

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 by the mere 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

Luxembourg is the only European country with no merger control regulatory scheme. The Law does not regulate mergers; neither does it grant power to any 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 subject to the control of the Authorities.

Nevertheless, in practice, none of the Authorities will 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, the world's number one steel company, decided to acquire Arcelor, the world's number two steel company, a company registered in Luxembourg. In this case, the Commission decided that it should examine the merger. The role of the Luxembourg Authorities was restricted to working as consultants to the Commission.

One may wonder whether the Luxembourg parliament should fill this gap in the Law by regulating the merger operations and granting more power to control pre-merger and merger issues to the Authorities as regards national deals, whether the merger case has a European dimension.

Duplication in Authorities

Although the Authorities have both been created in order to ensure proper implementation of the competition principles as 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 they think 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.

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;
- their 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 they identify 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 authorities 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;
- the Commission Indépendante de la Radiodiffusion, 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 telecommunication market. Within this framework the ILR cooperates with the Inspectorate and the Council in order to ensure compliance with the competition rules.

Reform project

A project of reform is currently pending. In view to optimise the human and financial resources and to simplify the administrative procedure, it is suggested to merge the two Authorities, the powers of the Inspectorate being transferred to the Council. The current reform project foresees also to grant explicitly a consultative power to the Council concerning the questions relating to competition law. However, it seems that the introduction of a merger control procedure in Luxembourg Law is not covered by the current reform project.

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