DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

LUXEMBOURG: PHASE 2

FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2 RECOMMENDATIONS ON THE APPLICATION OF THE CONVENTION AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 2 August 2006.

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SUMMARY AND CONCLUSIONS OF THE WORKING GROUP ON BRIBERY

a) Summary of findings

1. Since the Phase 2 evaluation of Luxembourg, the authorities have taken steps to address the issues raised in the recommendations given in the Phase 2 report by the OECD's Working Group on Bribery in International Business Transactions. Mechanisms for the prevention of money-laundering have been strengthened by implementing the second European Directive on money laundering in national legislation, starting work on the implementation of the third Directive and continuing awareness-raising efforts targeting professions that come under legislation on the prevention of money laundering (Recommendation 7). A 20 per cent increase in the total number of magistrates and police personnel over the period 2000 to 2005 together with the recruitment of 21 additional magistrates by 2009 should permit more effective prosecution of the offence of bribing foreign public officials (Recommendation 10). Now that the criminal investigation unit of the Grand Duchy's police service has become the central clearing house for bribery prevention and all bribery cases are handled by a single magistrate in the Office of the Prosecutor in Luxembourg, it should be easier to compile statistics on bribery cases and to evaluate case follow-up in order to develop criminal policy in this regard, if necessary (Recommendation 11). Recent developments in case law and legislation on confiscation may also be expected to facilitate more effective prosecution of the offence of bribing foreign public officials: in addition to the reminder that the Court of Appeal issued in December 2005 on how important it was for magistrates to confiscate bribes in bribery cases, two Bills, one aimed at legalising the confiscation of the equivalent value, the other at regulating the procedures for impounding property in criminal cases were tabled in the Chamber of Deputies (Recommendation 15).

2. Other steps taken by Luxembourg addressed, at least in part, some of the issues identified in the Phase 2 recommendations. For instance, an awareness campaign on the new legislative provisions concerning the prevention of money laundering indirectly made indirectly the finance sector and audit and accountancy professionals aware of the offence of bribery of foreign officials. In contrast, steps were taken to a greater or lesser extent to raise awareness in the private sector and to encourage the latter to develop internal prevention mechanisms (Recommendation 1). Steps aimed at the administration were also taken: these consisted in including overall awareness-raising of bribery and the duty to report any crime or offence to the State prosecutor in the framework of in-service training provided for civil servants in Luxembourg. However, no specific steps were taken concerning staff of Grand Duchy diplomatic missions abroad or other staff in contact with national firms exporting or investing abroad and therefore particularly likely to play a role in reporting and detecting an offence (Recommendations 2 and 3).

3. Other measures were aimed more specifically at the tax administration. Firstly, a new Code of Conduct for staff of Luxembourg's VAT and property registration office, the *Administration de l'Enregistrement et des Domaines* (AED), which entered into force in November 2004, makes explicit reference to the legal provisions on bribery and the obligation to report any crime or offence to the prosecutor in accordance with Article 23 (2) of the Code of Criminal Procedure; a special investigative unit, an "anti-fraud unit" was also set up inside the AED. Secondly, a handbook for staff of the income tax administration, the *Administration des Contributions Directes (ACD),* was issued on 1 March 2005. It was designed to educate tax officials on detecting bribes paid to public officials and was based on and

developed from the model drafted by the OECD's Committee on Fiscal Affairs. ACD officials were however not given a clear reminder of their obligation to report to the prosecutor, nor were they made aware of the importance of making rigorous use of all the sanctions available under Luxembourg's tax legislation in order to deter any attempt on the part of tax payers to pass off bribes paid to foreign officials as deductible charges, nor were the measures accompanied by any increase in human and financial resources available to staff of the ACD responsible for inspections (Recommendations 5 and 16).

4. In the context of the on-going efforts that Luxembourg has made over several years to ensure greater transparency in corporate accounting, a Grand-Ducal regulation in March 2005 defined the categories of company likely to be subject to external audit. On the other hand, work on the introduction of stricter corporate auditing procedures has not yet begun, pending the European Directives on the audit and reliability of corporate accounts (Recommendation 8).

5. In March 2006, the government also passed a Bill extending the investigatory powers of the police and magistrates This initiative is aimed at giving police officers and magistrates access to certain administrative files right from the preliminary enquiry stage, but it excludes access to basic information such as the whereabouts of suspects who may be attempting to cover his tracks, nor does it provide for lowering the prosecuting authority's appraisal of what constitutes sufficient evidence at the preliminary enquiry stage to begin proceedings. The Working Group had found the evidence threshold much too high in its Phase 2 evaluation report on Luxembourg (Recommendation 12). As regards ensuring that the prosecuting authority is made aware of the importance of prosecuting bribe payers in transnational bribery cases, while the Working Group acknowledges that the direct involvement of very senior magistrates from Luxembourg's prosecuting authority in the work of the OECD Working Group and GRECO may contribute to this awareness, it deems that formally reminding prosecuting authorities of the importance of prosecuting bribe payers is an essential condition for effective application of the offence of active bribery of foreign public officials (Recommendation 13).

6. Other outstanding issues raised by the Working Group in the course of its Phase 2 evaluation need to be addressed. The Group notes that some problems still persist in the chain of detection: as outlined in the Phase 2 Report, these problems could prevent private-law personnel of export credit agencies – particularly personnel of the *Office du Ducroire* -- from passing on evidence of bribery of foreign public officials, if not to the prosecuting authority, at least to staff of such agencies who are subject to the provisions of Article 23 (2) of the Code of Criminal Procedure (Recommendation 4). The general detection and prevention framework continues to be hampered by the lack of measures to guarantee effective protection of private sector whistle blowers (Recommendation 6). The implementation of the law on establishing bribery of foreign public officials also continues to suffer from the lack of a formal process for co-operation and co-ordination among the various agencies concerned. As the Working Group noted in its Phase 2 evaluation of Luxembourg, the absence of such a process, combined with professional confidentiality, was likely to be prejudicial to the exchange of crucial information and to keeping evidence of bribery offences up to date (Recommendation 9). Lastly, since work on the Bill which would introduce clear liability for legal entities into the legislation of Luxembourg in the event of bribery of foreign public officials is still in progress, the Grand Duchy continues to be in non-compliance with Article 2 of the Convention (Recommendation 14).

b) Conclusions

7. Based on the findings of the Working Group with respect to Luxembourg's implementation of the Phase 2 recommendations, the Working Group reached the overall conclusion that Recommendations 7, 10, 11 and 15 have been implemented or dealt with in a satisfactory manner. Recommendations 1, 2, 3,

5, 8, 12, 13 and 16 have been partially implemented. Recommendations 4, 6, 9 and 14 have not been implemented.

8. Noting a substantial shortfall in Luxembourg's satisfactory handling of the recommendations given in the Phase 2 report, the Working Group urged the Luxembourg authorities to speed up the process of reforms in order to deliver tangible results with respect to the implementation of these recommendations as soon as possible. In order to provide support for the reform process and evaluate the results achieved, the Working Group decided to conduct a second on-site evaluation of Luxembourg in 2007. The evaluation, which would take two days at most, would focus specifically on the implementation of the recommendations relating to the detection of the offence of bribery of foreign public officials (Recommendations 1, 2, 3, 4, 5, 6, 8), interdisciplinary co-operation and co-ordination between the various public bodies concerned with the oversight, detection and enforcement of that offence (Recommendation 9) and the liability of legal entities (Recommendation 14). Luxembourg's authorities have also agreed to report orally on the implementation of Recommendations 12, 13 and 16 within one year, i.e. by 30 June 2007.

