

Luxembourg

I. Brief introduction to Luxembourg legal system

The Grand-Duchy of Luxembourg is a parliamentary democracy headed by a constitutional monarch, the Grand-Duke. The function of the three powers (legislative, executive, and judiciary) is described by the Constitution. As a constitutional monarchy, the executive power authority in Luxembourg lies with the Grand-Duke and the cabinet, which consists of several ministers.

The legislative power is exercised by the *Chambre des Députés*, which is composed of 60 representatives elected by Luxembourg nationals aged above 18 years old. Voting is compulsory until the age of 75 years old.

The judicial power is independent from the executive and legislative powers. Judgments and decisions are required to be reasoned, are pronounced in public court session, and are enforced in the name of the Grand-Duke. The judicial system of Luxembourg is divided into a judicial branch and an administrative branch. Besides these two branches there is also a Constitutional Court, which rules on the constitutionality of the laws.

The Luxembourg legal system is based on civil law. Many laws are based on French (e.g., Civil Code) or Belgian (e.g., Commercial Code) legislation. An increasing amount of legislation has also its source in European Union regulations, directives, and decisions.

II. Luxembourg's Anticorruption laws

Luxembourg adopted the OECD Convention on November 21, 1997, and ratified it by a law of January 15, 2001, which has introduced a certain number of articles in the Luxembourg Penal Code (which have been since amended by a law of 13 February 2011). The anticorruption laws are set forth in several articles of the Luxembourg Penal Code¹ (articles 246 to 253, article 310 and article 310-1). The law prohibits bribery of a person holding public authority, or vested with a public electoral mandate, or discharging a public service mission, or persons exercising public authority and other public officials, law enforcement officials and persons performing public duties or holding elective public office.

¹ <http://www.legilux.public.lu/>

Active and passive bribery

The Luxembourg Penal Code distinguishes between active corruption (articles 247, 249, paragraph 2 and article 250, paragraph 2, of the Penal Code) and passive corruption (articles 246, 249, paragraph 1, and 250, paragraph 1, of the Penal Code). The offense of passive corruption is characterized by the following constitutive elements:

- the perpetrator of the offense must be holding a position of public authority, vested with a public electoral mandate, or discharging a public service mission;
- he or she must have sought or received without any right, directly or indirectly, for the perpetrator or for a third party any offer, promise, donation, gift, reward, or advantage of any kind, in order: (i) to carry out or abstain from carrying out an act pertaining to his or her office, duty, or mandate, or facilitated by his or her office, duty, or mandate; or (ii) to abuse his or her real or alleged influence with a view to obtaining distinctions, employment, contracts, or any other favourable decision from a public authority or the government.

The offense of active corruption is characterized by the following elements:

- the perpetrator must be liable for unlawfully offering or giving, directly or indirectly, to a person holding a position of public authority, or vested with a public electoral mandate, or discharging a public service mission, for the accused or a third party any offer, promise, donation, gift, or reward,
- the perpetrator must adopt this behavior in order to induce this same person (i) to carry out or abstain from carrying out an act pertaining to his or her office, duty, or mandate, or facilitated by his or her office, duty, or mandate; or (ii) to abuse his or her real or alleged influence with a view to obtaining distinctions, employment, contracts, or any other favourable decision from a public authority or the government.

The various offenses of active and passive corruption are understood to include the concepts of “giving” and “receiving” (an undue advantage), without involving an automatic requirement for an agreement between the parties.

Foreign official

Article 252 of the Luxembourg Penal Code defines “foreign public official” and provides that the provisions of articles 246 to 251 (active and passive corruption) also apply to such foreign public officials. Foreign public officials are defined by article 252 of the Luxembourg Penal Code as

- Persons entrusted with or agents of public authority or law enforcement, officers or persons holding elected office, or charged with a public service mission in another state; persons sitting in a foreign jurisdiction, even non-professional members of a collegiate entity in charge of deciding a case, or practicing as arbitrators under foreign state regulations or a public international organization regulation concerning arbitration;
- 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, in full respect of the relevant provisions of the treaties instituting the European Communities, the Protocol on the Privileges and Immunities of the European Communities, the Statutes of the Court of Justice, and the implementing regulations thereof, with regard to the withdrawal of immunities;
- Officials or agents of another public international organization, members of a parliamentary assembly of a public international organization and persons practicing judicial functions or record office functions in an other international court whose competence is accepted by the Grand-Duchy of Luxembourg in full respect of the relevant provisions of those public international organizations, public international parliamentary assemblies, or international courts and the implementing regulations thereof, with regard to the withdrawal of immunities.

