

Template pursuant to Section 3 (a) of the ICN Framework on Competition Agency Procedures

Competition Council, Luxembourg

The following template is submitted by the Competition Council, Luxembourg, pursuant to Section 3(a) of the ICN Framework on Competition Agency Procedures (“CAP”).

I. Introduction

The Competition Council of Luxembourg (hereafter: the “Council”) is an independent administrative authority. It ensures the proper functioning of markets by monitoring the respect of national and European competition rules (<https://concurrency.public.lu/fr.html>).

II. Laws, Regulations, and Policies relevant for the implementation of the CAP

The Council aims to protect both the interests of consumers and the interests of undertakings from behaviors that could have the object or the effect of restricting competition.

The Council's powers stem from the Competition Act of 23 October 2011¹ as amended. Previously, the Competition Act of 17 May 2004 had established two separate entities, i.e. one in charge of investigations and the other of decision-making. As a result of the entry into force of the current Act, these two entities have merged into a single one, which continues to apply a strict separation between investigative and decision-making powers, in order to guarantee the impartiality of decisions. From a substance point of view, Luxembourg legal provisions are similar to European competition rules.

The Council deals with antitrust cases. It can impose fines on undertakings involved in cartels or undertakings that have abused their dominant position. The Council is not competent for the implementation of state aids rules. There is in addition no *ex ante* merger control regime in Luxembourg. The Act provides for the opening of antitrust proceedings *ex officio* or *upon request* (complaint).

The Council's duties are not limited to infringement decisions. The Council prevents anti-competitive behavior by making commitments offered by undertakings legally binding (commitments decisions) or by imposing interim measures. The Council may also conduct sector inquiries to assess the degree of competition in specific sectors. In addition, the Council promotes competition (advocacy) through the release of information notes and guidelines, e.g. on the benefits of compliance with competition rules its presence on social networks (Twitter and LinkedIn).

¹ Find the English version of our Competition Act: <https://concurrency.public.lu/dam-assets/fr/legislation/Competition-Act-of-23-October-2011.pdf>.

The Council may also issue opinions on any competition issue and on any draft law or regulation, *ex officio* or at the request of the Minister of Economy.

Eventually, the Council cooperates with:

- administrative and judicial courts;
- the European Commission, pursuant to Regulation 1/2003;
- other national competition authorities, pursuant to Regulation 1/2003 and within the European and International Competition Networks.

b) Non-Discrimination

Each Participant will ensure that its investigation and enforcement policies and Procedural Rules afford Persons of another jurisdiction treatment no less favorable than Persons of its jurisdiction in like circumstances.

The Council does not take into account the nationality, residence or origin of the persons subject to its investigative measures and enforcement policies. All persons concerned are treated in the same way.

c) Transparency and Predictability

- i. Each Participant will ensure that Competition Laws and regulations that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- ii. Each Participant with the authority to adopt Procedural Rules will have in place such rules applicable to Investigations and Enforcement Proceedings in its jurisdiction.*
- iii. Each Participant will ensure that Procedural Rules that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- iv. Each Participant will follow applicable Procedural Rules in conducting Investigations and in participating in Enforcement Proceedings in its jurisdiction.*

- v. *Each Participant is encouraged to have publicly available guidance or other statements, clarifying or explaining its Investigations and Enforcement Proceedings, as appropriate.*

The publication of the laws in the Official Journal completes the process of their promulgation in Luxembourg.

Legilux (Luxembourg's legal portal) provides every citizen with free and direct online access to national laws and regulations.

The Council also makes available to the public on its website the applicable legal framework and any relevant information on its activities. The Council publishes an annual report, which reviews all its activities during the past year. Procedural rules are also available online.

