Luxembourg

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1 Legislation

What is the legislation applying specifically to the behaviour of dominant firms?

The Law on Competition of 23 October 2011 (the 2011 Law) has abrogated the Law on Competition of 17 May 2004 (the 2004 Law) with effect from 1 February 2012.

Further, the law of 30 July 2002 governing certain commercial practices and prohibiting unfair competition (the 2002 Law), as amended, prohibits anti-competitive practices such as sale at a loss. This anti-competitive practice may be considered as an abuse of a dominant position if exercised by one or several undertakings in a dominant position in the relevant market.

The 2011 Law provides for the enforcement of articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) (ex articles 81 and 82 of the EC Treaty) and basically mirrors EU Regulation No. 1/2003.

The 2011 Law does not change the provisions of the prohibition of any abuse by one or more undertakings with a dominant position in the market (article 5 of the 2011 Law) but provides for various changes to the competition law regime:

- the merger of the Investigation Division into the Competition Council (the Council) (see question 33);
- the modification of the proceedings in order to make them more effective and less cumbersome;
- the differentiation of the maximum amount of the fines according to whether the undertaking was a party to a cartel, has abused its dominant position or has refused to submit information to the Council during the investigation of the case; and
- the adaptation of the leniency regime to the European Competition Network Model Leniency Programme.

2 Non-dominant to dominant firm

Does the law cover conduct through which a non-dominant company becomes dominant?

No. Since article 5 of the 2011 Law mirrors article 102 TFEU, only the abuse of a dominant position by one or several undertakings is prohibited by the 2011 Law.

3 Object of legislation

Is the object of the legislation and the underlying standard a strictly economic one or does it protect other interests?

In accordance with the preparatory parliamentary documents of the 2004 Law, although these documents are not legally binding, the underlying standard is almost identical to the standard applicable under article 102 TFEU, which is an economic one.

The economic object of the Luxembourg competition law was further explained in the preparatory documents of the 2011 Law. In accordance with these documents, the object of the 2011 Law is the protection of competition as an instrument to achieve competitiveness, on both macro- and microeconomic levels.

4 Non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms? Is your national law relating to the unilateral conduct of firms stricter than article 102 TFEU?

No. Since article 5 of the 2011 Law is a copy of article 102 TFEU, the 2011 Law is as strict as article 102 TFEU.

The 2011 Law does not provide for any rules applying to the unilateral conduct of non-dominant firms. But the 2002 Law prohibits unfair competition practices, such as sale at a loss, whether or not the relevant undertaking is in a dominant position.

5 Sector-specific control

Is dominance regulated according to sector?

Competition law in principle applies to all economic sectors. However, certain sectors are regulated by specific rules under the supervision of a regulator. The Luxembourg regulatory authority (ILR) is the regulatory body for:

- the postal sector (Law of 15 December 2000 on postal services and financial postal services, as amended);
- the electronic communications sector (Law of 27 February 2011 on the networks and services of electronic communications);
- the electricity sector (Law of 1 August 2007 on the organisation of the electricity market, as amended); and
- the gas sector (Law of 1 August 2007 on the organisation of the natural gas, as amended).

One of the main functions of the ILR is to open the postal, electronic communications, gas and electricity markets to competition.

In accordance with article 76(2) of the law of 27 February 2011 on the networks and services of electronic communications (the ILR Law), the jurisdiction of the ILR should not interfere with that of the Luxembourg competition authorities, even though in practice such interference may occur.

6 Status of sector-specific provisions

What is the relationship between the sector-specific provisions and the general abuse of dominance legislation?

The general abuse of dominance legislation may interfere with sector-specific provisions such as the prohibition of squeeze-out practices or of entry barriers to accessing essential facilities.

Furthermore, article 19 of the 2011 Law authorises the competition authorities to request information, including confidential information, from other regulatory bodies of the various sectors.

Article 76(1) of the ILR Law provides that the ILR cooperates with the competition authorities.

7 Enforcement record

How frequently is the legislation used in practice?

The Luxembourg competition authorities were appointed on 29 October 2004. Eleven decisions on the merits have been rendered so far by the Council on cases involving alleged abuse of dominant position. The first decision (2007-FO-01) dealt with the refusal to grant storage capacities for petroleum products (in which the Council held that part of the investigation had not been done properly); the second (2007-FO-03) and third (2009-FO-03) decisions related to the insurance sector and more particularly the damage surveys for car accidents and to the press distribution sector (in which no infringement of the 2004 Law or of the former law of 17 June 1970 were found). The fourth decision (2009-FO-02) was based on further investigations requested by the Council in its first decision (in which the Council concluded that an abuse of dominant position occurred but found grounds to justify it).