In compliance with the provisions of article 252, “community official” includes any person who is an official or other contracted employee within the meaning of the staff regulations of officials of the European Communities or the conditions of employment of other servants of the European Communities; and any person seconded to the European Communities by member states or by any public or private body that carries out functions equivalent to those performed by European Community officials or other servants. The same article also provides that members of bodies set up in accordance with the treaties establishing the European Communities and the staff of such bodies shall be treated in the same way as community officials inasmuch as the staff regulations of officials of the European Communities or the conditions of employment of other servants of the European Communities do not apply to them.

Penalties

Criminal penalties and sanctions for bribery (involving foreign public officials or not) vary from fines of €500 to €250,000 and imprisonment from six months to fifteen years and

such additional penalties as loss of civil rights, disqualification from public procurement, and prohibition from practicing certain professions.

Legal persons

Companies are also subject to criminal liability, since a Law of March 3, 2010² introduced the liability of corporate bodies. The specific sanctions for crimes and misdemeanours incurred by legal persons are:

- a fine in compliance with the law;
- special confiscation;
- disqualification from public tenders, either permanently or for a maximum period of five years;
- exclusion from the opportunity to obtain public aid or advantages;
- dissolution.

Predicate offense

Luxembourg legislation considers corruption as a predicate offense whose object or proceeds can give rise to the offense of money laundering. In this respect, note that the law of 12 November 2004 on combating money laundering and terrorist financing, as modified, provides an obligation for some professionals (such as credit institutions, lawyers, and economic advisors) to cooperate fully with the Luxembourg authorities responsible for combating money laundering and terrorist financing.

Exceptions

Luxembourg anticorruption legislation applies in principle without any specific exceptions, but general immunity rules which apply to certain persons regarding their functions or their status would also apply to the anticorruption laws. For instance, members of the government, members of the judiciary, and law enforcement officers benefit from some immunities, even though these are essentially procedural rules which do not allow the individuals concerned to escape prosecution or sanctions.

² <http://www.legilux.public.lu/>

Recent enforcement

One of the first decisions on acts of corruption was the case *Morby vs. Luxembourg State Prosecutor* (March 10, 2003, n°588/2003). Mr Morby was a public officer (director of the Department of Transport Licences within the Luxembourg Ministry of Transports). He abused his function by soliciting and accepting, for him and for the sport club of which he was the president, money and other advantages to favor some companies at the time of the issuance of transport licenses. Mr Morby's conduct was considered a breach of article 246, 1° of the Luxembourg Criminal Code.³ The District Court of Luxembourg found him guilty of corruption and condemned him to imprisonment of nine months with probation and a fine of €2.500.

³ "the fact, for a person entrusted with or agent of public authority or a law enforcement officer or for a person charged with a public service mission or holding elected office, of soliciting or accepting, for himself or for a third party, without right, directly or indirectly, offers, promises, gifts, presents or advantages of any kind whatsoever, in order to perform or refrain from performing an act in accordance with his function, mission or office or facilitated by its function, mission or office"

The three main characteristics of the offense of corruption discussed in this case, were:

- the identity of the recipient of the bribe, which must be “ a person entrusted with or agent of public authority or a law enforcement officer or ... a person charged with a public service mission or holding elected office”
- the illegality of the agreement passed between the recipient of the bribe and the briber, whose object must be the “offers, promises, gifts, presents or advantages of any kind”
- the aim of the corruption pact which must be an “act in accordance with the function, mission or office” of the recipient of the bribe.

The judgment rendered by the District Court of Luxembourg in this case was particularly interesting because of the clarifications it gave about the aim of the corruption pact. In this respect, the judgment highlighted two important points:

- The necessary link between the act in accordance with the function, mission, or office of the public officer and the advantage he receives. The act may be an act that is *per se* lawful, in which case it constitutes the execution by the public officer of his or her duties. However, this act becomes illegal because of the necessary link between the act and an advantage received by the public officer, which is undue. Any advantage received by a public officer from the citizen which is within the officers’s jurisdiction is considered as undue, as public officers do not deserve any advantage (other than salary) resulting from the exercise of their profession.
- The importance of the aim of the corruption pact. The aim of the corruption pact, *i.e.* the performance or the abstention from performing an act in accordance with his function, mission, or office, is the only element which must be taken into account in the establishment of the existence of the offense of corruption under article 246 of the Luxembourg Penal Code, notwithstanding the result, nor the fact that the act of function accomplished by the public officer is fair or unfair.

