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LEGISLATION AND JURISDICTION

1. What is the relevant merger control legislation? Is there any pending legislation that would affect or amend the current merger control rules described below?

The Law on Competition of 23 October 2011 (Mémorial A 2011, No 218, p 3755; the 2011 Law) prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition (*Article 3 of the 2011 Law*) and the abuse of a dominant position by one or several undertakings (*Article 5 of the 2011 Law*).

The 2011 Law contains no specific provisions on mergers. There is no prior merger control regime under Luxembourg law. Nevertheless, mergers and acquisitions and the behaviour of parties involved may be subject to an a posteriori control by the Competition Council pursuant to Article 5 of the 2011 Law.

In this respect, reference must be made to the Competition Council's *Utopia decision 2016-FO-04*, in which it recently asserted its competence to exercise an *ex post* control of concentrations which strengthen an existing dominant position by relying, in the absence of a prior merger control regime at national level, on the provisions prohibiting the abuse of a dominant position (*Article 5 of the 2011 Law and Article 102 TFEU*). The case concerned the already completed acquisition by a dominant cinema management company of a small local competitor. On the basis of the judgment of the ECJ of 15 July 1970 in *Case C-6/72 Europemballage Corporation and Continental Can Company Inc v Commission (Continental Can)*, the Competition Council stated that the acquisition of a competitor may constitute an abuse of a dominant position if it affects the structure of the market to such an extent that the dominant undertaking faces no competitive pressure from its remaining competitors, given that they do not represent a real counterweight. However, the Competition Council applied the "failing firm defence" and closed the case without further action on the grounds that the acquisition did not have anti-competitive effects. See the answer to *question 32* for further details on this case.

The *Utopia* decision reinvigorated the discussion among specialists on the question whether Luxembourg should introduce a merger control regime, which has been the object of ongoing debate. In 2016, the Competition Council published the report of an expert working group asked to examine the question of the benefits of introducing a merger control system in Luxembourg. The authors of the report expressed themselves as being in favour of introducing such a regime. However, during a parliamentary debate at the end of 2016, the Minister of Economy confirmed that the government does not intend to introduce a prior merger control regime.

Finally, agreements between or practices of merging undertakings may be caught by Article 3 of the 2011 Law if they give rise to agreements or concerted practices having as their object or their effect the prevention, restriction or distortion of competition.

For sector-specific legislation, see *question 7*.

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2. What are the relevant enforcement authorities, and what are their contact details?

The 2011 Law provides that the Competition Council, an independent administrative authority, is a collegial body composed of four members, namely the President and three councillors, as well as five substitute councillors. It holds investigative competences mirroring those granted to the European Commission under Regulation No 1/2003 (*Articles 14 to 19, 25 and 26 of the 2011 Law*), as well as decision-making competences relating to the finding of an infringement and requests to bring it to an end, the adoption of interim measures, the acceptance of commitments or the imposition of fines (*Articles 11, 12, 13 and 20 of the 2011 Law*). The councillor in charge of the investigation of a case is not entitled to take part in the deliberations and decisions of the Council regarding that case. The members of the Competition Council are assisted by investigators in the performance of their duties.

The contact details of the Competition Council are as follows:

Competition Council
19–21, boulevard Royal
L-2449 Luxembourg
Grand-Duché de Luxembourg
t +352 247 84174
e info@conurrence.public.lu
w www.conurrence.public.lu

3. What types of transactions are potentially caught by the relevant legislation?

There are no specific merger control provisions in the 2011 Law.

However, as mentioned in the answer to *question 1*, in its *Utopia* decision, the Competition Council recently asserted its competence on the basis of Article 5 of the 2011 Law and Article 102 TFEU to analyse *ex post* concentrations within the meaning of Regulation No 139/2004 that may strengthen an existing dominant position.

Further, as also mentioned in the answer to *question 1*, agreements between or practices of merging parties may be caught by Article 3 of the 2011 Law if they have as their object or effect the prevention, restriction or distortion of competition.

4. Are joint ventures caught, and if so, in what circumstances?

Absent a prior merger control regime, only joint ventures giving rise to an anti-competitive agreement within the scope of Article 3 of the 2011 Law or to an abuse of a dominant position as defined in its Article 5 are caught by the 2011 Law.

5. What are the jurisdictional thresholds?

There is no prior merger control regime, so the 2011 Law does not provide for specific jurisdictional thresholds for merger control. See also the answer to *question 1*.

6. Are these thresholds subject to regular adjustment?

Not applicable (*see question 5*).