In December 2010, the Council rendered two decisions that dealt with dominance. In the first decision (2010-FO-02), a cable-TV operator was found to have abused its dominant position through tying practices and for having charged exploitative prices to consumers. The second decision (2010-FO-03) related to tobacco manufacturers. In the latter case, the Council has determined not to analyse the claim of the refusal to supply as no dominant position was found.

In 2012, the Council rendered two decisions in which it accepted commitments from undertakings after having reached the preliminary conclusion that the two undertakings have committed an abuse of dominant position. In the first decision (2012-E-04), the undertaking concerned was operating in the press distribution sector, while the second decision (2012-E-07) dealt with postal services. The two undertakings had proposed several commitments addressing the concerns raised by the plaintiffs and by the Council's statement of objections.

A third decision on dominance has been rendered by the Council in 2012 (2012-RP-05) in the livestock farming sector (in which the Council rejected the complaint lodged by an undertaking acting in the livestock marketing sector against another undertaking acting in the livestock farming sector as no infringement of competition law was found).

More recently, in March 2013, in a case involving the alleged abuse of a dominant position related to internet access and telephone services, the Council reached the conclusion that the undertaking, a cable-TV operator and internet provider, was not in a dominant position in the relevant markets (2013-FO-01). The Council had already rendered a decision regarding the same undertaking (see 2010-FO-02).

The most recent decision on dominance rendered by the Council dealt with predatory prices in the internet service provider market following a complaint lodged by an undertaking operating in that market. Further to a cost analysis, the Council found no predation and thus rejected the complaint lodged by the competitor (2013-RP-02).

8 Economics

What is the role of economics in the application of the dominance provisions?

In the assessment of alleged abuse of dominant position, the Council relies on analysis based on both economic and legal elements. The economic analysis is especially relevant in the assessment of abuse such as predatory pricing. In its decision 2013-RP-02 which dealt with predation, the Council referred to more extensive and comprehensive explanations on economic grounds and undertook cost analysis to determine whether prices applied by the undertaking were to be qualified as predatory.

In accordance with article 18 of the 2011 Law, the Council may appoint economic experts to determine the scope of their mission. No specific information is available regarding the frequency of assistance by economic experts.

9 Scope of application of dominance provisions

To whom do the dominance provisions apply? To what extent do they apply to public entities?

The 2011 Law applies to private entities, whether they be natural or legal persons, and to public entities.

10 Definition of dominance

How is dominance defined?

The 2011 Law does not define dominance. The preparatory parliamentary documents expressly refer to the European Court of Justice in *Michelin* (C-322/81 (1983 ECR 3503)) where dominance is defined as:

> *[A] position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers.*

The same position has been taken by the Council. See decision 2007-FO-03 of 5 September 2007, where the Council referred to the definition given by the European Court of Justice in the *Hoffmann-La Roche* case of 13 February 1979 and decision 2012-E-07 of 18 December 2012, where the Council referred to the definition given by the European Court of Justice in *United Brand Continentaal BV/ Commission* (13 February 1979).

11 Market definition

What is the test for market definition?

The test for market definition will be the same as under EU Law. The Council has expressly referred to the methodology used by EU competition law and has quoted large parts of the European Court of First Instance judgment in *France Télécom* (T-340/03). Moreover, in its decisions of 23 April 2007 (2007-FO-01), 2 July 2009 (2009-FO-01), 10 December 2010 (2010-FO-02) and 8 May 2013 (2013-RP-02), the Council expressly refers to the notice of the Commission on the relevant market definition.

12 Market-share threshold

Is there a market-share threshold above which a company will be presumed to be dominant?

To our knowledge no statutory law or case law exists defining a market-share threshold above which an undertaking will be presumed to be dominant. The Council considers that a market share above 60 to 70 per cent will generally lead to the presumption of a dominant position. However, the Council indicates that the market share is not the sole criteria on which to assess a dominant position and that other factors should be taken into consideration, such as barriers to entry and the situation of the competitors (decision of 5 September 2007 (2007-FO-03)).

13 Collective dominance

Is collective dominance covered by the legislation? If so, how is it defined?

