/her liability.**

84. Luxembourg has various provisions on active and passive trading in influence committed by persons in general (article 248 of the criminal code) or persons exercising public authority and other public officials, law enforcement officials and persons performing public duties or holding elective public office (articles 246.2 and 247.2 of the criminal code for the passive and active elements respectively). This overlap sometimes leads to apparent inconsistency. For example, trading in influence may be a lesser or serious offence, according to circumstances, the penalties are different and there are also inconsistencies in the wording of the two provisions[7]. This could make the offence of trading in influence unnecessarily complex for the practitioners concerned. The Luxembourg authorities point out that the various provisions need to be considered in their context, that part of them – the older ones – are meant to apply to the public sector only (which calls for higher levels of protection and sanctions) and that these had to be complemented by broader provisions aimed at covering all the other trading in influence situations. In any event, trading in influence is always only an offence if the aim is "to obtain from a public authority or department distinctions, employment, contracts or any form of favourable decision". These are, admittedly, the situations most likely to occur in practice. However, the way that the offence is defined does seem to restrict its scope to influencing decision makers to take a positive action. Trading in influence as defined in Article 12 of the Convention – through references to the provisions on bribery – covers both positive and negative actions (or failure to take a decision). This does not appear to be the case in Luxembourg with regard to trading in influence, though it does apply to other corruption offences. Some of the professionals whom the team met, including judges, lawyers and academics, confirmed this interpretation. Finally, although the three provisions concerned make it quite clear that the influence may be real or supposed, they do not specify whether the offence of trading in influence can be prosecuted even if it did not achieve the intended results and/or the intermediary was not successful in his or her efforts. The GET was sometimes told that these additional elements were unnecessary[8]. In the absence of any national case-law, it would be preferable for the offence to be defined more carefully with regard to these aspects. Consequently, the GET recommends **to ensure that the various elements required by Article 12 of the Criminal Law Convention on Corruption - STE 173 - (in particular acting and refraining from acting, whether or not the intended result is achieved and whether or not an intermediary is used) are included in the trading in influence offences of Luxembourg.**

85. Trading in influence is an offence when applied to all the various categories of officials and other persons identified in Article 12 of the Convention. The Luxembourg provisions on trading in influence in the public sector (articles 246.2 and 247.2 of the criminal code) concern influence that targets a public authority or department which, for the Luxembourg authorities, incontestably includes judges. In addition, article 252 of the criminal code makes a cross reference to a wider

[7] For example, article 248 does not include the notion of accepting an advantage "unlawfully" or of "granting" an advantage, but it does refer to accepting requests from those trading in influence.

[8] The evaluators were told that the fact that the influence could be real or supposed made the issue of the result obtained irrelevant in determining whether an offence had been committed, since a purely supposed – and therefore ineffective – influence was sufficient for there to be an offence.

range of "target" persons for trading in influence, such as foreign public officials and the staff of international organisations[9].

86. The Additional Protocol to the Criminal Law Convention (ETS 191) would make it an offence to bribe arbitrators or jurors. The GET notes that juries do not exist in Luxembourg and that there is therefore no provision concerning the bribery of national jurors. However, it has made specific provision for foreign jurors, which makes it possible not only to prosecute this type of offence but also to apply the dual criminality principle when responding to requests from foreign judicial authorities.

87. The GET has not been able to obtain an overview of penalties imposed or information on how corruption cases have been dealt with in recent years, apart from what appears in the replies to the questionnaire. At all events the number of cases coming before the courts appears to be very small, which police officials attribute to a number of factors[10]. At the same time, they acknowledge that they receive a large number of complaints about government departments in general and that these probably include elements of corruption. The GET therefore takes the view that the law establishing various corruption offences is probably fairly ineffective in practice. Generally speaking, the statutory penalties for most of the various corruption offences are fairly similar, and other than in the case of bribery in the private sector all carry terms of imprisonment of more than five years. Theoretically, imprisonment and fines are cumulative.

88. The practitioners met on site indicated that, in practice, reducing serious offences to lesser ones ("*correctionnalisation*" or "*décriminalisation*"), and lesser offences to petty ones ("*contraventionnalisation*") in certain circumstances, for example for first offenders and offences of lesser importance, was common practice in Luxembourg. Since 2001, this does not affect the limitation period anymore, but it still affects the additional penalties that can be applied under articles 7 and 14 of the criminal code, such as ineligibility and disqualification from certain functions, some of which, like ineligibility, are only applicable to serious offences. The professionals interviewed thought that it would be preferable if all the additional measures were always applicable, having regard to each individual case. The GET recommends **that the necessary steps be taken to ensure that various additional penalties, particularly ineligibility, are applicable in corruption cases even as regards lesser offences and circumstances in which recategorisation of the offence occurs ("*correctionnalisation*" and "*contraventionnalisation*").**

89. Under the reservation concerning nationality under Article 17.1 b and c of the Criminal Law Convention Luxembourg has retained its jurisdiction with regard to offences committed in all or part of its territory, but those committed abroad can only be prosecuted in Luxembourg if the

[9] Article 252 extends the application of articles 246-251 to offences involving certain persons listed, which means that as well as offenders themselves, third parties at whom the influence is targeted are also taken into account.