Recent evolutions of the law

By a law of February 13, 2011⁴, which amended the Luxembourg Penal Code, offenses of active and passive corruption are now understood to include the concepts of “giving” (active) and “receiving” (passive), without involving an automatic requirement for an agreement between the parties (a corruption pact).

⁴ <http://www.legilux.public.lu/>

III. Assessment

Few cases of corruption have been judged in the Grand-Duchy of Luxembourg since the adoption of articles 246 to 253 and 310 to 310-1 of the Luxembourg Penal Code in 2001. There has not been to our knowledge any court decision on cases involving corruption acts of a foreign public official.

The OECD Working Group complimented the Luxembourg authorities on the conscientious way in which it had implemented the OECD Convention in domestic law. Moreover, the Working Group noticed that Luxembourg's implementing legislation even goes beyond the OECD Convention's requirements on some points. Some problems, in particular the absence of a regime of criminal liability for legal persons (which did not exist until 2010), were pointed out by the Working Group. Meanwhile, this particular weakness has been solved by the adoption of the law of March 10, 2010, which has established a comprehensive regime in this respect.

In 2004, after a second report of the Working Group, there were still recommendations made to the Luxembourg for ensuring effective measures for preventing and detecting bribery of foreign public officials and for ensuring adequate mechanisms for the effective prosecution of these offenses.⁵

In its last report in 2011, the Working Group recommended to Luxembourg:

- to ensure that its new criminal liability regime applicable to companies is efficient in case of transnational bribery;
- to continue to strengthen the powers and means of investigation at the disposal of its police force, in particular in order to obtain information from banking and financial establishments as well as tax authorities;
- to review the applicability of its offense of bribery of foreign public officials;

⁵ OECD, Report on the application of the Convention on combating bribery of foreign public officials in international business transactions and the 1997 recommendation on combating bribery in international business transactions, May 28, 2004.

- to increase the awareness of public and business sector of the importance of detecting and reporting transnational bribery, as well as the protection afforded to whistleblowers.⁶

However, the Working Group has appreciated the efforts deployed by Luxembourg to combat bribery, and in particular:

- the introduction into its legal system of the criminal liability regime for companies;
- the priority it has given to responding to requests for mutual legal assistance received from other countries signatories of the OECD Convention;
- the entry into force of a new law on the protection of whistleblowers and two laws aimed at making it easier to obtain information in this sector from banking and financial establishments as well as tax authorities.

As a conclusion, even if the Working Group has noticed that “Luxembourg must step up its efforts to detect and prosecute cases of bribery of foreign public officials, particularly now that its legal framework has been strengthened,” it must be pointed out that Luxembourg legislation has been substantially modified since the ratification of the OECD Convention in 2001 in order to provide a legal regime effectively combatting bribery.

In addition to the treaties noted above, Luxembourg ratified the UN Convention on August 1, 2007. The country is a member of GRECO and the IACA. It is ranked 12 on Transparency International’s 2012 Corruption Perceptions Index.

IV. Texts (For links to relevant websites, see the footnotes to this section)

- Penal Code (articles 246 to 253, article 310 and article 310-1)⁷;
- Law of 12 November 2004 combating money laundering and terrorist financing⁸;
- Law of 10 March 2010 implementing in Luxembourg the criminal responsibility for legal persons⁹;
- Circular 05/211 of the CSSF¹⁰;

⁶ OECD, Corruption: Luxembourg must implement without delay its legislation against the bribery of foreign public officials, says OECD, 30 juin 2011, [en ligne: <http://www.oecd.org>]

⁷ <http://www.legilux.public.lu/>

⁸ <http://www.legilux.public.lu/>

⁹ <http://www.legilux.public.lu/>

¹⁰ <http://www.cssf.lu/>



- Circular 08/387 of the CSSF¹¹;
- The OECD Convention;
- Phase 3 Report on implementing the OECD anti-bribery convention in Luxembourg, June 2011;
- Judgment of the District Court of Luxembourg, 10 March 2003, n°588/2003;
- Judgment of the Appeal Court of Luxembourg, 2 February 2011, n°61/11;
Judgment of the District Court of Luxembourg, 19 May 2011, n°1679/

¹¹ <http://www.cssf.lu/>