7. Are there any sector-specific thresholds?

Not applicable (*see question 5*).

However, in particular sectors, specific legislation applies to mergers and acquisitions, and provides for compulsory notification or authorisation if specific thresholds are met. Nevertheless, such notification leads to an assessment based not on competition law, but on other criteria.

Pursuant to Article 6, paragraph (5) of the Law of 5 April 1993 on the financial sector (the LFS), as amended, any natural or legal person who has taken a decision to either acquire, directly or indirectly, a qualifying holding in a credit institution or to further increase, directly or indirectly, such a qualifying holding as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20%, 33 1/3% or 50% or so that the credit institution would become its subsidiary, shall first notify in writing such decision to the Commission de Surveillance du Secteur Financier (CSSF), which may oppose the transaction upon reasonable grounds on the basis of the criteria set out in the LFS.

Article 8(1) of the Law on electronic communication networks and services of 27 February 2011 requires that any physical or legal person who intends to provide electronic communication services or networks shall notify the Institut luxembourgeois de régulation at least 20 days before the start of its activities in Luxembourg.

Stock-exchange-related legislation also provides for specific thresholds, such as Articles 8 and 18 of the law of 11 January 2008 on transparency requirements for issuers of securities, as amended, which provide that a shareholder acquiring or disposing of shares of an issuer for which Luxembourg is the home member state, whose shares are admitted to trading on a regulated market and to which voting rights are attached, shall notify the issuer and the CSSF of the proportion of voting rights of the issuer held by the shareholder as a result of the acquisition or disposal where that proportion reaches, exceeds or falls below the thresholds of 5%, 10%, 15%, 20%, 25%, 33 1/3%, 50% and 66 2/3%.

8. In the event the relevant thresholds are met, is a filing mandatory or voluntary?

In the absence of a prior merger control regime, the 2011 Law does not provide for the mandatory or voluntary filing of proposed concentrations.

9. Can a notification be avoided even where the thresholds are met, based on a “lack of effects” argument?

Not applicable (*see question 5*).

10. Are there special rules by which a notification of a “foreign-to-foreign” transaction can be avoided even where the thresholds are met?

Not applicable. There is no prior clearance of mergers, irrespective of whether the proposed transaction involves local or foreign companies, but see the indications in the answer to *question 1* on the possibility of *ex post* control.

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11. Does the relevant authority have jurisdiction to initiate a review of transactions which do not meet the thresholds for a notification?

Not applicable (*see question 5*).

NOTIFICATION REQUIREMENTS, TIMING AND POTENTIAL PENALTIES

12. Is there a specified deadline by which a notification must be made?

Not applicable, since the 2011 Law does not require notification of proposed concentrations. However, it should be noted that in the press release accompanying the *Utopia* decision the Competition Council stressed its willingness to discuss with undertakings which need to self-assess the impact of their behaviour on the market in order to guarantee them a maximum level of legal certainty.

13. Can a notification be made prior to signing a definitive agreement?

Not applicable (*see question 12*).

14. Who is responsible for notifying?

Not applicable (*see question 12*).

15. What are the filing fees, if any?

Not applicable (*see question 12*).

16. Where a notification is necessary, is approval needed before the transaction is closed/implemented (is there a waiting period or a suspension requirement)?

Not applicable. The Competition Council is not empowered to take decisions clearing proposed concentrations.

17. If there is a suspension requirement, is it possible to apply for a derogation in order to close before approval is granted? If so, under what circumstances?

Not applicable, since the 2011 Law does not provide for either the compulsory or voluntary filing of merger agreements. See also the answer to *question 16*.

18. Are any other exceptions (for example, carve-outs) available to allow parties to close/ implement prior to approval?

Not applicable (*see question 17*).

19. What are the possible sanctions for failing to notify a transaction?

Not applicable (*see question 12*).

20. What are the possible sanctions for implementing a transaction prior to receiving approval (so-called “gun-jumping”)?

Not applicable, since the 2011 Law does not provide for either compulsory or voluntary filing of merger agreements and the Competition Council is not empowered to take decisions clearing proposed concentrations. However, as

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mentioned in the answer to *question 1*, agreements or practices of merging parties may be assessed under Article 3 or 5 of the 2011 Law. In particular, when merging parties are competitors and coordinate their competitive conduct prior to the actual closing of the transaction, their conduct may be caught by Article 3 of the Law prohibiting agreements and concerted practices that have as their object or effect the prevention, restriction or distortion of competition on a market. Fines of up to 10% of the turnover of the undertakings concerned in the preceding year may apply. See also the answer to *question 40*.