The 2011 Law prohibits, as does article 102 TFEU, 'any abuse by one or more undertakings of a dominant position'. Consequently, the 2011 Law covers collective dominance. The definition used by the Council to define a collective dominant position and to set the conditions that must be fulfilled are therefore identical to those found in EU competition law (European Court of First Instance, judgment of 6 June 2002 *Air Tours*, T-342/99) (see Council decision dated 5 September 2007 (2007-FO-03)).

14 Dominant purchasers

Does the legislation also apply to dominant purchasers? If so, are there any differences compared with the application of the law to dominant suppliers?

The 2011 Law does not differentiate between dominant purchasers and dominant suppliers, so the 2011 Law applies equally to both dominant suppliers and dominant purchasers. Owing to the absence of any decision of the Council on this matter, an opinion cannot be expressed on whether there would be a difference of application of the 2011 Law to dominant suppliers and dominant purchasers.

Abuse in general

15 Definition

How is abuse defined? Does your law follow an effects-based or a form-based approach to identifying anti-competitive conduct?

The abuse of a dominant position is not defined by the 2011 Law, but it does provide a list of examples that mirrors the list in article 102 TFEU. Abuse may consist of:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts. The list in the 2011 Law is not exhaustive.

In its decision of 3 August 2009 (see question 18), the Council stated that the object and the effect of the practice in question (the introduction of provisions on the choice of the transport undertaking in storage agreements by a company in a monopolistic situation on the storage market) was to foreclose the transport market and to prevent other undertakings from entering into this market and that such foreclosure had at least potential negative effects on consumers. The Council then concluded that the practice was an abuse of dominant position on the basis that the anti-competitive object of the practice was characterised by the fact that such practice was of such a nature as to prevent oil companies from using other transport undertakings and to prevent other undertakings from entering into the transport market. The Council seemed to apply both approaches by referring to the object of the relevant practice and to its effect.

16 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

The concept of abuse covers exploitative practices (for example, unfair prices and tying practices) and exclusionary practices (for example, refusal to supply).

17 Link between dominance and abuse

What link must be shown between dominance and abuse?

Because the 2011 Law mirrors article 102 TFEU, the assessment is the same as under article 102 TFEU, so that dominance and the abuse thereof by one or several undertakings must not necessarily occur in the market where the potential economic benefit for an undertaking arises.

18 Defences

What defences may be raised to allegations of abuse of dominance? Is it possible to invoke efficiency gains?

The 2011 Law does not provide for any defences, but in accordance with article 21 of the 2011 Law, the Council may cancel or reduce the amount of the fines imposed on an undertaking, depending on the scope of its cooperation with the competition authorities (leniency regime).

Article 5 of the 2011 Law mirrors article 102 TFEU. As the case law of the Court of First Instance on article 102 TFEU accepts abusive conduct by an undertaking in a dominant position, under certain circumstances, on the basis of the justification of economies of scale such as efficiency gains, it is likely that the Council may also accept such justification.

In its first decision of 23 April 2007 (2007-FO-01), the 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 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 Council.

In a decision (2009-FO-02 of 3 August 2009), based on further investigations requested by the Council in its decision of 23 April 2007, the Council went one step further. After having established the existence of an abuse (introduction of provisions on the choice of the transport undertaking in storage agreements by a company in a monopolistic situation on the storage market), the Council examined whether such behaviour might be justified. In this respect, the Council explained that although no express provision in the EC Treaty provides for justifications for abuses of dominant position (as is the case for cartels and anti-competitive practices), it is admitted that some kind of rule of reason should be applied in order to exempt certain abusive behaviours. It then referred to Commission Communication 'C(2009) 864 final', of 9 February 2009 with regard to the methodology adopted in this analysis. In its communication the European Commission explains at paragraph 27 that a conduct may be justified 'by demonstrating that such conduct is objectively necessary or produces substantial efficiencies that outweigh any anti-competitive effects on consumers. In addition, the conduct must be indispensable and proportionate to the goal allegedly pursued by the dominant undertaking'. The Council recognised that the practice in question was legitimate, produced efficiency gains (even if limited) and guaranteed and improved the national supply of oil in terms of security and reliability. The 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 Council in the decision of 10 December 2010 (2010-FO-02). Nevertheless, the Council decided that the mitigating factors raised by the undertaking did not objectively justify the practices of tying and exploitative prices. Therefore it determined that the undertaking had committed an abuse of its dominant position.

Specific forms of abuse

19 Price and non-price discrimination

This should be covered by the 2011 Law. But as the Council has not yet rendered a decision on this issue, we cannot provide any leading precedents.