WRITTEN FOLLOW-UP TO PHASE 2

Name of country: Grand Duchy of Luxembourg

Date of approval of Phase 2 Report: 28 May 2004

Date of information: 24 May 2006

Preliminary remarks

In addition to implementing the recommendations issued by the OECD Working Group on Bribery, the Luxembourg authorities wish to inform the Working Group of two matters that have arisen in relation to the fight against bribery since the report of 28 May 2004 on Phase 2 of the Luxembourg evaluation was adopted.

1. Luxembourg has enhanced its legal framework for combating bribery with the law of 23 May 2005, which approved certain international conventions on bribery and introduced into Luxembourg law the criminal offence of "bribery in the private sector" as provided for in Framework Decision 2003/568/JAI of the Council of the European Union of 22 July 2003 on combating corruption in the private sector, and the Council of Europe Criminal Law Convention on Corruption of 27 January 1999 and the Protocol of 15 May 2003 relating thereto.

Thus, under the terms of new Articles 310 and 310-1 of Luxembourg's Penal Code, any person who is a director or manager of a legal person and any agent or employee of a legal person or natural person who seeks, accepts or proposes, directly or through an intermediary, an offer, promise or advantage of any kind, for himself or for a third party, to perform or refrain from performing any act in the course of his duties or facilitated by his duties, without the knowledge and the permission of the board of directors, shareholders' meeting, principal or employer, as the case may be, shall be liable to imprisonment for one month to five years and a fine of €251 to €30,000.

The law introduces an innovation in respect of international corruption by extending the offences of bribery, influence trafficking and intimidation in Luxembourg to foreign and international judges and arbitrators, whereas formerly, such offences applied only to national judges and to national, foreign and international public and elected officials.

2. On 29 November 2005, a number of EU Member States, including Luxembourg,[1] introduced a proposal for a Council decision on the setting-up of a European anti-corruption network[2] designed to enhance international cooperation in the fight against corruption in order to secure more effective cooperation in criminal matters and improved exchange of best practices as well as the development of high professional standards.

Against the backdrop of these preliminary observations, the following remarks may be made about the follow-up to the recommendations addressed to Luxembourg in the Phase 2 evaluation report.

Part I: Recommendations for Action

Text of recommendation 1:
Take necessary measures, in cooperation with the professional organisations and the business circles concerned, to raise awareness among the private sector regarding the offence of bribery of foreign public officials, and promote the implementation within enterprises of preventive organisational measures – internal control mechanisms, ethics committees, and warning systems for employees –, as well as the adoption of codes of conduct specifically addressing the issue of foreign bribery. [Revised Recommendation, Articles I and V.C.(i)]

Steps taken to implement this recommendation at the date of the follow-up report:

From the moment the Phase 2 evaluation report was adopted, the Luxembourg authorities drew apprised national public and private authorities and bodies to the recommendations contained in the report and in the report adopted by GRECO within the framework of the Council of Europe.

As a result, various players in the financial sector have taken responsive measures in respect of concerned persons.

In October 2005, the Luxembourg Bankers' Association (ABBL) published a new version of its code of ethics. Presented at a special information session, the code has been updated reflecting legislative changes and market practice. The ABBL recommends in its code that members introduce rules relating to incentives that employees could receive or offer with a view to ensuring the independence and integrity of their staff.

By emphasising changes in introduced by the law of 12 November 2004 concerning the fight against money laundering and the financing of terrorism – which will be considered in greater detail in connection

[1] The Member States that initiated the proposal are Austria, Finland, Greece, Hungary, Lithuania, Slovakia and Luxembourg.
[2] The proposal was published in document 15629/05 LIMITE CRIMORG 157 of 14 December 2005.

with certain recommendations which follow – the new code of ethics lays down a number of rules, particularly relating to regulatory compliance, competence and the due diligence and attention which ABBL members are expected to exercise.

The Luxembourg authorities informed persons concerned by these legislative changes through circular 05/088 of 27 May 2005 issued by the *Commission de Surveillance du Secteur Financier* (Financial Sector Supervisory Commission - CSSF).

Concerned professions were also made aware of the law of 23 May 2005 on bribery in the private sector in another CSSF circular (05/211 of 13 October 2005 on "The fight against money laundering and the financing of terrorism and prevention of use of the financial sector for such purposes"). In the circular, the CSSF specifically mentions bribery as a predicate offence for money laundering and its annex contains more detailed information about the offence of bribery. The circular also contains specific provisions relating to politically exposed persons (PEPs) who are subject to increased vigilance.

This circular requires supervised entities to introduce internal anti-money laundering procedures which must also take account of bribery as a predicate offence for money laundering. These internal procedures are intended to ensure good cooperation with the judicial authorities responsible for the fight against money laundering, especially as regards the transmission of suspicious transaction reports, including those relating to bribery.

Circular 05/211 also discusses the law of 23 May 2005 on private sector corruption and new Articles 310 and 310-1 of the Penal Code and alerts supervised entities that under the new law the notion of "bribery", which; according to Article 506-1 of the Penal Code; is a predicate offence for money laundering, henceforth encompasses bribery in the private sector. Furthermore, Annex 1 to the Circular states that the offence of bribery also covers persons who direct or work for a private sector entity. Pursuant to the circular, supervised entities must observe the new rules in connection with their obligation to introduce written internal control procedures.

On the basis of these two CSSF circulars, the ABBL's Professional Obligations commission has started to overhaul its anti-money laundering manual to reflect new changes to the law. While work is ongoing, the manual will explicitly refer to the law of 23 May 2005 on corruption in the private sector and will advise ABBL members on how to identify passive and active bribery in both the public and the private sectors.

With the same end in mind the *Institut de Formation Bancaire Luxembourg* (Luxembourg banking sector training institute, IFBL) organises regular training courses on banking ethics, banking secrecy and the fight against money laundering (for which bribery is a predicate offence) and the financing of terrorism.

The entry into force of the law of 12 November 2004 on the fight against money laundering and the financing of terrorism also prompted information and training initiatives from the *Ordre des Experts-Comptables* (Accounting Institute, OEC), since amongst other provisions the law amended the law of 10 June 1999 on the organisation of the accounting profession.

In June 2004, the OEC's General Assembly adopted a regulation on peer supervision which covers, inter alia, compliance with legal requirements relating to the fight against money laundering and bribery. The implementation of peer supervision is scheduled for autumn 2006, on the basis of a detailed guide due to be approved in May 2006.

OEC members were informed about the law of 12 November 2004 at a conference in January 2005, jointly organised with ALCO, the Luxembourg Association of Compliance Officers in the financial sector, IACI, the Institute of Internal Auditors, and IRE, the Auditing Institute. The conference, entitled "Changes in anti-money laundering legislation in Luxembourg and in the European context", dealt in particular with the law of 12 November 2004 and the draft of the Third EU Money Laundering Directive. Issues relating to bribery and "non-domestic politically exposed persons" were addressed by one of the speakers, Mr. J. Reitrae from the European Commission.

In June 2005, the OEC General Assembly also adopted amendments to their code of ethics which, with the approval of the International Federation of Accountants (IFAC) has been adapted to IFAC's code. Inserts specific to Luxembourg have been introduced into the original text, in particular relating to the principles of independence inherent in the accounting profession and cooperation between accountants and the Luxembourg authorities responsible for the fight against money laundering and the financing of terrorism. To facilitate cooperation, the OEC systematically informs members of new circulars issued by the Luxembourg Financial Intelligence Unit and posts them online in the secured portion of its website reserved for members.

