

## New competition law adopted

On 24 November 2022, Luxembourg enacted a new law on competition ("**Law**"), aiming to overhaul the current competition legislation and transpose into Luxembourg law Directive (EU) 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market ("**Directive**"). The Law repeals and replaces the law on competition of 23 October 2011. It is due to enter into force on 1 January 2023.

**Why is it important?** The Law transforms both the internal organisation and the statute of the Competition Council (*Conseil de la concurrence*). It becomes an "*établissement public*" and will be renamed "National Competition Authority" (*Autorité de concurrence du Grand-Duché de Luxembourg*, the "**Authority**"). In addition, the Law modifies the powers of the Authority during the investigation as well as certain other elements of procedure.

However, the Law does not introduce a national merger control regime. On this topic, a draft bill has been announced for Spring 2023 but this timetable may seem unlikely in view of the Parliamentary elections scheduled to take place on 8 October 2023.

**What does it mean?** Some of the most notable changes are analysed below.

→ Change in statute of the Authority

While the current *Competition Council* is an independent administrative authority, the *Authority*, which will commence operations on 1 January 2023, will be a public corporation with legal personality and financial and administrative autonomy. This change aligns with the Directive's objective to ensure that competition authorities "*have the guarantees of independence, resources, and enforcement and fining powers necessary to apply Articles 101 and 102 TFEU effectively*" (Recital 3 of the Directive).

The State Information Technology Centre is responsible for the operation of the Authority's IT facilities. They are crucial for the Authority's efforts to conduct investigations, which require efficient digital means. Moreover, to remedy the issue of a lack of recruitment, State employees and State officials will both have the possibility to become investigators.

The members of the Authority's decision body (the "*Collège*") must have Luxembourg nationality since they will exercise prerogatives of State power.

Furthermore, the Law introduces specific provisions aiming to safeguard the impartiality and independence of the Authority. According to Article 7, the Authority has to work impartially in the interest of an effective and uniform application of the rules on anti-competitive practices. In addition, the members of the Collège and the agents have to be independent and must refuse any instructions by the government. Moreover, for a period of two years

after leaving office, they cannot deal with implementation procedures that might give rise to conflicts of interest. These provisions are essential to protect the Authority from any political influence. In addition, Article 12 adds new details about the transparency of recruitment procedures and provides that “*the members of the Collège are appointed on the basis of their competence and experience in competition matters*”.

→ Framework for the handling of complaints

The Law introduces a more detailed framework for the submission and handling of complaints. For example, Article 22 provides a detailed list of information that a complaint must contain. Further, if a complaint is rejected, the Authority must now give reasons for this decision and base it on one of five possible justifications listed in Article 22 of the Law. The decision to reject a complaint may be appealed before the Administrative Tribunal, which can either annul or alter the decision (*recours de pleine juridiction*).

→ Obligation to give reasons to close a case

According to Article 35 of the Law, the Authority must state the reasons that led it to close a case. If the case originated from a complaint, the Authority must inform the plaintiff and give him the opportunity to comment before closing the case. Any such decision can only be appealed to the hierarchy and not before the Administrative Tribunal, unlike the decision to reject a complaint (see above).

→ Framework for investigative powers

The Law distinguishes between the Authority’s “verification” powers (*pouvoirs de contrôle*) and its “inspection” powers (*pouvoirs d’inspection*). The verification powers, laid out by Article 24 of the Law, allow the Authority, when announced, among other things, to have access to a company’s premises, inquire and ask questions, but also to request the disclosure of documents and transcription of stored data. Unlike the inspection powers defined in Article 25, the verification powers are exercised by the Authority without the authorisation of a judge (except if the premises subject to verification are also used for residential purposes).

To exercise its inspection powers, the Authority must obtain authorisation from the investigating judge (under the Law of 23 October 2011, the president of the district court was the competent judge). The judge should only order an inspection measure if it appears to be justified and proportionate to the aim pursued.

In the event of an inspection, the Law governs the treatment of documents covered by attorney/client privilege. Article 26 (7) provides that the company may request the confidential treatment of such documents. If there is disagreement about the nature of the document, it is put under seal (*mis sous scellé*) in order to allow the company to launch an appeal against the inspection within a deadline of five days before the Council Chamber (*chambre du conseil*) of the Court of Appeal.

As regards the inspection of data, the Law provides that if the filtering of data proves too complicated, the data may be seized as a whole and put under seal (*mis sous scellé*). The seized data will be sorted in the presence of a representative of the company. If the company’s data is stored outside its premises, the Authority will theoretically require a specific order by the judge in order to inspect it. When refusing access to data stored outside the premises, the company should be mindful of Articles 31 and 32 of the Law, which allow the Authority to sanction a company for lack of cooperation during the investigation.

An appeal may be launched against the order of the judge authorising the inspection, but also, against the conduct of the inspection itself (for example, should there be a

disagreement about the confidential nature of a document to be seized). The latter is a novelty introduced by the Law. Both appeals are brought before the Council Chamber (*chambre du conseil*) of the Court of Appeal (Article 25(8) and Article 26(12)). The appeals do not suspend the investigation or the proceedings.

→ Possibility of settlement

Article 47 of the Law provides for a framework for a company and the Authority to settle. In this case, the company must recognise that it violated the Law and the Authority may grant a reduction of up to 30 percent of the fine. The Authority's decision to terminate the settlement procedure may not be appealed.

→ Leniency regime specified

The leniency regime is amended to comply with the requirements of the Directive, aimed at harmonising the procedure at European level. The Law details the conditions and procedure linked to "markers" (*marqueurs*) through which a company may be granted a place in the queue for leniency for a certain period, allowing it to gather the necessary information and evidence. In addition, the conditions to be met by a leniency applicant and the formal requirements of such an application are further specified.

**Impact and what's next?** The Law is organisational and procedural in scope. Hence, the definition and appreciation of competition law infringements (in essence, agreements or concerted practices restricting competition or abuses of dominant positions) remain unchanged.

Initially, the Luxembourg legislator wanted to include a provision in the Law relating to the government's power to fix prices in exceptional circumstances. Due to a formal opposition by the State Council, the bill was divided into two parts. The legislator will continue to discuss this specific provision in a separate draft bill.

As the Law is expected to strengthen the Authority, an important recruitment effort is envisaged. Useful procedural clarifications and additions, such as regarding complaint handling, available appeals and the conditions for settlement and leniency increase legal certainty and are to be welcomed.

It is hoped that the Law will further increase the effectiveness of the application of competition law in Luxembourg.

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