20 Exploitative prices or terms of supply

As explained under question 18, the Council's decision of 3 August 2009 (2009-FO-02) recognised that the introduction of provisions on the choice of the transport undertaking in storage agreements by a company in a monopolistic situation regarding the storage market, constitutes an abuse because it foreclosed the transport market by preventing access to the transport market by other companies than the one appointed in the storage agreements. However, the Council found grounds to justify such abuse and closed the file.

In the decision (2010-FO-02 of 10 December 2010), a Luxembourg company operating on the cable-TV distribution market was found to have abused its dominant position for, inter alia, having charged exploitative prices to consumers (the company had charged an unjustified subscription fee). After having concluded that the relevant product market was the market of TV programmes distributed by cable, satellite and DSL, the Council concluded that the operator occupied a dominant position in the market. The Council then concluded that the billing practices were anti-competitive and therefore constituted an abuse of dominant position.

21 Rebate schemes

See question 19.

22 Predatory pricing

The Council rendered a recent decision, which dealt with predatory prices in the internet service providers sector (2013-RP-02). Following a complaint lodged by an undertaking operating in the market, the Council analysed whether the prices offered by the internet service provider in question could be qualified as predatory, namely, whether they were so low that other firms competing in the relevant market were not able to compete and were thus forced to leave the market. However, pursuant to a cost analysis, the Council found no predation and thus rejected the complaint lodged by the competitor.

23 Price squeezes

See question 19.

24 Refusals to deal and access to essential facilities

A refusal to deal may be considered as an abuse of a dominant position in the absence of an objective justification. There would be an infringement of the 2011 Law if the refusal derived from the intention to limit competition on the relevant market or limit the competitive capacities of other undertakings.

The refusal to grant access to essential facilities may also be a form of abuse of dominant position. The conditions set forth by the Council as regards access to essential facilities are identical to those used in EU competition law.

25 Exclusive dealing, non-compete provisions and single branding

The Council rendered a recent commitment decision which dealt, inter alia, with territorial exclusivity in favour of a press supplier that was dominant in the relevant market of press distribution. In the statement of objections, the Council reached the preliminary conclusion that the contractual clause contained in the distribution agreement entered into with the retailers was likely to constitute an abuse of dominant position within the meaning of article 102 TFEU and article 5 of the 2011 Law. The undertaking proposed several commitments addressing the concerns raised by the plaintiffs and by the Council's statement of objections and a commitment decision was rendered by the Council on 23 November 2012 (2013-E-04).

26 Tying and leveraging

Tying and leveraging may lead to an abuse of dominant position. In its decision of 5 September 2007 (2007-FO-03) the Council had to deal with a complaint lodged by an association of automobile experts against a decision of a Luxembourg insurance company to select only those experts who were using a specific computer program (which enables the assessment and calculation of damages and repairs) in order to assess damages in car accidents. This software had been developed by a Belgian company in which the insurance company was a shareholder (along with 30 or so other companies). The Council did not have the opportunity to deal with the subject matter of the complaint as it held that the insurance company did not enjoy any dominant position whether individually or collectively.

The Council went one step further in its decision of 10 December 2010 (2010-FO-02) (see question 20). In this case, a cable-TV operator was found to have abused its dominant position in the market by, inter alia, having organised tying practices. The operator had organised tying contractual arrangements whereby the consumer was only entitled to obtain the cable-TV subscription (the tying service) if he or she also agreed to subscribe to other tied products and services. In practice, the subscribers had to purchase a decoder commercialised by Coditel (the set-top box), without having the choice to purchase a decoder from a competitor. Furthermore, the operator deliberately restricted the subscribers' choice in offering them a few types of decoders containing some technical functions that not all of the operator's subscribers wanted to have, whereas a decoder without those technical functions did exist but was deliberately not offered by the operator to its subscribers.

27 Limiting production, markets or technical development

See question 19.

28 Abuse of intellectual property rights

According to the preparatory parliamentary documents, the possession of intellectual property rights by an undertaking may be a criterion for the assessment of its dominant position, so that the abuse of such rights may be considered as an abuse of dominant position.

29 Abuse of government process

See question 19.

30 'Structural abuses' – mergers and acquisitions as exclusionary practices

See question 19.

31 Other types of abuse

No specific type of abuse is excluded by the 2011 Law.

Enforcement proceedings

32 Prohibition of abusive practices

Is there a directly applicable prohibition of abusive practices or does the law only empower the regulatory authorities to take remedial actions against companies abusing their dominant position?