On the Council's website, anyone has access to all the Council's decisions since its creation.

d) Investigative Process

- i. *Participants will inform any Person that is the subject of an Investigation as soon as practical and legally permissible of that Investigation, according to the status and specific needs (e.g., forensic considerations) of the Investigation. This information will include the legal basis for the Investigation and the conduct or action under Investigation.*
- ii. *Participants will provide any Person that has been informed that it is the subject of an Investigation, or that has notified a merger or other transaction or conduct, with reasonable opportunities for meaningful and timely engagement on significant and relevant factual, legal, economic, and procedural issues, according to the status and specific needs of the Investigation.*
- iii. *Participants will focus investigative requests on information that they deem may be relevant to the competition issues under review as part of the Investigation. Participants will provide reasonable time for Persons to respond to requests during Investigations, considering the needs to conduct informed Investigations and avoid unnecessary delay.*

The persons concerned by the Council's investigations are informed as soon as practical and legally permissible of that investigation, according to the status and specific needs of the Investigation.

For example, when the Council sends a request for information to the undertakings involved, such a request would provide information on the applicable legal basis, the type of alleged infringement and the purpose of the request. The request for information also indicates the deadline for replies².

Similarly, the Council may carry out any necessary inspection. The investigators have an obligation to provide to the undertaking with a copy of the Council's decision ordering the

² 1 month at least, pursuant to article 14 of the Act.

inspection. Such a decision must contain the object of the inspection and its purpose. The inspection must also be authorized by a decision of a judge.

e) *Timing of Investigations and Enforcement Proceedings*

Each Participant will endeavor to conclude its Investigations and aspects of Enforcement Proceedings under its control within a reasonable time period, taking into account the nature and complexity of the case.

The Council has to conclude its proceedings within a reasonable time period. The draft proposing to amend the Act in order to transpose the directive ECN+ should – once adopted- explicitly refer to this obligation.

The imposition of sanctions is subject to certain limitation periods (3 years for breach of rules related to requests for information and 5 years for other infringements³).

Fines and periodic penalty payments imposed by the Council are time-barred after five years⁴.

f) *Confidentiality*

- i. Each Participant will have publicly available rules, policies, or guidance regarding the identification and treatment of confidential information.*
- ii. Each Participant will protect from unlawful disclosure all confidential information obtained or used by the Participant during Investigations and Enforcement Proceedings.*
- iii. Each Participant will take into consideration both the interests of the Persons concerned and of the public in fair, effective, and transparent enforcement regarding the disclosure of confidential information during an Enforcement Proceeding.*

According to Article 27 of the Competition Act, members, agents and investigators of the Council as well as experts appointed to issue an expert opinion or any other person duly mandated by the Council are subject to professional privilege, even after their duties have come to an end.

There are exceptions to this principle:

- in the case they are called to testify in court;

³ Article 23 of the Act.

⁴ Article 24 of the Act.

- in cases where the law requires them to disclose these secrets (e.g. actions for damages⁵).

Undertakings may request that the information they submitted be treated as confidential. Pursuant to Article 26 of the Act, undertakings must specify the nature of the information they consider as confidential, as well as the damage that the disclosure of such information may cause.

The person in charge of the investigation assesses confidentiality requests. It may result in an acceptance or in a total or partial refusal. This decision may also grant different access rights to the concerned information depending on the situation of the persons concerned. This decision is notified by registered letter with acknowledgement of receipt (indicating the time limits and remedies available to the undertakings against the decision).

g) Conflicts of Interest

Officials, including decision makers, of the Participants will be objective and impartial and will not have material personal or financial conflicts of interest in the Investigations and Enforcement Proceedings in which they participate or oversee. Each Participant is encouraged to have rules, policies, or guidelines regarding the identification and prevention or handling of such conflicts.

Pursuant to Article 7 of the Act, "The members of the Council cannot intervene in a case when it affects direct or indirect interests that they have in an economic activity, failing which the Council's decisions will be declared void".

h) Notice and Opportunity to Defend

- i. Each Participant will provide Persons subject to an Enforcement Proceeding timely notice of the alleged violations or claims against them, if not otherwise notified by another governmental entity. To allow for the preparation of an adequate defense, parties should be informed of facts and relevant legal and economic reasoning relied upon by the Participant to support such allegations or claims.*
- ii. Each Participant will provide Persons subject to a contested Enforcement Proceeding with reasonable and timely access to the information related to the matter in the Participant's possession that is necessary to prepare an adequate defense, in accordance with the*

⁵ Following the rules set by the Law of 5 December 2016 on actions for damages for breaches of competition law rules.

requirements of applicable administrative, civil, or criminal procedures and subject to applicable legal exceptions.