The Luxembourg association of insurance companies, ACA, has also responded to the new provisions of the law of 12 November 2004 on the fight against money laundering and the financing of terrorism by adopting a code of ethics in November 2004 that deals with the issue at various levels. The code provides, among other things, that insurance companies must report on their own initiative any evidence of money laundering or the financing of terrorism to the Luxembourg State Prosecutor and at the same time inform the insurance supervisory authority, the *Commissariat aux Assurances*.

The ACA has also introduced know-your-customer guidelines and model procedures for life insurance transactions.

As regards the business sector in general, the Luxembourg Chamber of Commerce, a quasi-state body, devoted an entire article to the subject of bribery in its members' magazine (*Merkur* no. 6/2005 of July-August 2005). The article reviewed all the international anti-bribery instruments (Council of Europe, OECD, UN) and the relevant national laws and regulations, ranging from the 2001 bribery reforms following ratification of the 1997 OECD Convention to the new measures introduced by the law of 23 May 2005 on bribery in the private sector.

In support of this initiative, a seminar on the legal responsibility of managers took place on 22 March 2006, focusing on the issue of bribery in particular. The seminar was so successful that it was given a second time on 4 May 2006.

The government has supported all these initiatives through seminars, conferences and training courses given in 2005 by members of Luxembourg's Financial Intelligence Unit to estate agents, dealers in high-value goods, notaries and employees of several Luxembourg banks and insurance companies as part of in-house training programmes.

Generally speaking, the Luxembourg authorities wish to emphasise that since the offence of bribery in the private sector is still relatively recent, they will be closely monitoring efforts by Luxembourg firms' to draw up codes of conduct in the coming months.

If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:
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Text of recommendation 2:
Take necessary measures to raise awareness of the offence among the administration, notably among those officials that may play a role in detecting and reporting acts of bribery and those in contact with Luxembourg enterprises exporting or investing abroad (in particular diplomatic missions of Luxembourg abroad), the Luxembourg public and professional bodies. [Revised Recommendation, Article I]

Steps taken to implement this recommendation at the date of the follow-up report:

As far as raising awareness in the administration is concerned, the *Institut National d'Administration Publique* (national institute for public administration, INAP), which provides initial and in-service training for central and local government officials in Luxembourg, has taken the initiative, based on the OECD evaluation report, of adding a 9-hour bribery module to its initial training programme, which is provided by the Diekirch State Prosecutor. The course includes information about anti-bribery bodies, national and international legal instruments and their implementation, "neighbouring" offences, and corruption in relation to public officials in particular.

Ethics is also featured in the continuing training programme. Public officials on senior career tracks wishing to obtain the public management certificate which is a pre-requisite for being promoted to senior positions, can take a course on ethics and integrity. Training in ethics will be revisited in light of the preparation of a code of ethics.

On the basis of the legal provisions relating to the general status of public officials – Chapter 5 on the "Duties of public employees" deals with the risks of bribery, for example, and Article 14 covers the right to engage in an incidental activity and other situations that may generate a conflict of interest, such as acceptance of material advantages or participation in the direction, administration or supervision of an

undertaking – the Ministry for the Civil Service and Administration Reform is developing an approach with the aim of introducing one or more codes of ethics in the administration. The following subjects are being considered as part of the work in progress:

- a public official's conduct with regard to the private sector (e.g., how to react to offers of undue benefits, etc.);
- acceptance of donations, gifts and favours;
- mobility of a public official into the private sector;
- a public official's conduct with regard to citizens (e.g., reasonable time for taking a decision, courtesy, impartiality and independence);
- treatment of confidential information;
- incompatible outside interests and financial interests (e.g., membership of boards of directors, incidental activities in the private sector, etc.);
- relations between the administration and politics (political activity, incompatibilities, recruitment principles);
- relations between superiors and subordinates and vice versa (e.g., bullying and sexual harassment);
- cessation of public duties and subsequent employment;
- whistleblowing rules.

Other issues under consideration include the introduction into general regulations of compulsory rotation for officials in certain "sensitive" positions, especially those relating to public procurement, the granting of subsidies, etc., and the better management of incompatibilities and incidental activities.

At the Grand-Ducal police college, several sessions on bribery in particular have also been included in basic training and in-service courses for promotion exams.

A draft Grand-Ducal regulation in view of the adoption of a code of ethics of the Grand-Ducal police was issued in May 2004. The draft code of ethics has not yet been adopted because the disciplinary provisions of the police regulations are undergoing revision and ethics is closely linked to disciplinary questions.

While waiting for this normative text to be adopted, a more informal document entitled the "Charter of Values of the Grand-Ducal Police" has been introduced and was circulated to all members of the Grand-Ducal police force in early 2006. Article 6 of the Charter states that members of the Grand-Ducal police force must show incorruptible, objective and impartial behaviour.

Regarding the provision of information to police officers, a procedure for the individual distribution of new laws when they take effect has been introduced within the different sections of the judicial police.

Police officers and ministry officials are continually encouraged to attend international conferences on bribery. For example, Justice Ministry officials and members of the judicial police and the General Inspectorate of police took part in international conferences on the subject, such as the conference on European cooperation in fighting bribery organised in December 2003 by the Rhineland-Palatinate police college in Germany and the international conference of departmental heads and representatives of police supervisory bodies and anti-corruption agencies held in Vienna (Austria) from 24 to 26 November 2004.

Representatives from the Ministry for Public Works attended the OECD Global Governance Forum on fighting corruption and promoting integrity in public procurement.

In addition to these general initiatives, Grand-Ducal police officers are regularly encouraged to take advantage of anti-bribery training courses organised in collaboration with German *Land* and federal criminal police agencies.

In order to maintain the impetus given to training and raising the awareness of public officials in this field, the Luxembourg authorities intend to assess these measures, when the time is ripe, with a view to ensuring continuity in such efforts.

Following the entry into force of the law of 23 May 2005, which introduced the offence of bribery in the private sector under Luxembourg law, the *Commission de Surveillance du Secteur Financier* organised internal training courses to alert its officials to the provisions of CSSF circular 05/211 of 13 October 2005 ("Fight against money laundering and the financing of terrorism and prevention of use of the financial sector for such purposes") and those provisions relating to bribery.

If no action has been taken to implement recommendation 2, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

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Text of recommendation 3:

Issue regular reminders to public officials of their obligation under article 23 (2) of the Code of Criminal Procedure to inform prosecuting authorities of any offence of bribery of a foreign public official that they may become aware of in the exercise of their duties, and of disciplinary sanctions applicable in the event of non-compliance with this obligation, and ensure effective application of such sanctions. [Revised Recommendation, Article I]

Steps taken to implement this recommendation as at the date of the follow-up report:

Recommendation 3 concerning the reminders to be issued to public officials of their obligation under Article 23(2) of the Code of Criminal Procedure was initially implemented through the initial and in-service training provided by the Diekirch State Prosecutor at INAP, the National Institute for Public Administration.

The obligation incumbent upon public officials under Article 23(2) is a significant aspect of the training.

It was deemed appropriate to transmit the message about this obligation through training rather than

through circulars, since the exam at the end of the training course offers an opportunity for verifying whether the officials concerned have fully assimilated the programme. Attendance at training courses is a pre-requisite for promotion.

Once sufficient time has elapsed to judge whether this is a suitable way of communicating the recommendation, this approach may be re-examined.

In this context, it is important to point out that the Ministry for the Civil Service and Administrative Reform had anticipated rules of procedure to be followed by a public official in reporting a bribery offence under bill N° 4891 amending the civil servants' code and which subsequently became the law of 19 May 2003, but the *Conseil d'Etat* formally opposed the draft measures.

