

# The Handbook of Competition Enforcement Agencies

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## Overview

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The Luxembourg Competition Law of 17 May 2004 (the Law) in its first chapter enacted three principles regulating competition in the Luxembourg market:

- prices should be determined freely simply by the operation of fair competition in the market;
- prohibition of cartel-type conduct; and
- prohibition of the abuse of a dominant position.

In the second chapter of the Law, two competition authorities were created: the Competition Council (the Council) and the Competition Inspectorate (the Inspectorate) (together, the authorities). The authorities are members of the European Competition Network (ECN).

### The missing merger scheme

The Law does not regulate mergers; neither does it grant power to either of the authorities to deal with or investigate merger cases.

One could argue that since the Law expressly prohibits all agreements, decisions and practices that may prevent, restrict or distort fair competition generally, mergers are also impliedly prohibited, in particular mergers that bear a risk of having adverse consequences for competition. On this basis, it would then be arguable that mergers fall within the scope of the law and thus are subject to the control of the authorities.

Nevertheless, in practice, the authorities will not supervise a merger deal taking place in Luxembourg because they do not consider this to fall within the scope of their mandate. Therefore, there are no pre-merger filing requirements under Luxembourg law. The situation is nonetheless different to some extent when a merger deal taking place in Luxembourg has a Community dimension; however, most of the merger deals now have a European dimension, with the consequence that although there is no control at the national level there will be at least control at the EC level in most of the deals.

Indeed, in such a case the European Commission will intervene to be fully responsible for supervising

and taking decisions about the relevant merger deal; in particular, the European Commission may request pre-merger filing requirements from the involved parties in Luxembourg. The role of the authorities will be limited to consulting and providing assistance to the European Commission, if needed. The best case exemplifying this situation in Luxembourg as regards merger control is when Mittal decided to acquire Arcelor. In this case, the Commission decided that it should examine the merger. The role of the Luxembourg authorities was restricted to work as consultants to the Commission.

Despite the fact that, as explained above, there is no merger control, or pre-filing merger requirements under Luxembourg competition law, mergers involving certain specific entities as entities listed on the Luxembourg Stock Exchange or professional of the financial sector are submitted to special regulations.

Indeed, the law of 11 January 2008 on transparency requirements implementing Directive 2004/109/EC of 15 December 2004 contains rules regarding the notification requirements when specific thresholds of voting rights are reached as a consequence of disposal or acquisition of listed shares.

In addition, major shareholders of entities considered as professional of the financial sector must be approved by the Luxembourg financial sector control authority pursuant to the law of 5 April 1993 on the financial sector.

### Duplication in authorities

Although the authorities were both created to ensure proper implementation of the competition principles identified above, there are some slight differences between them.

#### Main characteristics of the Council

- The Council is an independent administrative authority. The president and the members of the Council are appointed directly by decree of the Grand Duke of Luxembourg;
- the Council is responsible for the full implementation of the Law;

- the Council has the authority to impose fines on any party infringing the Law. There are no clear rules regarding the amount of the fine, so it is up to the Council to take a decision on this issue. Nonetheless, the Law provides the amount of the fine should not exceed 10 per cent of the total annual turnover of the infringing party;
- nothing in the Law prevents the Council from sending the case to the general state prosecutor if it thinks that the actions of the relevant party amount to a criminal offence under Luxembourg criminal law;
- the Luxembourg tax authority is the administration responsible for the collection of the fines imposed by the Council; and
- an appeal against a decision of the Council should be lodged with the Luxembourg Administrative Court; an appeal against a decision of the Luxembourg Administrative court can be lodged with the Administrative Court of Appeal.

#### Main characteristics of the Inspectorate

- It is one of the administration offices of the Ministry of the Economy and Foreign Trade;
- the members of the Inspectorate are appointed by decree of the minister of economy and foreign trade;
- its main duty is to receive complaints regarding infringement of the Law and to investigate these complaints; and
- the Inspectorate reports directly to the Council if it identifies any infringement of the Law.

#### Relations with other authorities

The Council and the Inspectorate are entitled to collect information from, and work closely with, specific regulatory bodies involved in the supervision of some sectors of activity, namely:

- the Commission de Surveillance du Secteur Financier, responsible for the prudential supervision of the financial sector;
- the Commissariat aux Assurances, responsible for the prudential supervision of the insurance and reinsurance sector;

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- the Commission Indépendante de la Radio-diffusion, responsible for the attribution of radio frequencies and which has all the relevant information concerning this sector;
- the Institut Luxembourgeois de Régulation (ILR), which is the independent regulatory authority of electronic communications networks and services. One of ILR's main functions is to ensure the freedom of telecommunications networks and services and to ensure a competitive telecommunications market. Within this framework the ILR cooperates with the Inspectorate and the Council in order to ensure compliance with the competition rules.

### **Role of the Luxembourg courts**

Luxembourg civil courts also ensure the enforcement of competition law and are entitled to cancel a contract that contradicts the principles of competition law. In addition, an action for tortious liability in order to obtain damages can be lodged with the Luxembourg courts in case of damage arising from a breach of competition law.

### **Reform project**

At the time of writing, reform is still pending. The merging of the two authorities has been proposed; transferring the powers of the Inspectorate to the Council would optimise human and financial resources and simplify administrative procedures.

However, such a merger, as contemplated in a draft bill, does not for the time being command unanimous support. This is the result of an opinion issued in July 2010 by the Council of State (*Conseil d'Etat*), a Luxembourg institution which gives its opinion about draft bills during the legislative process, that a merger of the authorities could lead to a lack of impartiality – or at least to the perception of such by those involved in a procedure before the Council – because the investigation and decision powers would be centralised in the hands of one authority.

The opportunity of such change will be discussed in the coming months by the various parties taking part in the legislative process.

The current reform project also proposes granting explicit consultative power to the Council concerning questions relating to competition law. The introduction of a merger control procedure into Luxembourg law, however, is not covered by the current reform project.



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