In accordance with article 5 of the 2011 Law, the prohibition of abusive practices is directly applicable, so that no prior decision to that effect is required.

This has also been confirmed in the preparatory parliamentary documents, where it has been expressly recalled that, as is the case for agreements between undertakings, decisions by associations of undertakings and concerted practices that fall under article 101

Update and trends

With the 2011 Law, the investigation and decision-making proceedings were modified in order to make them even more effective and less cumbersome. The newly composed Council actively fulfils its role and has imposed fines on undertakings for non-competitive practices (2012-FO-08).

On the other hand the Council rendered for the first time two commitment decisions in cases involving abuse of dominant position (decisions 2012-E-04 of 23 November 2012 and 2012-E-07 of 18 December 2012). By those decisions the Council demonstrates its willingness to engage in discussions with undertakings in order to agree on binding commitments rather than imposing fines

TFEU, any abuse of a dominant position by an undertaking is prohibited and will be directly null and void retroactively and for the future. This notwithstanding, the Council or the courts will have to record the nullity of the abuse of a dominant position by the undertaking.

33 Enforcement authorities

Which authorities are responsible for enforcement and what powers of investigation do they have?

Before the 2004 Law, Luxembourg had no actual competition authorities. The 2004 Law authorised the setting up of the Council and the Investigation Division. The Council, an independent administrative authority composed of three members, was in charge of the decision-making process in order to enforce competition law.

The Investigation Division, a service of the Ministry of Economics and Foreign Trade, was in charge of the registration of the complaints of infringements of competition law, the investigation and the submission of reports to the Council. The Investigation Division was entitled to require the undertakings to provide all necessary information by simple request or decision, interview natural or legal persons and conduct all necessary inspections. Generally, the powers of the Investigation Division were similar to the powers of the European Commission and were subject to the same conditions as set out in Regulation No. 1/2003.

The 2011 Law provides for the merger of the Investigation Division with the Council. The Council remains the decision-making body but is also in charge of the investigation. The members of the Council who will investigate competition law matters in the future are not entitled to take part in the process to decide whether an infringement of the competition law has occurred or not.

34 Sanctions and remedies

What sanctions and remedies may they impose?

Where an abuse of dominant position by one or several undertakings has been ascertained, the Council requests the relevant undertaking to immediately stop the unfair practice. The Chairman of the Council may also award interim injunctions to avoid a situation where the practice could cause irreparable harm to public and economic policy.

Under article 22(2) of the 2011 Law, the Council may fine undertakings that are in breach of the 2011 Law or of article 102 TFEU. The amounts of the fines are to be fixed on a case-by-case basis. The amounts will depend on the duration, gravity, and so on, of the infringement. The maximum fine shall not exceed 10 per cent of the highest worldwide turnover (excluding VAT) that has been realised during the latest full financial year preceding the year during which the anti-competitive practices have been committed. In the case of consolidated accounts, the turnover to be considered is the turnover stated in the consolidated accounts of the mother company. The Council may also order the publication of its decision.

On 10 December 2010 (2010-FO-02), a company (Coditel) was found to have abused its dominant position (see questions 20 and 26). The company was ordered to cease its anti-competitive practices within two months of notification of the decision, but the Council did not use its right to announce any fines as it concluded that the violation of the 2004 Law was not of sufficient seriousness and because the investigation took nearly four years.

On 18 July 2011, namely, more than six months after the decision, the Council released the corrective measures to be taken by Coditel in an 'assessment notice'. As Coditel had not implemented such measures on the due date, the Council enforced the daily penalties incurred by Coditel from February 2011 onwards.

Coditel having fully implemented such measures as from 11 July 2012, the Council set the final amount of the fine to €180,000 by the decision of 17 July 2012 (Decision 2012-AA-02).

Finally, the sanctions imposed by the Council, as administrative decisions, may be challenged before the administrative courts.

Alternatively, in 2012, the Council rendered two decisions to accept commitments from undertakings after having reached the preliminary conclusion that the two undertakings had allegedly abused of their dominant position. In the first decision (2012-E-04), the involved undertaking was operating in the press distribution sector while the second decision (2012-E-07) dealt with postal services. The two undertakings had proposed several commitments addressing the concerns raised by the plaintiffs and by the Council's statement of objections. By those two commitment decisions rendered in 2012, the Council demonstrated that it is open to hear and cooperate with undertakings in order to reach a pragmatic solution such as binding commitments rather than imposing mandatory measures and fines.

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