However, in the context of the fight against money laundering and the financing of terrorism, Article 23 of the Code of Criminal Procedure now includes paragraph 3 which provides: "Any constituted authority and any public officer or official who, in the exercise of his or her duties, discovers facts liable to constitute evidence of money laundering or the financing of terrorism, is required to inform the State Prosecutor of the Luxembourg District Court thereof and to transmit to him or her all information, reports and acts relating thereto."

The obligation to blow the whistle has thus been significantly extended in scope and no longer relates only to criminal offences *per se* but also to facts liable to constitute evidence of money laundering.

If no action has been taken to implement recommendation 3, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

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Text of recommendation 4:

Encourage the implementation of a similar reporting procedure to the prosecuting authorities for officials not subject to the provisions of article 23 (2) of the Code of Criminal Procedure working for bodies vested with supervisory powers with regard to corruption in the attribution of public subsidies (notably certain officials of the Ducroire and Lux Développement). [Revised Recommendation, Articles I and II.(v)]

Steps taken to implement this recommendation as at the date of the follow-up report:

On the subject of Recommendation 4, action has been taken to raise awareness among Ducroire officials.

Following adoption of the evaluation report, and very pragmatically, advantage was taken of Luxembourg's presidency of the European Union to closely involve Ducroire officials in the Luxembourg presidency's

work and assignments relating to meetings of the "Export Credits" working group. Bribery in international transactions is one of the subjects regularly considered by the group which reports to the Council of the European Union.

This step had the undeniable advantage of ensuring that Ducroire officials acquired a detailed knowledge of Luxembourg law on the subject. At the same time, it afforded them an exceptional opportunity to become familiar with equivalent legislation in other EU Member States.

In light of the positive outcome, it was subsequently decided that Ducroire officials would participate on a permanent basis.

Awareness among Ducroire officials has increased thanks to their direct participation in or preparation of the half-yearly meetings of the OECD's Export Credits working group since 2004.

It is important to point out that the existence of a reporting obligation within the meaning of Article 23(2) of the Code of Criminal Procedure arises only for some Ducroire staff, since the Ducroire comprises both civil servants, especially at the level of management and at decision-making, and staff attached to the Luxembourg Chamber of Commerce, which is responsible for the day-to-day management of certain credit insurance matters. The question of the existence of a reporting obligation does not arise for the latter. All staff members who take legal decisions are civil servants and are therefore bound by the reporting obligation set forth under Article 23(2) of the Code of Criminal Procedure.

Where credit insurance is concerned, Luxembourg has gone beyond what is foreseen by the OECD, since the Office du Ducroire not only follows the action statement for transactions with medium or long-term financing but also requires a declaration from firms involved in current trading, representing a host of individual transactions.

It should be remembered that the Office National du Ducroire in Belgium provides reinsurance and handles technical issues.

It is precisely the close links between the Luxembourg and Belgian Ducroires that finding a durable solution to the question of a reporting obligation is somewhat problematic, since any solution adopted in Luxembourg must be compatible with solutions envisaged in Belgium.

In this context, the point has been made – rightly in the opinion of Luxembourg authorities – that in neighbouring countries the public sector has concluded agreements with purely private companies like Euler-Hermes and Atradius, whose employees are definitely private-sector employees and therefore not bound by the same obligations as a civil servant.

Thus, consideration is still being given to a long-term solution.

The entry into force of the law of 23 May 2005 on bribery in the private sector has also had an effect in the Office du Ducroire, since the text of the law was distributed individually and each officials was asked

whether he had acquainted himself with its provisions.

If no action has been taken to implement recommendation 4, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

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Text of recommendation 5:

Develop clear instructions for the Tax Administration prescribing verifications to be carried out in order to detect possible offences of bribery of foreign public officials, and remind these officials of their obligation to alert the prosecuting authorities of any offence that they may become aware of in this regard, and ensure that sufficient human and financial resources are made available to the tax authorities for effective controls. [Revised Recommendation, Articles II.(ii) and IV]

Steps taken to implement this recommendation as at the date of the follow-up report:

The Phase 2 evaluation report did not go unnoticed in the Luxembourg tax administration.

On 16 November 2004, the director of the *Administration de l'Enregistrement et des Domaines*, the department responsible for VAT and excise duty, issued a new code of conduct in direct response to the OECD and GRECO evaluations of Luxembourg.

The code reminds public officials of the legal rules and the most important interpretations and recommendations, including those relating to bribery and influence trafficking. It also formally reminds public officials of the obligations arising from their status and explicitly refers to the reporting obligation contained in Article 23(2) of the Code of Criminal Procedure. From an organisational standpoint, care has been taken to point out that public officials can call on administrative inspectorates for assistance if they wish to fulfil that obligation. Inspectors may also be called in when tax officials uncover facts or violations of the anti-bribery rules which, according to the code, are to be reported "immediately" and "in all cases".

The director himself has said that the code is just a starting point and will be supplemented as legislation and practical experience evolves.

The same department has also carried out a major reorganisation so that it can detect tax fraud more effectively. A special anti-fraud unit was created by a Grand-Ducal regulation of 21 December 2004. Under the terms of Article 1 of the regulation, the unit is responsible inter alia for detecting all offences within the competence of the Administration de l'Enregistrement et des Domaines.

Given that the unit is still relatively new, no figures or statistics on the results of its work are available to

date.

On 1 March 2005, also in direct response to the OECD and GRECO evaluations, the director of the *Administration des Contributions Directes* issued a handbook designed to raise awareness among tax officials on how to detect bribes paid to public officials.

The handbook is based on the model drawn up by the OECD Fiscal Affairs Committee and completed and adapted according to Luxembourg tax law. The twenty page manual sets forth rules and information based on applicable laws and regulations in respect of different forms of bribes, how to organise audits and techniques related thereto, and more generally, the steps public officials should take in such situations.

Once sufficient time has elapsed, the results of these initiatives will be examined and appropriate measures will be taken as necessary.

If no action has been taken to implement recommendation 5, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

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Text of recommendation 6:

Adopt measures to ensure effective protection of any person collaborating with the law enforcement authorities, notably employees who report in good faith suspected cases of bribery. [Revised Recommendation, Article I]

Steps taken to implement this recommendation as at the date of the follow-up report:

Two important developments deserve mention in connection with Recommendation 6.

1. First, the bill referred to at the end of paragraph 20 of the evaluation report has since become the law of 8 June 2004 on freedom of expression in the media.

The law has been warmly welcomed in media circles. Article 7 clearly and explicitly lays down the rules governing protection of journalists' sources in Luxembourg.

Under the terms of Article 7(1), any journalist who testifies before an administrative or judicial authority in the course of administrative or judicial proceedings is entitled to refuse to disclose information identifying a source, or content of which she has obtained or collected. The publisher or any other person having access to information identifying a source in the course of his professional relations with a journalist may

invoke the same right.

Article 7(3) states that the administrative, judicial and police authorities must refrain from ordering or taking measures for the purpose or effect of circumventing this right, in particular by carrying out searches or seizures at the home or workplace of the journalist concerned. The law additionally provides that if information identifying a source has been lawfully obtained through a search or seizure which was not carried out for the purpose of revealing the identity of a source, such information may not be used as evidence in subsequent judicial proceedings.

However, in view of the seriousness of certain offences, and so as not to give journalists an absolute and inviolable right to silence, the law carves out certain exceptions.

Thus, under Article 8, where the action of the administrative, judicial or police authorities concerns the prevention, prosecution or punishment of serious crimes against persons, drug-trafficking, money laundering, terrorism or against State security, neither the journalist nor other persons having knowledge of information identifying a source may invoke the right to silence.