21. What are the possible sanctions for implementing a transaction despite a prohibition decision or in breach of a condition/obligation imposed by a conditional clearance decision?

Not applicable (*see question 17*).

22. What are the different phases of a review? Is there any way to speed up the review process?

Not applicable (*see question 12*).

23. Is there a possibility for a “simplified” procedure or shorter notification form and, if so, under what conditions would this apply?

Not applicable (*see question 12*).

24. What types of data and what level of detail is required for a notification?

Not applicable (*see question 12*).

25. In which language(s) may notifications be submitted?

Not applicable (*see question 12*).

26. Which documents must be submitted along with a notification?

Not applicable (*see question 12*).

27. What are the possible sanctions for providing incorrect, misleading or incomplete information in a notification?

Not applicable (*see question 12*).

28. To what extent is the relevant authority available for pre-notification discussions? Are pre-notification consultations customary?

Not applicable (*see question 12*). Although there is no prior merger control regime, the Competition Council is willing to discuss with undertakings which need to self-assess the impact of their behaviour on the market.

29. Where pre-notification consultations are possible, what measures does the relevant authority take to ensure that such discussions are treated confidentially?

See the answers to *questions 12* and *28*.

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It is worth noting that Article 27 of the 2011 Law imposes professional secrecy obligations on the members of the Competition Council, agents, investigators and appointed experts subject to criminal sanctions. Further, the secrecy of deliberations and information submitted to the members, agents and investigators is guaranteed, and information obtained within the context of the application of the 2011 Law can only be used for that purpose.

In addition, with respect to the rules on access to the file, Article 26 of the 2011 Law provides that business secrets or confidential information provided by the undertakings or seized during an investigation, the non-disclosure of which undertakings have requested in writing by specifically stating the reasons for the request, shall not be revealed when all or part of the documents' confidentiality is proved, except when their communication or consultation is necessary for the procedure or the exercise of the rights of the parties.

30. At what point and in what forum does the relevant authority make public the fact that a notification has been made?

Not applicable (*see question 12*).

31. Once the authority has issued its decision, what information about the transaction and the decision is made publicly available?

Non-confidential versions of the decisions of the Competition Council are published on its website.

SUBSTANTIVE ASSESSMENT OF THE MERGER, ROLE OF THIRD PARTIES AND REMEDIES

32. What is the substantive test for assessing the legality of a notified transaction?

Not applicable, since the 2011 Law does not provide for a prior merger control regime and notification obligation.

However, as discussed in the answer to *question 1*, the Competition Council considers itself competent to exercise an *ex post* control of concentrations which strengthen a dominant position by relying on Article 5 of the 2011 Law and Article 102 TFEU.

Except for the reference to trade between member states, Article 5 of the 2011 Law mirrors the wording of Article 102 TFEU verbatim, and the assessment carried out by the Competition Council largely follows the analysis of the European Commission and the European Court of Justice in abuse of dominance cases.

In the *Utopia* decision, the Competition Council rejected a *per se* approach to establishing the existence of an abuse of a dominant position by the completed concentration, but examined its effects. It referred to *Continental Can* to set out three cumulative conditions that need to be fulfilled to characterise the existence of an abuse: (1) the degree of dominance attained must lead to existing competition being reduced to undertakings whose behaviour depends upon the dominant undertaking; (2) real and potential competition must, in practice, be eliminated for the products concerned in a substantial part of the internal market; and (3) residual competitors must be unable to exercise sufficient counterweight. In the case at hand, the Competition Council concluded that these conditions were fulfilled considering that the merger of the undertakings concerned led to the creation of a position of "super-dominance" in the market for cinema management, remaining competitors not being able to exercise effective counterweight. One may question whether this case law is applicable to the case at hand. Anyway, the Competition Council considered

that consumer welfare would not be harmed in this particular case, considering the “failing firm” status of the target company: the assets of the latter would have exited the market in the absence of the concentration so that its market share would have transferred, in any event, to the acquirer. The Council thus concluded that there were no anti-competitive effects of the concentration at issue on the market by focusing on its potential harm to the structure of the market, on the one hand, and consumer welfare, on the other hand. As mentioned in the answer to *question 34*, job maintenance at the acquired cinema was also an argument invoked by the Competition Council.

33. What theories of harm are considered by the authority in assessing the transaction? How concerned are the authorities with non-horizontal (for example, vertical or conglomerate) effects, and are any other theories of harm analysed (for example, coordination in the case of joint ventures)?