- iii. Each Participant will provide Persons subject to an Administrative Proceeding with reasonable opportunities to defend, including the opportunity to be heard and to present, respond to, and challenge evidence.*

The Act provides for specific time limits for the parties to complete various actions and use their defense rights, especially once the statement of objections has been issued (access to the file, observations, hearings, etc.) Pursuant to Article 25, the statement of objections has to specify the nature and the legal assessment of the facts on which the proceeding was initiated. The undertakings targeted by the statement of objections can submit comments⁶.

Further to the statement of objections, undertakings have a right to access the file and to review all the documents that will be added subsequently. These documents are available from the day on which the statement of objections has been sent.

Business secrets or confidential information transmitted by undertakings or seized during the investigations shall not be disclosed, except in cases where the disclosure or consultation of such documents is necessary for the proceedings or for the exercise of the parties' rights. Documents considered confidential are removed from the file or confidential information is anonymized.

Before the Council adopts an infringement decision, parties will have the opportunity to express their point of views at a hearing that may take place only after a period of not less than two months following the notification of the statement of objections.

The Council, in its decision, also indicates the remedies available to the recipient undertakings.

i) Representation by Counsel and Privilege

- i. No Participant will deny, without due cause, the request of a Person to be represented by qualified legal counsel of its choosing.*
- ii. Each Participant will provide a Person a reasonable opportunity to present views regarding substantive and procedural issues via counsel in accordance with applicable law. Notwithstanding the foregoing, Persons may be required to provide direct evidence.*
- iii. Each Participant will recognize applicable privileges in accordance with legal norms in its jurisdiction governing legal privileges, including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or rendering of legal advice. Each Participant is encouraged to have rules, policies, or guidelines on the treatment of privileged information.*

⁶ 1 month at least.

Duly mandated lawyers may provide the requested information on behalf of their clients, in response to a request for information. In addition, the lawyer can be present during the hearing in order to gather information. Their presence is also allowed during inspections.

During the investigation measures, the parties concerned may interact with the Council's person in charge, on any aspect of the investigation measure.

More specifically, with regard to inspections, Council's investigators follow the same practice as the Commission, e.g. they may wait, for a reasonable period, for the arrival of the undertaking's legal counsel⁷.

The Council is bound by the *Akzo* case law that recognizes professional privilege for correspondence between the legal counsel and his client. This right will be explicitly included in the new law transposing the ECN+ Directive (still to be adopted).

j) Decisions in Writing

- i. Each Participant in charge of issuing decisions or orders will issue in writing its final decisions or orders in which it finds a violation of, or imposes a prohibition, remedy, or sanction under applicable Competition Laws. Such final decisions or orders will set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions. Each Participant will ensure that all final decisions are publicly available, subject to confidentiality rules and applicable legal exceptions.*
- ii. Each Participant will ensure that all commitments it accepts to resolve competition concerns are in writing. Subject to confidentiality rules and applicable legal exceptions, each Participant will (i) make public the commitments it accepts, and (1) describe the basis for the competition concerns or (2) reference public materials in which those concerns are expressed, or (ii) provide a summary explanation of the commitments and the reasons for them.*

Both infringement and commitments decisions are in writing.

The decisions fulfill the requirements mentioned above (findings of fact, conclusions of law, sanctions and remedies).

These decisions are publicly available⁸, on the Council's website.

The Council publishes a non-confidential version on its website in order to comply with confidential requirements.

k) Independent Review

No Participant will impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws unless there is an

⁷ See the Explanatory note on Commission inspections pursuant to Article 20(4) of Council Regulation No 1/2003, point 6: https://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf.

⁸ The commitments are also publicly available, as mentioned in the published decision.

opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body).

The Act provides for the right to appeal the Council's decisions before the administrative Courts.

There are two levels of jurisdiction:

- the Administrative Tribunal, which can either annul or amend Competition Council's decisions
- and the Administrative Court (Court of appeals), which carries out a judicial review of the Administrative Tribunal's decisions.