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Brief overview over the law and enforcement regime

The legal and regulatory framework in Luxembourg has been partially inspired by neighbouring countries such as France and Belgium, as the country's legal system historically was founded upon the same general principles of law as the French "Code Napoléon" and as all Luxembourg laws and regulations are written in French. Nonetheless, due to both the increasing international characteristics of corruption and bribery practices and the need to have a transnational cooperation (or as suggested, prosecution), Luxembourg laws and regulations have been largely inspired by principles put forth by international organisations and with significant influence of the European Union. Most notably, the 1997 OECD "Anti-Bribery" Convention, and both the United Nations Convention on transnational organised crime (2000) and the United Nations Convention against corruption (2003) were implemented into national law respectively in 2001 and 2007.

The legal and regulatory framework criminalises both the active and the passive behaviours of agents. Corruption, malfeasance in office (abuse of office powers), facilitation payments (still often referred to as "*pots-de-vin*" in French, implying a certain degree of innocuousness), the offer and the acceptance of gifts (up to a certain degree), as well or any other direct or indirect form of trafficking of interests are subject to criminal sanctions in Luxembourg. Following the influence of international bilateral and multilateral international conventions and the important influence of the European Union, Luxembourg legislators reinforced provisions regarding bribery and corruption following the law of February 13th, 2011 concerning the reinforcement of the mechanisms for fighting corruption.

Specifically, articles 246, 247 and 248 of the Luxembourg criminal code ("Code pénal") classify active and passive corruption of public agents as a felony ("crime") a legal classification usually reserved to severe criminal violations (e.g. forgery and falsification of documents or murder), denoting the importance the legislator places on the necessity to fight corruption. If found guilty by a criminal court, both the instigating party (considered to have acted actively in order to create the act of bribery) and the receiving party may be subject to

imprisonment from 5 to 10 years and/or fines ranging from EUR 500.00 up to EUR 187,500.00.

Article 247 of the criminal code provides that "*[a]ny person who unlawfully either directly or indirectly proposes or makes an offer, a promise, a donation, a gift or an advantage of any kind to persons holding public authority, public officials, persons entrusted with public service missions, or any persons entrusted with an elective public mandate, with the objective of getting this person to: 1) either carry out or refrain from carrying out an act relating to their office, duty, or mandate or made possible by the nature of their office, duty or mandate, 2) or abuse their real or alleged influence in order to obtain from a public entity or public administration any distinction, employment contract, public private cooperation, or any other favourable decision, is subject to imprisonment of 5 to 10 years and a fine of EUR 500.00 to EUR 187,500.00*" (free translation made by the author), whereas article 246 of the same legal text defines the "passive" role of acts of corruption, which are subject to identical criminal sanctions.

Further to the modification of the criminal code following a law dated January 15th, 2001 (implementing the OECD "Anti-Bribery Convention" dated November 21st, 1997), article 249 of the criminal code was rescinded, as it was observed that articles 246 et seq. would merely incriminate acts of corruption where a transaction would be made before the misuse of power or the faultable abstention (under the prementioned circumstances). Following the 2001 law, article 249 of the criminal code was modified in order to take into account any acts of corruption where a transaction would be made ex post.

According to predominant Luxembourg case law, it is to be proven that the goal of corruption is the commission of a criminal act relating to the powers held by persons holding public authority, public officials, persons entrusted with a public service missions, any person entrusted with an elective public mandate, as well as persons entrusted by a non-national public mandate or authority, members of foreign judicial deliberative bodies, employees, agents and members of international organisations and all employees of any pillar of the European Union (e.g. the Court of Justice of the European Union, the European Commission), hereinafter defined as "Public Persons". National courts rule that acts of corruption require a convention between aforementioned persons and a third party. The defining characteristic of the felony of corruption is thus the fact that one party of the involved persons must be a Public Person.

Furthermore, article 250 of the criminal code defines and sanctions the active or passive corruption of magistrates and judges, arbitrators, expert witnesses and any other person being part of a judicial deliberative body. Corruption of the prementioned persons are classified as felony and are punishable by a prison sentence from 10 to 15 years and/or fines from EUR 2,500.00 to EUR 250,000.00.

Influence peddling, on the other hand, which is classified as a misdemeanour ("délit"), is considered a lesser form of a similar criminal behaviour. According to article 248 of the criminal code, as specified in detail by multiple court decisions, the notable difference is the fact that influence peddling does not require any convention between two or more parties where one is a Public Person as a legal prerequisite to be punishable. Accordingly, the criminal code defines influence peddling as the solicitation or reception of bribes by any person, aiming at the misuse of real or alleged power to obtain from a public entity or public administration any distinction, employment contract, public private cooperation or any other favourable decision.