2. Second, the situation in relation to the bill mentioned in paragraph 83 of the evaluation report, designed to strengthen the rights of victims of criminal offences and increase witness protection, has also changed. Provisions relating to the anonymity of witnesses had to be stricken from the bill, following sharp criticism and protests from some corners of civil society.

These criticisms were not aimed at provisions of the bill relating to victims' rights, namely, acknowledgement of the victim's standing in judicial proceedings; these are still part of the bill, which is currently being deliberated by the *Conseil d'Etat*.

After the provisions relating to witness protection were withdrawn from the bill in autumn 2004, a ministerial working group was set up to continue work in this area and to draft a new text, especially in light of Article 22 of the Council of Europe Criminal Law Convention on Corruption of 27 January 1999 relating to the protection of informants and witnesses.

The working group is currently looking at possible changes to the law relating to the withholding or reduction of sentences for informants in certain criminal cases, particularly those involving bribery. The working group noted that this type of provision is already part of Luxembourg substantive law, especially with regard to terrorism, drug law violations, crimes against the State, criminal association and organised crime, but rarely used.

A comparative study showed that Luxembourg's close neighbours have not introduced such legal measures for bribery offences. In France, for example, the "Perben Act" lists a number of offences for which a reduced sentence is possible, but according to information available to us, bribery is not among them. To the best of our knowledge, Belgian law also does not provide for any withholding or reduction of sentence.

The working group also felt that such a system poses significant drawbacks, such as undercutting the

principles of proportionality and equality before the law. From a more practical standpoint, the risk of manipulation by persons acknowledging guilt is considered to be significant. Generally speaking, the working group doubted the effectiveness of current systems dealing with repentants.

Nonetheless, it has been decided that the working group should continue to give consideration to these issues.

If no action has been taken to implement recommendation 6, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

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Text of recommendation 7:

Given the particular importance of the Luxembourg financial centre, continue ongoing efforts in the context of the Action Plan against Money Laundering in order to ensure rigorous implementation by the entire banking and financial sector of legislative and regulatory measures aimed at preventing and detecting money laundering of funds that may be related to the bribery of foreign public officials on international markets, and ensure that non-compliance with the legal obligation to report be sanctioned in a dissuasive manner. [Convention, Article 7; Revised Recommendation, Article II.(iv)]

Steps taken to implement this recommendation as at the date of the follow-up report:

Since the evaluation report was adopted, the law of 12 November 2004 on the fight against money laundering and the financing of terrorism has completely overhauled the legal rules pertaining thereto (this report concerns only money laundering, not anti-terrorist measures). The rules now apply to a whole set of professions that are not part of the financial sector in the customary sense, such as insurance brokers, mutual funds, pension funds, auditors, accountants, estate agents, notaries, lawyers, tax advisers, financial advisers, casinos and gaming establishments and all those who deal in high-value goods when payment is made in cash in an amount equal to or in excess of 15,000 euros.

Various rules have been supplemented and improved on a certain number of points, as a result of the experience in fighting money laundering on the national and international levels over the last ten years.

Thus, the three professional duties (know your customer, adequate internal systems, cooperation with the authorities) have been extended to all these players. They are now required to identify their clients and, where relevant, those for whom the clients act, at the outset of a business relationship or when providing custodial services. They are required to collect all information in view of minimising the risk of being a vehicle for money laundering purposes in the course of their business relations.

The identification requirement also applies to any transaction for an amount equal to or in excess of 15,000 euros, whether carried out in one operation or in several transactions which appear to be related. Professionals must also request identification upon a suspicion of money laundering even where the amount involved is less than 15,000 euros. No such requirement applies, however, if the client is a national or foreign financial institution subject to an equivalent identification requirement.

The professions concerned must also introduce suitable internal control and reporting procedures and take appropriate measures to sensitise and train their staff about the provisions of the law.

Firms, their senior managers and their employees are also required to cooperate fully with the competent Luxembourg authorities. They must provide the State Prosecutor on request with all necessary information in accordance with the procedures set forth under the relevant legislation. They are also required to inform the competent authorities, on their own initiative, of any fact that could constitute evidence of money laundering and they may not carry out a transaction that they know or suspect to be linked to money laundering without first informing the State Prosecutor, who may instruct them not to do so. They may not inform the client concerned or a third party that such information has been transmitted to the competent authorities or that an investigation is underway.

The law added a new paragraph to Article 23 of the Code of Criminal Procedure, paragraph 2 of which requires public officials to report any criminal offence to the public prosecution service. Under new paragraph 3, any public official who, in the exercise of his or her duties, discovers facts liable to constitute evidence of money laundering is required to inform the State Prosecutor of the Luxembourg District Court thereof and to transmit to him or her all information, reports and documents relating thereto.

The purpose of this provision is to emphasise that public officials must report any suspicion of money laundering even if they do not have knowledge of the facts which allow them to conclude that a criminal offence has been committed. The amendment to the law thus considerably strengthens the legal arsenal for combating money laundering.

Despite the fact that this legislative amendment is relatively recent, work on transposing the Third Money Laundering Directive into Luxembourg law is currently being undertaken.

If no action has been taken to implement recommendation 7, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

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Text of recommendation 8:

Bearing in mind the important role of accounts auditing in the detection of suspicious operations related to bribery of foreign public officials, and in the context of ongoing efforts by Luxembourg aimed at ensuring

greater transparency in corporate accounting, ensure compliance by accountants and external and internal auditors with their obligation to inform prosecuting authorities of any suspected money laundering related to corruption. In this regard, Luxembourg authorities are invited to further raise awareness of such professionals to the provisions of the anti-bribery legislation, notably by introducing stricter auditing procedures, and to ensure that non-compliance with the reporting obligation be effectively sanctioned. [Convention, Article 8; Revised Recommendation, Articles I et V]

Steps taken to implement this recommendation at the date of the follow-up report:

With regard to improving the auditing procedures followed by auditors and accountants, the Grand-Ducal regulation of 16 March 2005[3] was enacted to provide a precise definition of micro-, small and medium-sized enterprises. Given that audit procedures and the information subject to audit vary according to the size of the firm, the measure henceforth enables auditors to more effectively control the accounts of such companies.

The anti-corruption evaluations carried out in Luxembourg have led to closer relations between the public authorities and the *Institut des Réviseurs d'Entreprises* (institute of auditors, IRE). One of the first results is that the IRE now provides the Justice Ministry with statistics on disciplinary cases.

In this regard, the IRE heard ten cases in the period from 1 June 2004 to 31 May 2005, of which four were notified by the State Prosecutor and two by third parties. One case involved a matter that was referred to the IRE by its president.

Two of the ten cases were closed. In three cases, the IRE issued a caution and/or an order for it to effectuate timely quality control. One case was passed on to the IRE's Disciplinary Council.

Concerning the latter, on 16 June 2005 the Disciplinary Council fined an auditor 9,500 euros for failing to comply with the law of 28 June 1984, as amended (which governs the auditing profession and which requires auditors to maintain their independence *vis à vis* their clients) and for failing to comply with the IRE's code of ethics relating to the duty to prevent money laundering.

According to the information provided by the IRE, investigations were motivated mainly by non-compliance with money laundering legislation and significant shortcomings in the auditor's work identified during quality controls carried out by the IRE. None of the cases was linked to bribery.

Further, the IRE has intensified its efforts in the area of continuous training of its membership and actively encourages its members to attend courses and seminars offered throughout Europe, in particular by negotiating reduced registration fees for members.

[3] Published in Mémorial A no. 38 of 1 April 2005, pages 677 et seq.

All work on new rules for audit procedures is currently on hold pending the European Parliament and EU Council directive proposal on the legal requirements for audited accounts and the directive to improve the reliability of company financial statements.

