

## **INFORMAL DOCUMENT 3**

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### ***Convention on Long Range Transboundary Air Pollution, CLRTAP***

***Note by the Ad Hoc Group of Legal Experts on obligations under the Gothenburg Protocol***

#### **1. Background and Problem Identification**

1. At its 34<sup>th</sup> session in December 2015, the Executive Body asked the Ad Hoc Group of Legal Experts to provide advice on obligations under the Protocol to the 1979 Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone pursuant to a request submitted by Luxembourg to the secretariat.

2. Luxembourg is a Party to the Protocol, having signed it on 1 December 1999 and ratified it on 7 August 2001.

3. In 2012 the Parties to the Protocol adopted Decision 2012/2 which provides for the amendment of the text of and annexes II to IX to the Protocol and the addition of new annexes X and XI (“the 2012 amendments”). These amendments will enter into force on the ninetieth day after the date on which two thirds of the Parties to the Protocol have deposited their instruments of acceptance with the Depositary (See art. 13, para. 3 of the Protocol and para. 3 of Decision 2012/2).

4. This note will distinguish between the Protocol in its current form (“the unamended Protocol”) and the Protocol as it would stand were the 2012 amendments to enter into force (“the amended Protocol”).

5. Under the unamended Protocol, a Party having an emission ceiling in any table in annex II is required to reduce and maintain the reduction in its annual emissions in accordance with that ceiling and the timescales specified in that annex (see art. 3, para. 1 of the unamended Protocol). Annex II gives Luxembourg a ceiling for nitrogen oxides of 11 kilotonnes with a timescale of 2010. This 2010 ceiling was derived from the national emission totals and projections calculated on the basis of fuels used in Luxembourg.

6. To date, Luxembourg has checked compliance with its 2010 emission ceiling for nitrogen oxides using national emission totals calculated on the basis of fuels used in its geographic area (“the fuels used basis”). This can be distinguished from checking compliance on the basis of fuels sold in a Party’s geographic area (“the fuels sold basis”).

7. Under the amended Protocol, a Party that ratified the unamended Protocol prior to 2010 would have an obligation to comply with its 2010 ceilings up to 2020 (see art. 3, para. 1 and

Annex II, para. 2 and Table 1, of the amended Protocol). A Party to the amended Protocol would also have emission reduction commitments which would require it to reduce its emissions of certain substances including nitrogen oxides by a certain percentage from its 2005 emissions by 2020, and maintain that reduction thereafter (see art. 3, para. 1 and annex II, para 3 and tables 2-6, of the amended Protocol).

8. Table 3 of annex II to the amended Protocol specifies emission reduction commitments for nitrogen oxides for 2020 and beyond. For Luxembourg a reduction of 43% from 2005 emission levels is specified. The table lists emission estimates for 2005. For Luxembourg an estimate of 19 kilotonnes of nitrogen oxides in 2005 is listed. This estimate was derived on the fuels used basis. Paragraph 4 of annex II provides that these estimates are for information only and may be updated if better information becomes available. This paragraph also provides that the 2020 emission reduction commitments are applicable to the most up-to-date estimates of the 2005 estimates as reported by the Party.

9. In its letter to the Secretariat, Luxembourg asked the following questions:

“The question that arises is: if Luxembourg decides to change its base to assess its compliance on the scenario "fuel sold", would such a change mean that the maximum nitrogen oxide emissions from 2020 would have to be calculated on the basis of fuel sold in 2005.

In other words, in this case, would Luxembourg be no longer bound from 2020 by the provision of the 1999 Protocol that “Each Party having an emission ceiling in any table in annex II shall reduce and maintain the reduction in its annual emissions in accordance with that ceiling and the timescales specified in that annex”?”

10. The Legal Group corresponded with Luxembourg to clarify this question. Luxembourg confirmed that it is seeking advice on whether, if it accepts the 2012 amendments, its 2010 ceiling will continue to apply in 2020 and beyond. If so, Luxembourg also asks for advice on whether it could use the fuels used basis for checking compliance with its 2010 ceiling while using the fuels sold basis for checking compliance with the 2020 emission reduction commitment. This note will address these questions.

### **The status of the 2010 ceilings in 2020 and beyond**

11. Both the unamended and amended versions of the Protocol include obligations to comply with the 2010 ceilings, but these obligations differ in duration. The obligation in the unamended Protocol applies for an unlimited period. By contrast, the obligation in the amended Protocol would only apply until 2020.

12. If Luxembourg were to accept the 2012 amendments, whether it would be bound by the 2010 ceilings in 2020 and beyond would depend on the extent to which other Parties also accept those amendments and whether/when those amendments enter into force.