The characteristic features of influence peddling are thus: (i) the existence of offers, promises, gifts, donations or any advantage of any kind for oneself or for a third party, (ii) the unlawful solicitation or acceptance of any advantage of any kind (directly or indirectly), (iii) the misuse of real or alleged influence, (iv) providing a favourable decision and, more generally, the intent to commit a criminal act ("dol général"). Persons convicted of influence peddling may be imprisoned from 6 months' time to 5 years and/or be fined an amount from EUR 500.00 to EUR 125,000.00.

Other legal infractions include misuse of public funds (articles 240 and 244 of the criminal code), over- or undercharging of taxes (article 243 of the criminal code), as well as the unlawful appropriation of advantages ("prise illégale d'intérêts"). The latter is defined by article 245 of the criminal code as the unlawful participation of a Public Person in any enterprise or venture which is subject to supervision of a public authority.

These misdemeanours are sanctioned by imprisonment from 6 months to 5 years and/or fines between EUR 500.00 and EUR 125,000.00. Over- or undercharging of taxes will be considered a crime, punishable by imprisonment from 5 to 10 years, if it has been carried out by threats or assaults. The criminal code also provides that Public Persons, if found guilty of any of these charges, may be prohibited from exercising public mandates of public offices.

Finally, it is to be noted that all threats and intimidations against Public Persons aiming at obtaining a favourable decision or abstention is punishable by law (article 251 of the criminal code). Sanctions range from imprisonment from 5 to 10 years, whereas fines may be ordered between EUR 500.00 and EUR 187,500.00.

Under Luxembourg law, there are no specific provisions incriminating the punishable attempt to commit acts of corruption, bribery or influence peddling, as the attempt to violate criminal laws is virtually included in the (active) legal definition itself. A notable exception is provided for by article 243 of the criminal code, which prohibits the over- or undercharging of taxes; attempts to commit said criminal violation are punishable by the same sanctions as the infraction itself.

As regards the private sector, and following the implementation of the 1997 OECD Convention in 2001, the criminal code has been modified to specify that *"[a]ny person who can be qualified as manager or director of a legal entity, or as an agent or employee of a legal entity or private individual, and who unlawfully either directly or indirectly solicits or accepts to receive an offer, a promise, or an advantage of any kind, for themselves or for a third person, or to accept an offer or a promise to refrain from carrying out an act relating to their office or made possible by the nature of their office, without prior authorisation given by neither the board of managers, nor the general assembly of shareholders or the employer, is subject to imprisonment of 1 month to 5 years and a fine of EUR 251.00 to EUR 30,000.00*" (article 310 of the criminal code).

As a continuation of efforts to fight corruption and bribery, national and international authorities also specifically target money laundering. Under Luxembourg law, certain regulated professions are subject to specific anti-money laundering obligations by virtue of applicable legislation, inter alia the amended law of 9 December 1976 on the organisation of the profession of notaries public, the amended law dated 20 April 1977 on gambling and sports betting, the amended law on the judicial system dated 7 March 1980, the amended law of 10 August 1991 on the legal profession, the law of 7 December 2015 on the insurance sector repealing the law of 6 December 1991, the amended law of 5 April 1993 on the financial sector and the amended law of 18 December 2009 concerning the audit profession. Luxembourg has progressively adopted all three European Union AML directives, the present legislation resulting from the implementation of the Third Anti-Money Laundering Directive (2005/60/EC). Following recommendations made by the Financial Action Task Force, Luxembourg amended its legislation in 2010 to the now applicable legal framework in the field of anti-money laundering.

Overview of enforcement activity and policy during the last year

A comprehensive and detailed overview of the enforcement activities is published annually by the Luxembourg Financial Intelligence Unit ("Cellule de renseignement financier"), which is a member of the "Egmont Group" and the Financial Action Task Force. Unlike the legal position of several other member States, the Luxembourg legislator, championed by judicial authorities, provides that the Financial Intelligence Unit is part of the Public Prosecutor's office, i.e. part of the judicial power. The aim is to guarantee independence from both the executive and the legislative powers in order to maintain impartiality and, foremost, to fight criminal infractions such as bribery and corruption.