Given that the latter will result in significant changes, such as establishing minimum requirements for the statutory audit of the annual and consolidated accounts of companies, extending the scope of previous European legislation (Directive 84/253/EEC), defining the role and independence of statutory auditors, introducing the requirement for external quality control, better public oversight of the profession and better cooperation between supervisory bodies within the EU as well as myriad other aspects, it has been deemed appropriate to wait until the texts have been finally adopted before taking any decisions about new rules on audit procedures.

The entry into force of the law of 12 November 2004 on the fight against money laundering and the financing of terrorism, discussed in connection with Recommendation 7, has also significantly refined and standardised the duties of auditors and accountants.

As the legal commission of the Chamber of Deputies rightly pointed out when adopting the law, the advantage of this approach is to make the action taken by the Luxembourg government against money laundering and the financing of terrorism more visible and to apply the same rules across the board.

Thus, the three professional duties, namely i) know your customer, ii) implement suitable internal systems and take appropriate steps to raise awareness among staff and train them in respect of the relevant legal provisions, and iii) cooperate with the competent authorities, now apply without distinction to all the professions concerned.

Under Article 9 of the law, infringements of the abovementioned professional duties are punishable by a fine ranging between 1,250 and 125,000 euros.

The initial reaction by the professions to the entry into force of the law was and has been, to provide and commission training for their members and to adapt their internal rules and codes of conduct.

In this context, in June 2005 the accountants' professional body, the OEC, introduced a new recommendation for prior identification of clients exercising a particular profession or official function (such as elected office) which require accountants' particular attention. It also adopted a standard general condition applicable to engagement letters to be signed by clients. The general conditions mention the accountant's obligations relating to money laundering and the client's obligation to provide accountants with all the documents and information they need to fulfil those obligations. Finally, OEC members' annual statement concerning independence was modified in 2005 to include a formal confirmation that they are acquainted with and respect the fundamental laws, standards and recommendations of the profession, including the fight against money laundering.

It is felt that the issue should if necessary be reviewed in due course to see whether further measures are needed.

If no action has been taken to implement recommendation 8, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

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Text of recommendation 9:

Establish effective interdisciplinary cooperation and coordination among the bodies concerned (administrative, financial and law enforcement) with regard to supervisory, detection and sanctioning powers, and, in this regard, ensure that professional secrecy does not constitute an impediment. [Revised Recommendation, Article I]

Steps taken to implement this recommendation as at the date of the follow-up report:

The law of 12 November 2004 on the fight against money laundering and the financing of terrorism must again be mentioned in connection with Recommendation 9, especially Article 14, which amended Article 13 of the law of 7 March 1980 as amended on organisation of the judiciary, in order to underline the role within the judicial system played by the Luxembourg State Prosecutor's department since 1993 as home of Luxembourg's Financial Intelligence Unit (FIU).

Under Article 26(2) of the Code of Criminal Procedure, Luxembourg's State Prosecutor and district courts have exclusive competence at national level for cases involving money laundering.

Before the law of 12 November 2004 came into effect, Article 13 of the law on the organisation of the judiciary provided merely that the State Prosecutor should designate two deputies to deal with economic and financial matters under the direction of the Deputy State Prosecutor or a principal or senior deputy.

The amendment introduced by the law of 12 November 2004 ensures that within the economic and financial section of the Luxembourg prosecution service a certain number of magistrates are assigned *full time* to matters involving money laundering and the financing of terrorism. They are assisted in their work by investigators from the judicial police.

Officially calling the unit of the Luxembourg prosecution service Financial Intelligence Unit gave it the needed international visibility in relation to its foreign counterparts. That "Financial Intelligence Unit" is recognised internationally is the result of the work of the Egmont Group in particular, which Luxembourg joined upon its creation in 1995 and which now has 69 members from around the world.

With a view to improving cooperation between the various authorities involved, the amendment further stated that the Luxembourg FIU henceforth has an obligation to provide financial sector professionals with general feedback on cases of money laundering and the financing of terrorism. Under the terms of Article

13 of the law; as amended; on the organisation of the judiciary, *"the financial intelligence unit shall ensure that members of the professions governed by the law of 12 November 2004 on the fight against money laundering and the financing of terrorism have access to up-to-date information about practices involved in money laundering and the financing of terrorism and about evidence from which suspicious transactions can be identified"*.

As a result of this new obligation, the Luxembourg FIU's next annual report is awaited with interest in order to see what impact the new measure has had in practice.

To conclude on the subject of cooperation between the public authorities, I should like to mention an initiative that could perhaps bring about some changes, namely in the relations between judicial and tax authorities.

The initiative was taken by the Luxembourg ombudsman, a position established by the law of 22 August 2003. Like his counterparts elsewhere in Europe, the Luxembourg ombudsman's mission is to receive complaints from the public concerning the conduct of central and local government agencies and public establishments when, for a particular matter, one such authority is considered to have failed in its mission or to have contravened the prevailing treaties, laws and regulations.

Under the 2003 law, if the ombudsman considers such to be the case, he can make recommendations to the public authorities concerned.

In October 2004, the ombudsman recommended to the government a proposed amendment of paragraph 22 of the general tax law which would enumerate offences the criminal prosecution of which would allow in principle the communication of information related thereto to the judicial authorities under tax secrecy provisions.

At present, however, no legislative work has been initiated on the basis of the ombudsman's recommendation.

If no action has been taken to implement recommendation 9, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

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Text of recommendation 10:

Grant determined financial support with a view to ensuring sufficient human and financial resources as well as specific training to law enforcement professionals (police, prosecution, investigating magistrates and judges) to guarantee effective prosecution of the foreign bribery offence and related offences, notably those related to accounting, without prejudice to the execution of request for mutual legal assistance [Convention, Articles 5 and 9; Revised Recommendation, Article I; Annex to the Revised

Recommendation, Paragraphs 6 and 8]

Steps taken to implement this recommendation as at the date of the follow-up report:

As regards ensuring sufficient human resources as mentioned in Recommendation 10, the Luxembourg authorities have taken certain steps to adapt staffing levels to identified needs.

The law of 24 July 2001 provided for an initial multiyear recruitment programme in the judicial system. Covering the period from 16 September 2001 to 16 September 2004, it called for the recruitment of 21 magistrates and 28 administrative staff.

As a result, the number of magistrates rose from 166 in 1999 to 197 in 2004, an increase of 31 (or, in percentage terms, nearly 19%) including 7 new investigating magistrates. Over the same period the number of staff employed in judicial administration rose by around 30, including a university economist assigned to the anti-money laundering unit of the Luxembourg prosecution service.

This unprecedented recruitment programme highlights the determination of the government at that time to ensure that the judicial authorities had sufficient staff to deal with growing numbers of increasingly complex and important cases within a reasonable timeframe.

That is also why the present government, formed after the elections on 13 June 2004, has decided to continue this recruitment drive, as stated by the Government in its formal policy statement, to wit:

> "The government will give the justice system and the police the necessary resources to tackle crime and its prevention. The financial and human resources of the justice system and the police will be increased, by means of multiyear recruitment programmes, to take account of the growing number and complexity of criminal cases. Modernisation of the property infrastructure of the police and the justice system will continue, including the construction of police and law court complexes."

Since then the government has issued a new multiyear recruitment plan for the present legislature, covering the period from 16 September 2005 to 16 September 2009. The new programme, like the previous one, aims to increase the number of magistrates and administrative staff and is based on proposals from the Prosecutor General after consultation with the heads of the various sections of the judiciary.