Apart from the *Utopia* decision, the Competition Council has not rendered decisions on the application of the 2011 Law to mergers, so no information on theories of harm considered by it can be provided other than its analysis of the effects of the concentration in the latter case, as discussed in the answer to *question 32*.

34. Are non-competition issues, such as industrial policy or labour policy, commonly taken into account in the assessment of the transaction?

In the *Utopia* decision, the Competition Council insisted on the consistency of its analysis of the effects of the concentration at issue with TFEU objectives regarding, in essence, the promotion of a high level of employment and social and cultural development. It mentioned that, absent the concentration, jobs would have been lost and the cinematographic offer in the region, a tool for social and cultural development, would have been reduced.

35. Are economic efficiencies considered as a mitigating factor in the substantive assessment?

See the answer to *question 1* on the absence of a prior merger control regime and the competence of the Competition Council to review concentrations a posteriori on the basis of Article 5 of the 2011 Law and Article 102 TFEU.

The 2011 Law does not set out any specific defences against the finding of an abuse of a dominant position. However, the Competition Council generally follows the European Commission’s analysis. It may thus be open to accepting a merger considered as leading to the abuse of an existing dominant position on the basis of the justification of efficiency gains. However, no relevant precedents exist.

When considering the Competition Council’s decision-making practice in Article 5 cases, reference can be made to the *Tanklux decision 2007-FO-01* relating to a refusal to grant access to heating fuel storage facilities. In this decision, the Competition Council considered that the refusal by a dominant undertaking to enter into commercial relations with another undertaking may be considered as a form of abuse of a dominant position in the absence of any objective justification for such refusal. In this case, the absence of additional storage capacities was accepted as a valid defence by the Competition Council. Further, in a different decision, *Tanklux decision 2009-FO-02* on an alleged abuse of dominance on the market for transport of petroleum products, the Competition Council expressly referred to the European Commission’s guidance on Article 102 TFEU enforcement priorities. It recognised that the contested practice was legitimate, produced efficiency gains (albeit limited), and guaranteed and improved the

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national supply of oil in terms of security and reliability. The Competition Council concluded on these grounds that the behaviour of the company was justified and decided to close the file.

The question of economic efficiencies and objective justifications was also addressed by the Competition Council in *Coditel decision 2010-FO-02*. In this case, the Competition Council decided that the mitigating factors raised by the undertaking to justify tying and exploitative pricing practices with regard to access to television content (in essence, the interest of the consumer to have at its disposal an integrated product compatible with the network and therefore ensuring good reception of content) did not objectively justify the contested practices.

Finally, it is worth noting that, pursuant to Article 18 of the 2011 Law, the Competition Council may appoint experts, including economic experts, to assist with the analysis of a specific case.

36. Does the relevant authority typically cooperate/share information with authorities in other jurisdictions?

Despite the absence of a prior merger control regime, Article 31 of the 2011 Law provides for a cooperation and assistance mechanism between the Competition Council and the European Commission, as well as with competition authorities of other member states, allowing for the exchange of information and cooperation in competition matters subject to reciprocity and professional secrecy.

The Competition Council belongs to a number of networks and organisations, such as the European Competition Network, the International Competition Network and the European Competition Authorities network.

37. To what extent are third parties involved in the review process?

Article 10 of the 2011 Law provides that third parties – physical or legal persons having a legitimate interest – may file a complaint with the Competition Council against an anti-competitive practice. Before the latter renders a decision, it will hear the plaintiff (*Article 26(5) of the 2011 Law*). It is worth noting that the recent *Utopia* case was initiated on the basis of a complaint by an interested third party. In addition, if the Competition Council considers it necessary, it may also hear other natural or legal persons. Applications to be heard on the part of persons showing a sufficient interest shall be granted.

Further, the Competition Council can address information requests to undertakings and associations of undertakings (*Article 14 of the 2011 Law*), and can require information from sectoral regulators and any other administration or public establishment, including confidential information, which is deemed necessary for its enforcement tasks (*Article 19 of the 2011 Law*).

Finally, although it exceeds the context of the review process, it is worth mentioning that the recent law of 5 December 2016 on actions for damages for competition law infringements (*Mémorial A 2016, No 245*) enhances the possibility for third parties to obtain redress for infringements of the 2011 Law.

38. Is it possible for the parties to propose remedies for potential competition issues?

Yes. It results from Article 13 of the 2011 Law that, where the Competition Council intends to adopt a decision that requires an infringement to be brought to an end and when the undertakings concerned offer commitments in order to meet the concerns expressed in the statement of objections, the Council may, by decision, make those

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commitments binding on the undertakings. Such a decision may be adopted for a specific period of time and shall conclude that there are no longer grounds for action.