The latest available report of the FIU, published in October 2016, details the enforcement situation in 2015. Of a total of 11,023 declarations of suspicious transactions made to the FIU, corruption-related felonies and misdemeanours represented a relative share of about 1.41 % of predicate offenses, approximatively representing an amount of EUR 630,753.95. Most suspicious transactions relate to forgery and falsification of documents (48 %) and general fraud (34 %).

Comparatively, a volume equivalent to the legal actions of about sixty-five percent was made following international rogatory letters, both from Member States of the European Union and of the OECD, such as Switzerland, Liechtenstein and the United States of America. Of all requests from third-party countries regarding predicate offenses such as bribery and corruption, none were refused or challenged by the Luxembourg judicial authorities.

The latest OECD country-specific report dates back to 2013; various recommendations, notably at the level of enforcement (specialisation within the Police and amongst the Public Prosecutor's representatives), have been taken into consideration since.

Law and policy relating to issues such as facilitation payments and hospitality

Facilitation payments are not separately criminalised under Luxembourg criminal law, as they fall within the legal qualification of either corruption or bribery.

Regarding the legislative power, provisions of hospitality (e.g. gifts, travel expenses, meals and entertainments) are limited by a code of conduct that was implemented for members of Parliament on March 15th, 2007, most recently amended in July 2014.

Furthermore, State employees and public officers are subject to the law of April 16th, 1979 regarding the general status of public officers and employees, which specifically refers to article 240 et seq. of the criminal code, whilst explicitly forbidding the solicitation, promise or acceptance by any source, either directly or indirectly, any advantages likely to put them into conflict with their legal obligations. More recently, an executive order ("arrêté grand-ducal") dated December 14th, 2014 (as amended on December 28th, 2015), hereinafter the "2014 Executive Order", subjects all members of government to a coordinated code of conduct.

Key elements of 2014 Executive Order provide for distinctions between gifts and donations received by national or foreign public officials and gifts and donations received by private entities. Accordingly, gifts and offers of hospitality offered by national or foreign public officials can be accepted under the conditions that (1) they shall originate from public, national or foreign entities, except for public entities operating mainly in a private competitive sector, and that (2) they must be consistent with the common practises and general rules of diplomacy courtesy. Gifts and offers of hospitality addressed to members of the Government by persons, private or public entities operating mainly in a private competitive sector, might be accepted if they are consistent with the common practises and general rules of diplomacy courtesy, and do not exceed an approximative value of EUR 150.00. Obviously, these provisions are not applicable to any gifts or offers of hospitality potentially likely to influence public officials or State employees in their decision making. Any gifts or offers of hospitality that would not fulfil said criteria, but has nonetheless been accepted by a member of the government, must be reported to the Luxembourg head of government (the Prime Minister), along with the names of the donors and the accepting party and the date of the occasion on which gifts or offers were accepted. In their non-public lives, members of government remain free to accept gifts and offers of hospitality within their private relations that remain without any connection to their public function. The distinction may, however, be very delicate.

Key issues relating to investigation, decision-making and enforcement procedures

A consultative entity, the Corruption Prevention Committee, established in 2007, is tasked with assisting government in fighting bribery and corruption, and is mainly involved in the determination and evaluation of national policies regarding the avoidance and observation of repression bribery and corruption. The Corruption Prevention Committee is not an investigating body, and does not have any judicial or administrative powers. It is presided by the Minister of Justice and composed by members that represent every Luxembourg government branch / ministry.

On an administrative level, various governmental or semi-private entities are charged with the enforcement of bribery and corruption provisions, such as branch of land domains and registration of the Luxembourg government ("Administration de l'Enregistrement et des Domaines"), the Regulatory Commission of the Financial Sector (CSSF) for persons subject to the amended law of 5 April 1993 on the financial sector, the Regulatory Commission of the Insurance Sector (CAA) for persons subject to the amended law of 7 December 2015 on the insurance sector and the President of the Luxembourg Bar Association for lawyers.

Under Luxembourg law, the Public Prosecutor's offices of Luxembourg and Diekirch each have sole judicial jurisdiction as regards criminal offences committed in the respective district. An impartial investigating judge has broad powers to investigate an offense either if an injured party forms a complaint or following a request by the Public Prosecutor.

Article 23 of the Luxembourg criminal procedural code ("Code de procedure pénale") provides for a general and broad obligation for all State employees, public officers and every person entrusted with a mission of public service, to report any felony and/or misdemeanor brought to their attention to the Public Prosecutor's office, notwithstanding any laws on confidentiality or professional secrecy that would otherwise apply. Whilst the rationale behind this law has always been of a general nature and not specific to bribery and corruption, it has been profoundly amended by the law of February 13th, 2011 concerning the reinforcement of the mechanisms for fighting corruption, consisting in the granting of a protection for whistleblowers (private employees and public agents) from retaliation or sanctions.