As a result, 21 new magistrates and 20 administrative staff will be recruited over the five-year period, almost the same number as under the previous programme.

Another criminal division will reinforce the Superior Court of Justice and a new position of First Attorney General will be created in the general prosecution service. The Luxembourg district court will also get a new criminal division and six new magistrates will be added to the staff of the Luxembourg prosecution

service.

The recruitment plan was tabled as a bill on 25 March 2005 and voted into law as the law of 1 July 2005.

The number of police officers since the Grand-Ducal Police was created from the merger of the Grand-Ducal Gendarmerie and the National Police on 1 January 2000 was substantially reinforced from 1,198 in 2000 to 1,460 in 2005. For bribery in particular, an additional seven civilian staff have been added to the judicial police analysis and support unit, which provides investigators with specialist support.

If no action has been taken to implement recommendation 10, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

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Text of recommendation 11:

Compile relevant statistical information regarding the number, source and treatment of bribery offences (prosecution, judgment and sanction) in order to facilitate evaluation, and, if necessary, develop criminal policy in this regard. [Revised Recommendation, Article I]

Steps taken to implement this recommendation as at the date of the follow-up report:

The issue of statistics referred to in Recommendation 11 has also been given consideration to determine how existing procedures need to be changed to ensure that they provide the necessary information to reliably assess the situation.

In tandem with this long-term work, another measure has already been taken in the field which, in the opinion of those concerned, is also likely to improve statistics. It involves applying the so-called "judicial police concept" to the phenomenon of corruption.

The concept, based on close cooperation between the prosecution service and the Grand-Ducal police and finalised in May 2004, is intended i) to determine the areas of competence between central units (Judicial Police Service) and regional units (Criminal Investigation Section), and ii) to improve coordination between the judicial and police authorities.

In this context, like the solution chosen by Belgium in 1998 with the creation of the *Office Central pour la Répression de la Corruption* (central office for the prevention of corruption), it has been decided that the Judicial Police Service will centralise information on the fight against corruption.

Under the concept, judicial investigations are in principle carried out by the general crime unit of the Judicial Police Service unless the particular circumstances of the investigation are such that the expertise of another Judicial Police Service unit, like the international mutual legal assistance unit, the organised crime unit or the anti-money laundering unit, is sought. This does not affect the powers of the judicial authorities, who can ask a regional police department to carry out investigative tasks for smaller-scale regional cases.

Given its role as a clearing-house for information, the Judicial Police Service is thus in a position to monitor and assess bribery and to inform the relevant ministry and the judicial authorities, according to their particular spheres of competence, of any identified shortcomings.

It is hoped that centralising information in this way will improve the preparation of statistics related to bribery.

For information, the following paragraphs contain further details of the 11 (exclusively domestic) bribery cases identified between 1 January 2003 and 12 December 2005 (figures provided at the "Tour de Table" of the most recent OECD Working Group on Bribery meeting).

7 of the 11 cases were closed either because it had not been possible to find evidence of bribery (5 cases), because the evidence was not sufficiently strong to open a judicial investigation (1 case) or because the matter was deemed too insignificant to warrant prosecution (1 case). In three cases, the decision on further action is pending.

The case which ended with a conviction began on 3 December 2003 and ended with a final judgment on 21 December 2005 which sentenced the guilty party to a 10-month suspended prison sentence for soliciting a bribe and breaching professional secrecy (provision of confidential information obtained in the performance of duties in return for 5,000 euros).

As of 31 December 2005, no case involving a showing of bribery in the private sector had been opened.

Within the Luxembourg prosecution service, better tracking of cases involving bribery has been achieved by assigning them to a single magistrate. The court clerk (secretariat) has also been instructed to specifically advise the magistrate of any case involving bribery and the undue taking of an advantage.

If no action has been taken to implement recommendation 11, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

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Text of recommendation 12:
In order to ensure effective prosecution of offences of active bribery of foreign public officials, and given the currently limited investigative powers at the preliminary enquiry stage, firstly, consider extending such powers, and, secondly, ensure that, at the stage where investigation is initiated, the threshold taken into account by the prosecuting authorities is not too high concerning the level of proof gathered in the course of the enquiry. [Convention, Article 5; Revised Recommendation, Article I]

Steps taken to implement this recommendation as at the date of the follow-up report:

Recommendation 12 concerns police investigative powers, a subject on which considerable work has been undertaken in recent months.

A first initiative, which hopefully will be finalised in 2006, concerns the introduction into Luxembourg law of a specific legal basis to conduct undercover work and covert investigations. The initiative was taken in order to increase the prosecuting authorities' investigative powers, especially with regard to serious criminal covert offences like bribery.

The draft text is inspired in particular by Articles 12 and 14 of the European Union Convention of 29 May 2000 on mutual assistance in criminal matters and in essence proposes to amend the Code of Criminal Procedure by introducing general provisions applicable to the use of Luxembourg or foreign undercover agents.

These legal measures could be used in connection with the prosecution of bribery, punishable in Luxembourg by imprisonment for five to ten years, since the current version of the draft legislation provides that covert investigations may be undertaken when an offence is punishable by imprisonment the maximum sentence of which is six months or more. Further, undercover police officers may be used when an offence is punishable by imprisonment the maximum sentence of which is four years or more.

The second initiative of which I wish to inform the working group and which is currently at a much more advanced stage than the one I have just mentioned, aims to give police officers and members of the judiciary direct automated access to certain personal data held by public law legal entities, including the database on VAT payers kept by the *Administration de l'Enregistrement et des Domaines*.

In view of the guarantees under the draft legislation permitting verification *ex post* that police officers and members of the judiciary have consulted the data legally and legitimately (a process known as "*logging*"), it is proposed to give them extensive direct automated access as from the preliminary investigation stage.

It is hoped that these new means of investigation will help to provide key information at a relatively early stage of the investigation, providing hard evidence and thus reducing the number of cases dropped because of insufficient evidence.

If no action has been taken to implement recommendation 12, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

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Text of recommendation 13:

Formally remind prosecuting authorities (via circulars or directives, or any other official channel) of the importance of prosecuting bribers, as an essential condition for the effective application of the foreign bribery offence, and, similarly, draw their attention to the importance of prosecuting money laundering offences related to bribery on foreign markets, without referring to the place of occurrence of the predicate offence or to the place of residence of the alleged offender. [Convention, Articles 1, 3 and 5; Revised Recommendation, Article I; Convention, Articles 8 and 9; Revised Recommendation, Articles I, II.(iii), and V.A.(iii)]

Steps taken to implement this recommendation as at the date of the follow-up report:

On the subject of Recommendation 13, the ad hoc interministerial working group responsible for following up on the OECD and GRECO recommendations on bribery has discussed in depth whether a circular should be issued to the prosecuting authorities.

The specific nature of Luxembourg's judicial system plays an important role here. One of the consequences to consider is that the issuance of official circulars addressed by the government to the prosecution service has always been regarded as a breach of the principle of the separation of powers.

A similar situation exists with regard to the order to prosecute a given case that the minister can theoretically refer to the prosecution service. As already stated in the evaluation report, this power is very rarely used.

Furthermore, the fact of not issuing circulars has never been seen as a hindrance to the effective prosecution of criminal offences. Where necessary, it is customary for the minister, the Prosecutor General and the two State Prosecutors to meet and consult on the steps to be taken. The existence of oral instructions issued after consultation explains why there is no need for official circulars emanating from higher spheres.

This informal and pragmatic approach proved effective in the fight against terrorism after 11 September 2001, when a series of major decisions about the prosecution of terrorist offences was taken without the issuance of a single official circular.