39. What types of remedies are likely to be accepted by the authority (for example, divestment remedies, other structural remedies, behavioural remedies)?

In several decisions regarding dominance, the Competition Council accepted commitments from undertakings after having reached the preliminary conclusion that they had abused their dominant position. In *Valora decision 2012-E-04*, the involved undertaking was operating in the press-distribution sector, while *Dintec c EPT decision 2012-E-07* dealt with postal services. The undertakings concerned proposed several commitments addressing the concerns raised by the plaintiffs and by the Council's preliminary findings, including notably the amendment of certain practices and contractual clauses. In *POST Telecom decision 2014-E-05*, concerning alleged discriminatory pricing practices for mobile telephone services, the Competition Council accepted commitments implying a modification of the contested pricing practices. In *Pompes funèbres decision 2015-E-01*, regarding the monopoly position of the City of Luxembourg for the transportation of human remains resulting from a communal order, the City's commitment to amend the contested order was accepted by the Competition Council. Finally, in *Simba Pro c CLT-UFA decision 2015-RP-03*, regarding exclusive broadcasting rights for certain sports competitions, commitments implying contractual modifications ending the exclusive relationship between the broadcaster and certain sports federations led to no further action.

Reference is also made to the answer to *question 40* on the enforcement powers of the Competition Council, which include the imposition of remedies.

40. What power does the relevant authority have to enforce a prohibition decision?

Given the absence of a prior merger control regime, the Competition Council has no competence to clear or prohibit proposed concentrations. Only an a posteriori review based on Article 5 of the 2011 Law is possible. Within that context, if an abuse of dominant position is established, the Competition Council may order the undertaking to stop the conduct by imposing any coercive measures, proportionate to the infringement committed, that are necessary to stop the infringement. Given that the 2011 Law does not expressly provide for structural remedies, it is unclear whether the Competition Council has the power to impose such remedies.

In case the practice could cause irreparable harm to the economic public order or to the plaintiff, the President of the Competition Council may also award interim injunctions and impose periodic penalty payments in order to compel the undertaking to comply with the interim injunction.

Pursuant to Article 20(2) of the 2011 Law, the Competition Council may fine undertakings that are in breach of the 2011 Law or of Article 101 or 102 TFEU. The amounts of the fines are to be fixed on a case-by-case basis and will depend, inter alia, on the duration and the gravity of the infringement. The maximum fine shall not exceed 10% of the highest worldwide turnover (excluding taxes) that was realised during one of the full financial years since the financial year preceding the year during which the anti-competitive practices were committed. In the case of consolidated accounts, the turnover to be considered is the turnover stated in the consolidated accounts of the mother company.

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In its 2014 *EPT decision 2014-FO-07*, the Competition Council imposed a fine of EUR 2.52 million on the incumbent telecommunications services provider for the abuse of its dominant position in fixed telephony and internet access by using bundled discounts for fixed telephony, internet access and mobile telephony services. However, this decision was annulled by the administrative tribunal. This judgment is currently under appeal.

JUDICIAL REVIEW

41. Is it possible to challenge decisions approving or prohibiting transactions? If so, before which court or tribunal?

The decisions rendered by the Competition Council may be challenged before the Administrative Court of First Instance (Tribunal administratif) (*Article 28 of the Law of 2011*). The latter court's judgments may be appealed before the Administrative Court of Appeal (Cour administrative). Both court levels review findings of fact and conclusions of law.

42. What is the typical duration of a review on appeal?

Not applicable. There has been no judicial review yet of decisions of the Competition Council relating to mergers.

43. Have there been any successful appeals?

Not applicable (*see question 42*).

STATISTICS

44. Approximately how many notifications does the authority receive per year?

Not applicable, since the 2011 Law does not require notification of proposed concentrations.

45. Has the authority ever prohibited a transaction? How many prohibition decisions has the authority issued in the past five years?

In the absence of a prior merger control regime, concentrations are caught by the 2011 Law only if they lead to an abuse of a dominant position within the meaning of its Article 5. The only a posteriori review of a concentration in the Utopia decision was closed without further action.

46. Over the past five years, in what percentage of cases have binding commitments been required in order to obtain clearance for a transaction?

Not applicable, given the absence of a prior merger control regime. However, see the answers to *questions 38 and 39* on the possibility for undertakings to offer commitments in accordance with Article 13 of the 2011 Law.

47. How frequently has the authority imposed fines in the past five years?

Not applicable (*see question 45*).