As a general observation, it is to be noted that Luxembourg does not yet offer additional protection mechanisms or other measures for witnesses and victims of acts of bribery and corruption apart from the provisions of the 2011 Law. Changes to the legislation are discussed publicly, notably following a highly publicized trial, and are suggested by various NGOs and international organisations. At the time this contribution went to press, however, there were no specific draft bills introduced to reinforce the legal regime of protection for

witnesses and/or whistleblowers from sanctions and reprimands.

Some third countries and Member States of the OECD have opted for the possibility, especially with regard to whistleblowing, that anonymous testimony can be used either by the prosecution or would be admissible in court. In Luxembourg this would, however, not be possible. Indeed, anonymous testimony could, and it is the humble opinion of the undersigned that it would, give rise to a shift of balance in the rights of the defending party in criminal matters. Luxembourg legislators, backed by a majority of magistrates, show concern that the right for a defendant to a fair trial, resulting inter alia from the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), prevent the production of anonymous testimony in court hearings.

In 2008, the Group of States against Corruption (GRECO) issued a recommendation for Luxembourg to soften the very restrictive practice of the use of anonymous witnesses as Luxembourg's international obligations in matters of human rights authorise anonymous hearings. Luxembourg reinforced the protection mechanisms by the adoption of the Law of October 6th, 2009 regarding the reinforcement of the rights of victims of criminal offences, but did not follow recommendations regarding practises considered to be contrary to the imperative of a fair and balanced trial.

Unlike Anglo-Saxon legal provisions, Luxembourg did not, until recently provide for the possibility for an alleged offender in criminal matters to plead guilty; even if she/he so did, the Public Prosecutor nonetheless needed to prove the constitutive elements of a felony or misdemeanour and the certainty, beyond any reasonable doubt, that the alleged author was, in fact, the perpetrator. This situation has evolved with the introduction of pre-court settlements ("jugements sur accord") in national legislation by a law dated February 24th, 2015, amending the Luxembourg code of criminal procedure (articles 563 to 578). Although there are substantial differences between the Luxembourg regime and, say, plea deals, the aim of the pre-court settlements is to simplify and shorten the administration of justice where a case is established to a sufficient degree of certainty. Negotiations are performed between the Public Prosecutor and the defendant (generally assisted by an attorney-at-law), and the agreement must be validated by a public court hearing. A limitation to conclude pre-court settlements, especially as regards bribery and corruption, is the fact that they can only be concluded if the alleged offender would face a prison sentence of a maximum of 5 years. The pre-court settlement thus only applies to misdemeanours and, to some extend, various felonies if the court decides beforehand to grant specific legal attenuating circumstances.

Overview of cross-border issues

Luxembourg's constitutional law provides that international obligations supersede national legislation, although authors generally agree that there is an exception to be made where such international obligations would go against the terms of the Luxembourg constitution, against any human right provision or general principles of law as admitted in Luxembourg.

Notwithstanding the superiority, in constitutional law, of international obligations compared to national legislation, it is important to note that most international conventions do not have any direct effect, meaning that they do not confer any specific rights to concerned persons (either alleged offenders, the prosecution, or witnesses and victims).

Luxembourg is a signatory State of multiple multilateral and bilateral anti-corruption conventions, such as the aforementioned 1997 OECD "Anti-Bribery" Convention, the UN Convention against Transnational Organised Crime and the respective Protocols from 2000 and the UN Convention against corruption (2003). Furthermore, Luxembourg, as a member State of the Council of Europe, adhere to the Criminal Law Convention on Corruption, dated 1999. Regarding more specifically the European Union, it should be noted that Luxembourg also adhered to the Convention on the Fight against Corruption Involving Officials of the European Union or Officials of the Member States of the European Union signed by Luxembourg on 26 May 1997, the EU Convention on the Protection of the European Communities' Financial Interests (Council Act of 26 July 1995) and its First and Second Protocols, as well as the EU Convention on the Fight against Corruption involving Officials of the European Union Communities or Officials of the EU Member States (Council Act 26 May 1997).

Finally, multiple agreements have been concluded both on a European level and at an international legal regarding the international mutual assistance of States in general matters of criminal prosecution (i.e. not limited to bribery and corruption) which provide, for instance, tools such as international rogatory letters and close cooperation of Police forces and prosecutions.