It was felt that in Luxembourg awareness of bribery offences in prosecution services can be raised in another way, by involving members of the judiciary directly in legislative and administrative work relating

to the fight against bribery. Supporting this view is the fact that the head of the Luxembourg delegation to GRECO is the State Prosecutor of the Diekirch district court, a very senior member of the prosecuting hierarchy. Within the Luxembourg prosecution service, the magistrate responsible for bribery cases is the Deputy State Prosecutor, in other words, the "number 2" of the service, as it were, directly below the State Prosecutor.

The same magistrates have participated extensively in the OECD and GRECO evaluations and attended the meeting of this working group in person when the Luxembourg Phase 2 evaluation report was discussed. They also personally represent the prosecution service in the ad hoc interministerial working group responsible for following up the OECD and GRECO recommendations.

The State Prosecutor of the Diekirch district court also provides the initial and in-service training dispensed by INAP mentioned in connection with Recommendation 2.

Thus, it has been considered that official steps have been taken to raise awareness of bribery in the prosecution service, as recommended, through its members' active participation in legislative and administrative work on the fight against corruption, in the context of which they receive detailed and continuous information about the government's views on the matter.

If no action has been taken to implement recommendation 13, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

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Text of recommendation 14:

Taking note of Luxembourg's continued non-compliance with Article 2 of the Convention, establish in Luxembourg law a clear liability of legal persons for bribery of foreign public officials within a year of the Phase 2 evaluation of Luxembourg, and put in place sanctions that are effective, proportionate and dissuasive. [Convention, Articles 2 and 3]

Steps taken to implement this recommendation at the date of the follow-up report:

In respect of steps taken to implement Recommendation 14, work on the bill to introduce the liability of legal persons into Luxembourg law is ongoing.

As the examiners have already said, legislative work in Luxembourg could draw on Belgian and French law in this area also. Indeed, Belgian and French case law shows that implementing the criminal liability of legal persons is not easy, which is why final decisions on the draft legislation have not yet been taken.

However, the matter remains a subject of work and reflection.

If no action has been taken to implement recommendation 14, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

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Text of recommendation 15:

Raise awareness among prosecuting authorities on the importance of rigorously applying the range of sanctions provided for in criminal law which may be effective and dissuasive with respect to corruption, including confiscation measures, and encourage prosecuting authorities to lodge the range of appeals provided for under the law, should the decisions handed down be too lenient. [Convention, Article 3; Revised Recommendation, Article I]

Steps taken to implement this recommendation as at the date of the follow-up report:

Implementation of Recommendation 15 has also been the subject of discussion within the *ad hoc* interministerial working group responsible for following up the OECD and GRECO recommendations on bribery, since very similar considerations apply to those relating to Recommendation 13.

As regards raising awareness among judges of the application of the sanctions for bribery provided under the law, it has been felt that any attempt by the political authorities to influence the sanctions for bribery ordered by the courts would constitute a clear violation of the principle of the separation of powers.

Consequently, it was agreed that it is only through training that the attention of members of the judiciary can be drawn to the phenomenon of bribery without infringing the principle of the separation of powers, which is a fundamental principle of Luxembourg law.

In this context, it is noteworthy that Luxembourg magistrates receive most of their initial and in-service training at France's *Ecole Nationale de la Magistrature* (national college for the judiciary), an arrangement with which the Luxembourg authorities are entirely satisfied.

As regards encouraging the prosecuting authorities to appeal against judgments in bribery cases regarded as too lenient, I refer readers to my comments in connection with Recommendation 13.

If no action has been taken to implement recommendation 15, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

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Text of recommendation 16:
Raise awareness among tax authorities regarding the importance of making rigorous use of all sanctions available under the Luxembourg tax legislation in order to deter any attempt on the part of taxpayers to pass bribes paid abroad as deductible charges. [Revised Recommendation, Article IV]

Steps taken to implement this recommendation at the date of the follow-up report:

Concerning the application of tax sanctions referred to in Recommendation 16, I refer to developments in connection with:

- Recommendation 5, on the subject of the circulars issued by the directors of the *Administration des Contributions Directes* and the *Administration de l'Enregistrement et des Domaines* to their staff, and

- Recommendation 2 on the subject of the training relating to bribery now provided to civil servants and public officials, including of course those in the tax administration.

Sanctions ordered by the tax authorities against a taxpayer may be appealed to the administrative courts, whose judges, under the principle of the separation of powers, enjoy the same independence as those of the civil and criminal courts.

Thus, with regard to raising awareness among administrative judges of the importance of not showing too much leniency towards persons who commit tax offences linked to bribery, the same comments made with regard to Recommendation 15 apply.

If no action has been taken to implement recommendation 16, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:
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Part II: Issues for Follow-up by the Working Group

Text of issue for follow-up (Phase 2 report, paragraph 133, item n°17):
Whether the current terms – "without right" and case law concept of "corruption pact" – are sufficiently clear to allow for effective prosecution of the foreign bribery offence. [Convention, Article 1]

Steps taken to implement this recommendation as at the date of the follow-up report:

The case in which the judgment of 21 December 2005 (mentioned in connection with Recommendation 11) was issued is the first – and, to date, the only – case brought and heard on the basis of the new bribery provisions introduced in 2001. Consequently, there is no body of case law, in particular with regard to the concepts contained in the texts.

In the case in question the court made no particular mention of the notions "without right" or "corruption pact"; the accused was unable to assert any legitimate and legal reason for soliciting a sum of money in return for providing confidential information and indeed had no right to do so. However, in the case, brought on the basis of the new text which makes soliciting advantages a criminal offence, the public official was found guilty of passive corruption. Prior to 2001, a "corruption pact" would have been required, since a public official who sought a bribe without receiving a positive response was not punishable under criminal law provisions because attempting to solicit a bribe was not at the time a criminal offence.

If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:
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Text of issue for follow-up (Phase 2 report, paragraph 133, item n°.18):
To what extent bribers are being prosecuted and the application of sanctions handed down, notably with regard to confiscation, in order to determine whether these sanctions are sufficiently effective, proportionate and dissuasive to prevent and combat the offence of bribery of foreign public officials. [Convention, Articles 1 and 3]

Steps taken to implement this recommendation at the date of the follow-up report:

In this context, the Luxembourg authorities point out that, in judgment 584/05/X of 21 December 2005, the Appeals Court set aside a judgment in the first instance on the grounds that it had failed to order the confiscation of assets – money not found – delivered by the briber to the bribed (public) official.

Bill 5019 on confiscation, tabled with the Chamber of Deputies on 26 August 2002 and currently being considered by the Conseil d'Etat, provides for confiscation for equivalent value. The bill seeks to amend Article 31 of the Penal Code, the common law provision for confiscation applicable to any criminal offence except where otherwise provided, by introducing, in paragraph 4, the confiscation from the convicted person of assets whose value corresponds to those that were the object or proceeds of the offence for which the person has been convicted. As the provision is of a general nature, forming part of the general section of the Penal Code (Book 1), it will apply to the criminal offences defined in new Articles 310 and 310-1 of the Penal Code (active and passive bribery in the private sector). Insofar as the provision on criminal procedure governing powers of seizure (Article 31 of the Code of Criminal Procedure) states that anything capable of being confiscated may be seized, it applies equally to the possibility of seizing assets suitable for value confiscation.

Another bill setting forth the procedure for preventive attachment of real property in criminal cases was tabled with the Chamber of Deputies on 4 January 2006. It aims to better clarify regulations concerning the seizure of real property.

After these two laws have been adopted and have entered into force, additional steps may be taken to promote confiscation of the proceeds of all bribery offences for equivalent value as a result of judicial practice.

If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

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