13. There are three potential scenarios:

- 1) The two thirds threshold for securing entry into force of the 2012 amendments is not reached;
- 2) The two thirds threshold is reached, but not all Parties to the unamended Protocol accept the 2012 amendments;
- 3) All Parties to the unamended Protocol accept the 2012 amendments.

*The two thirds threshold is not reached;*

14. Unless and until the two-thirds threshold is reached, Luxembourg's rights and obligations would continue to be governed by the unamended Protocol and would be obliged to comply with the 2010 ceilings.

*The two thirds threshold is reached but not all Parties to the unamended Protocol accept the 2012 amendments;*

15. If the two thirds threshold were reached but not all Parties were to accept the 2012 amendments, Luxembourg's rights and obligations would be governed by both the unamended and amended versions of the Protocol.

16. The amended Protocol would govern Luxembourg's rights and obligations in relation to the other Parties that had accepted the 2012 amendments. However, the unamended Protocol would apply in relation to Parties that had not accepted the amendments<sup>1</sup>.

17. In relation to the first set of Parties to the amended Protocol, Luxembourg would be obliged to comply with its 2010 ceilings up until 2020, and to comply with its 2020 emission reduction commitments thereafter. In relation to the second set of Parties, Luxembourg would be obliged to continue to comply with its 2010 ceilings. This would remain the case until all of those Parties had accepted the 2012 amendments.

*All Parties to the unamended Protocol accept the 2012 amendments.*

18. If all of the Parties to the unamended Protocol were to accept the 2012 amendments, then the amended Protocol would govern their rights and obligations to one another. Luxembourg would be obliged to comply with its 2010 ceilings up until 2020, and to comply with its 2020 emission reduction commitments thereafter.

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<sup>1</sup> The Vienna Convention on the Law of Treaties (VCLT) addresses the situation where some but not all Parties to a multilateral treaty become Parties to an agreement to amend that treaty. In such a case "(t)he amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement" (See art. 40, para. 4 of the VCLT). The mutual rights and obligations of a Party to both the original Agreement and the amending Agreement, on the one hand, and a Party to the unamended Agreement only, on the other, will be governed by the Treaty to which both are Parties (i.e. the original agreement) (see art. 40, para 4, and art. 30, para. 4(b) of the VCLT).

## **Fuels used versus fuels sold**

19. If a Party were faced with a situation in 2020 and beyond in which it was bound by both the 2010 ceilings and the 2020 emission reduction commitments, it would be necessary to check its compliance with both obligations.

20. Neither the unamended nor the amended version of the Protocol explicitly addresses the issue of using the fuels used or fuels sold basis for compliance checking.

21. The issue is addressed in paragraph 23 of the Guidelines for Reporting Emissions and Projections Data under the Convention on Long-range Transboundary Air Pollution (ECE/EB.AIR/125), which provides: “For Parties for which emission ceilings are derived from national energy projections based on the amount of fuels sold, compliance checking will be based on fuels sold in the geographic area of the Party. Other Parties within the EMEP region [there is a footnote which names these Parties: “Austria, Belgium, Ireland, Lithuania, Luxembourg, the Netherlands, Switzerland and the United Kingdom of Great Britain and Northern Ireland”] may choose to use the national emission total calculated on the basis of fuels used in the geographic area of the Party as a basis for compliance with their respective emission ceilings.”

22. In accordance with these Guidelines, the legal group understands that the rationale for Luxembourg’s use of the fuels used method for compliance checking with its 2010 ceiling for nitrogen oxides is that the ceiling was derived on this basis. In both the amended and unamended versions of the Protocols, Luxembourg’s 2010 ceiling for nitrogen oxides is expressed as an absolute number the group understands to have been derived on a fuels used basis. Using the fuels used basis therefore allows a proper comparison to be made between Luxembourg’s 2010 ceiling and its annual emissions in order in order to assess whether the ceiling is being adhered to.

23. The amended Protocol would provide scope for Luxembourg to use the fuels sold basis for checking compliance with its 2020 emission reduction commitment for nitrogen oxides. Under the amended Protocol a Party would be able to provide updated estimates of its 2005 emissions of nitrogen oxides and, if this occurred, the 2020 emission reduction commitment would be applicable to those updated estimates. This would allow a Party whose 2005 emissions were estimated on a fuels used basis to update these estimates on the fuels sold basis and use that same basis for checking its compliance with the 2020 emission reduction commitment.

24. The group considered that if Luxembourg were to use the fuels sold basis for checking compliance with its 2020 emission reduction commitment, this would not oblige it to adopt the same basis for checking compliance with its 2010 ceiling. Luxembourg’s obligation to comply with its 2010 ceiling would be a separate obligation, and the rationale for using the fuels used basis for checking compliance with that obligation, as described above, would still apply.