Regarding jurisdiction based on territoriality, Luxembourg criminal law has an extraterritorial reach in certain situations, meaning that it applies not only to alleged perpetrators residing or domiciled in the Grand-Duchy for acts carried out in Luxembourg, but to any situation where one or more constitutive elements of the criminal offence have been executed or occurred in Luxembourg or to the disadvantage of a Luxembourg person (e.g., a Luxembourg-based credit institution). Additionally, Luxembourg anti-money laundering legislation in principle also applies to situations in which the predicate offences have taken place in a foreign jurisdiction, subject to the principle of double incrimination.

Following Luxembourg case law (e.g. Court of Appeals, 3 June 2009), offences potentially giving rise to acts of bribery and corruption are subject to legal qualification under Luxembourg law, insofar as the Luxembourg courts are not bound by the legal qualification of the incriminated act in the jurisdiction where it has been committed.

The question of jurisdiction based on nationality of the alleged offender has, with the advent of the internationalisation of societies and legal systems, somewhat lost its *raison d'être*, which historically was based upon the believe that national courts would constitute a certain guarantee that trials would be fair. Although article 5 of the code of criminal procedure accordingly provides that every citizen of Luxembourg who is suspected of a violation of criminal law provisions may be prosecuted and judged within the Grand-Duchy of Luxembourg, in fact, criminal prosecution will however only occur if the defendant is arrested in Luxembourg or if the government requests an extradition or an international arrest warrant.

Corporate liability for bribery and corruption offences

Under Luxemburg law, a legal entity can be held criminally liable for offences committed by one of its bodies, such as directors, managers and statutory auditors. The law introducing criminal liability for legal entities had been adopted on March 3rd, 2010 and has amended the Luxembourg criminal code and the Luxembourg code of criminal procedure. Following the 2010 amendment, article 34 of the criminal code states that "*(if) a felony or misdemeanour is committed in the name of and in the interest of a legal entity by one of its legal bodies or by one of its de jure or de facto managers, that legal person may be held criminally liable and may incur the penalties provided for by articles 35 to 38 (of the Luxembourg criminal code)*". In such respect, "legal entity" refers to legal persons, but also to enterprises owned or controlled by the Luxembourg State; only municipalities are exempt from the scope of the aforementioned article 34.

Legal entities being found criminally liable for an offence committed by one of its bodies, can be convicted to fines between EUR 500.00 and EUR 750,000.00. Depending on the severity of the offense, a legal entity can also face asset seizing and exclusion from participating in open tendering procedures. Finally, a legal person may be dissolved in cases where it had been incorporated only in order to commit or to facilitate the commission of the respective offence.

Proposed reforms / The year ahead

In the field of bribery and corruption, at the time this contribution went to press, there were no draft bills or proposed reforms for the year ahead.

In the closely related field of the fight against money laundering and financing of terrorism, Luxemburg must still transpose the forth European Anti-Money Laundering Directive (EU) No. 2015/849, the delay for the implementation into national law having originally been set for June 26th, 2017. The draft bill (reference 7128 of the Parliament) is still subject to comments and reservations by various consultative bodies, whose concerns are being taken into consideration, causing a delay in the vote of the draft bill. The key elements of the forth AML directive would be the broadening of the scope to include foreign banking and financial institutions if they do business in Luxembourg through a branch or following the freedom to provide services in the Single Market, any person operating in the activity of Family Office and bailiffs in cases when they carry out valuation and public sales. Furthermore, the threshold for cash transactions which persons trading in goods qualify as "obliged entities" and in which an obligation to identify the customer is triggered is reduced from EUR 15,000.00 to EUR 10,000.00. Most notably, also with regard to bribery and corruption, the forth AML directive provides for the obligation by the Member States to create a central registry containing information on the beneficial ownership of legal entities, including structures without a separate legal personality, such as UK and US trust.

In the recent Luxembourg news, the so-called "**Lux Leaks**" trial was highly publicised and debated. The main defendant, a French person working in Luxembourg, had initially been sentenced to imprisonment and a fine by the Luxembourg District Court sitting in correctional matters for having violated both contractual and legal provisions regarding professional secrecy by leaking internal documents from his employer, evidencing various legal constructs preapproved by the Luxembourg tax authorities. Seeking recourse against this punishment he considered harsh and illicit, the defendant has submitted his case to the Court of Appeals, where he was fined for the aforementioned infractions, but freed from imprisonment. Declaring that he should be freed from all sanctions, the defendant has filed a recourse with the Luxembourg Supreme Court ("Cour de cassation"), which, at the time of this contribution goes to press, is still pending.

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