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## A new legal framework in Luxembourg for a more effective application of competition rules

On 24 November 2022, the Luxembourg Chamber of Deputies adopted bill no 7479A on competition (the "Law"), which aims to provide the Luxembourg competition authority with the necessary means to implement competition rules more effectively.

The main objective of the new law is to allow the Luxembourg competition authority to act more independently. The new rules are also expected to strengthen legal certainty in the activities of the Competition Authority, especially concerning its investigative powers, and the options to close proceedings. This is achieved by introducing additional procedural guarantees and further clarifications on the relevant procedures.

The new rules will become effective as of 1 January 2023.

### Main Changes

The independent administrative competition authority formerly known as the Competition Council, will be transformed into a public institution, now called the National Competition Authority ("**Competition Authority**"). The Law transposes Directive 2019/1 of the European Parliament and the Council (the "**Directive**") into Luxembourg Law, without modifying the substantive provisions of the competition law in force to date. The objective of the Directive is to ensure that national competition authorities "have the necessary guarantees of independence, resources, and enforcement and fining powers" for the effective application and enforcement of Articles 101 and 102 TFEU.<sup>[1]</sup>

The Competition Authority will operate as of January 2023 as "*établissement public*", allowing for independent standing before the administrative courts.

### Procedural Changes and Clarifications

#### Investigative Procedure

The Law introduces a more detailed framework for the Competition Authority's investigation powers and procedure.

**Complaints.** Article 22 establishes new criteria for the filing of complaints, as well as with regards to the Competition Authority's response to complaints. The Law sets out a list of minimum information that must feature in a complaint and obliges the Competition Authority to justify the rejection of a complaint. This rejection decision can be appealed by the complainant.

**Investigation powers.** Moreover, the new rules make a distinction between the Competition Authority's **inspection powers** and **verification powers**:

- Article 25 of the Law outlines the process and requirements for so-called inspections, which relate primarily to dawn raids and necessitate judicial authorisation by the competent investigating judge ("*juge d'instruction*").<sup>[2]</sup>
- Article 24 of the Law sets out more general verification powers, which relate primarily to observatory and control powers in the public space (with an explicit exclusion of residential / private spaces) – these can be carried out without prior judicial permission.

**Legal privilege.** The companies subject to inspection may be assisted by a lawyer.<sup>[3]</sup> Communications between the company and their lawyer about an alleged competition law violation are legally privileged under Article 26(7) of the Law. However, the inspected company must inform the investigating officer about the nature of such documents, and request for their privileged treatment. The Law also provides a resolution mechanism in case of disagreement over claims for legal privilege, in which case the Competition Authority has to abstain from reviewing and seal the documents over which the parties claim legal privilege to allow for judicial review – an appeal must be lodged within five days of the decision to contest a claim for legal privilege and the sealing of the documents.<sup>[4]</sup> We recommend that our clients clearly label communications with their lawyers and file them separately from other documents (which may be collected during inspections) to avoid disputes about legal privilege.<sup>[5]</sup>

**Decisions to discontinue an investigation & appeals.** Where the Competition Authority decides not to proceed with an infringement decision or discontinue its investigation, Article 35 of the Law obliges the Competition Authority to inform any potential complainant of this decision and to state its reasons.

Additionally, affected parties may now lodge an appeal not only against inspection orders,<sup>[6]</sup> but also against specific conduct during the inspection process.<sup>[7]</sup>

## Settlement mechanism & Leniency

In addition to the option of offering commitments to discontinue an investigation and the leniency programme, there is now also a settlement procedure according to Article 47 of the Law. A settlement agreement requires the admission of having committed an infringement, and the acceptance of the proposed fine – in return, fines may be reduced by up to 30%.

In the context of the leniency programme, Article 55 of the Law introduces a "marker" system, which allows applicants to protect their place in the (temporal) order of leniency applications. The Authorities can determine a specific time period for the applicant to collect the necessary information and evidence required for a reduction of fines or immunity.

## Expected Developments in Merger Control

The Law neither affects nor pre-empts the ongoing legislative efforts to introduce merger control in Luxembourg. Nevertheless, the Law can be viewed as a "cornerstone" for future competition law developments, as the new design and extended competences of the Competition Authority will be a crucial element for its evolving enforcement regime.<sup>[8]</sup>

<sup>[1]</sup> Article 1 of the Directive. Article 4 of the Directive lays down the requirements for appropriate levels of independence of national competition authorities, and Article 5 for the resources. Articles 6 – 9 elaborate on the necessary investigative powers. Articles 10 – 12 discuss the termination of proceedings. Articles 13 – 23 lay down the fining powers in-depth.

<sup>[2]</sup> Prior to this, the president of the district court was the competent judge.

<sup>[3]</sup> Article 26(6) of the Law

<sup>[4]</sup> Article 26(7) and (12) of the Law

<sup>[5]</sup> Especially in light of Article 26(5) of the Law, which allows automated data collection of certain files.

<sup>[6]</sup> Article 25(8) of the Law

<sup>[7]</sup> Article 26(12) of the Law

<sup>[8]</sup> Previous news pieces from Arendt on the developments on Luxembourg's national merger control:

[Read the Newsflash Luxembourg Ministry of Economy initiates public consultation on the design of a national merger control regime here\\_](#)

[Read the Newsflash Merger Control in Luxembourg – first results of the public consultation procedure and next steps here\\_](#)

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