[10] Limited police access in law and/or practice to administrative and financial information at the preliminary inquiries stage, tax data base scattered over several local authorities, lack of staff in the investigating authorities, who concentrate on important and priority cases, no "whistle blowing" arrangements and in some cases reporting hindered by professional confidentiality, excessively strict rules on the burden of proof in criminal law, room for improvement in relations between the prosecution service and investigating judges, and so on. There are currently proposals for improving co-operation between the police and the administrative authorities, facilitating police access to on-line information and resolving the problem of relations between the prosecution service and investigating judges. A prosecutor has stated that even though banking confidentiality has been relaxed in recent years, the non-banking financial sector and financial institutions such as trust funds were still very reluctant to impart information. Certain lawyers stressed the importance of relationships and networks of persons in Luxembourg society, the difficulties faced by the police in dealing with complex economic and financial crime, particularly because of lack of legal and other resources, and the ease with which companies can be established in Luxembourg.

perpetrator is one of its citizens. In addition, Luxembourg does not consider that it has jurisdiction in the case of an offence committed abroad by a foreign national which involves one of its officials falling in the categories specified in Article 17.1 c of the Convention (public officials, judges, members of assemblies, officials of international organisations and so on). The GET is aware of the small size of the country and its close commercial, financial and other relations with foreign countries – relations that European integration has reinforced. The prosecutors whom the team met said that they received numerous requests from neighbouring countries indicating that certain problems of corruption affected Luxembourg citizens or institutions, with the corrupters being located abroad. The GET has also noted that the press has sometimes reported a number of controversial practices, such as for example private organisations inviting Luxembourg officials to a casino or night club in a nearby town or city in a neighbouring country. In view of this situation, it is regrettable that Luxembourg has not sought to take full advantage of the arrangements in Article 17 of the Convention. The provisions on Luxembourg's jurisdiction over corruption cases are somewhat disparate. Although in the absence a dual criminality requirement serious offences ("crimes") committed by Luxembourg citizens abroad can easily be prosecuted in Luxembourg, this is not the case with lesser offences ("délits"), for which the facts must also constitute an offence in the country where they were committed. The GET considers that this is an unnecessary restriction. Consequently, the GET recommends that **a) the requirement of dual criminality for lesser offences ("*délits*") committed by Luxembourg citizens abroad be abolished in all circumstances, including those in which recategorisation of the offence occurs ("*correctionnalisation*") and b) Luxembourg consider withdrawing or not renewing the reservation relating to Article 17 of the Criminal Law Convention on Corruption (ETS 173).**

V. CONCLUSIONS

90. Luxembourg's legal framework on the incriminations of corruption complies to a large extent with the standards of the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191). The shortcomings that do appear often reflect apparent oversights by parliament or a lack of consistency between neighbouring provisions. For example, certain clarifications are missing from article 252 of the criminal code, concerning the bribery of foreign public officials and the employees of international organisations. Articles 246-248 establish a series of offences of trading in influence for which certain elements seem to be missing. Articles 310 and 310-1 of the criminal code on bribery in the private sector also raise certain questions since the wording seems to suggest that in certain cases employers might exonerate employees who are being prosecuted for corruption on the grounds that they were aware of what those employees were doing.

91. In practice, the number of convictions for bribery and corruption remains very low. Various reasons were involved on-site to explain this situation, including the authorities' lack of legal and other resources. The GET also notes that in the basic offences of active and passive bribery it is not always clear whether unilateral acts of corruption – giving and receiving – can be prosecuted without the need to show that there was a corrupt pact between the parties, which is always difficult to establish, when it exists. Finally, it is regrettable that, in the absence of dual criminality Luxembourg is only able to prosecute its nationals when they have committed a serious, and not a lesser, corruption offence abroad, and that because of the reservation to Article 17 of the Criminal Law Convention it cannot prosecute offences against domestic and other officials committed by foreign nationals outside of Luxembourg territory.

92. In the light of the foregoing, GRECO addresses the following recommendations to Luxembourg:

i. **to take the appropriate measures to ensure that the various offences of active and passive bribery are understood as including the notions of "giving" and "receiving" (an undue advantage), without involving an automatic requirement for an agreement between the parties** (paragraph 78);

ii. **in order to harmonise the provisions in this area, to align the wording of article 250.2 CC with that of article 250.1 CC by adding the words "indirectly", "grant" and "unlawfully"** (paragraph 79;

iii. **to extend article 252 CC on the bribery of foreign public officials and international staff to include the various categories of staff of international organisations** (paragraph 81);

iv. **to give consideration to rewording articles 310 and 310-1 CC on bribery in the private sector to ensure that the requirement that employers not be aware of or approve the criminal behaviour of the employee cannot be misused to enable them to exonerate the prosecuted employee from his/her liability** (paragraph 83);

v. **to ensure that the various elements required by Article 12 of the Criminal Law Convention on Corruption - STE 173 - (in particular acting and refraining from acting, whether or not the intended result is achieved and whether or not an intermediary is used) are included in the trading in influence offences of Luxembourg** (paragraph 84);

vi. **to take the necessary steps to ensure that various additional penalties, particularly ineligibility, can be applied in corruption cases even as regards lesser offences and circumstances in which recategorisation of the offence occurs ("*correctionnalisation*" and "*contraventionnalisation*")** (paragraph 88);

vii. **a) to abolish the requirement of dual criminality for lesser offences ("*délits*") committed by Luxembourg citizens abroad in all circumstances, including those in which recategorisation of the offence occurs ("*correctionnalisation*") and b) to consider withdrawing or not renewing the reservation relating to Article 17 of the Criminal Law Convention on Corruption (ETS 173)** (paragraph 89).

93. Pursuant to Rule 30.2 of the Rules of Procedure, GRECO invites the Luxembourg authorities to present a report on the implementation of the above-mentioned recommendations by 31 December 2009.

94. Finally, GRECO invites the Luxembourg authorities to authorise publication of this report as soon as possible, translate it if necessary into the other national languages and publish these translations.