

Luxembourg

Léon Gloden and Céline Marchand

Elvinger, Hoss & Prussen

Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

The Law on Competition of 23 October 2011 (Mémorial A 2011, no. 218, p3755) (the 2011 Law) has abrogated the Law on Competition of 17 May 2004 (the 2004 Law) with effect as of 1 February 2012. The 2011 Law prohibits any agreements between undertakings, decisions by an association 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 any abuse of dominant position (article 5 of the 2011 Law).

The 2011 Law contains no specific provision on mergers.

The 2004 Law set up 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 into the Council. As from 1 February 2012, the Investigation Division's competences are exercised by the Council, which remains the sole competition authority. However, the members of the Council who are in charge of the investigation of a case are not entitled to take part on the decision process in order to decide whether on infringement of the competition law has occurred or not.

The 2011 Law provides for other changes to the competition law regime:

- 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 or 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 What kinds of mergers are caught?

As the 2011 Law contains no specific provision on mergers, only mergers that lead to an abuse of dominant position are caught.

3 What types of joint ventures are caught?

Joint ventures are caught only if the joint venture leads either to an agreement prohibited by article 3 of the 2011 Law or to an abuse of dominant position (article 5 of the 2011 Law).

4 Is there a definition of 'control' and are minority and other interests less than control caught?

No definition is contained in the 2011 Law.

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

There are no thresholds stipulated.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Luxembourg law does not provide for either the mandatory or voluntary filing of merger plans. Indeed, the 2011 Law provides only for a control a posteriori; if the 2011 Law has been violated, sanctions can be imposed after the violation has occurred.

There may be other issues in mergers arising either from legislation on substantial holdings in Luxembourg stock exchange listed companies or from legislation pertaining to special markets, and requiring special authorisations (banks, insurance business, etc). If the merger pertains to any of these specially regulated markets, a pre- or post-merger notification might be mandatory. Such notifications do not lead to an assessment based on competition law, but on other criteria.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects test?

Mergers or joint ventures between two foreign companies might be subject to the application of Luxembourg law if their activities have any effect on the Luxembourg market.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Please see question 12.

Notification and clearance timetable

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There are no deadlines.

10 Who is responsible for filing and are filing fees required?

Not applicable, as there is no compulsory filing for mergers in Luxembourg.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

As filing is not mandatory, there is no waiting period or obligation to suspend the transaction.

12 What are the possible sanctions involved in closing before clearance and are they applied in practice?

There are no possible sanctions unless special authorisations and notifications are required (notification of substantial holdings for companies listed on the Luxembourg stock exchange, special authorisation from the Luxembourg government, the Commission de Surveillance du Secteur Financier for banking activities or the Commissariat aux Assurances for insurance activities, etc).

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Please see question 12.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Please see question 12.

15 Are there any special merger control rules applicable to public takeover bids?

There are no special merger control regulations applicable to public takeover bids directed at Luxembourg-based companies. However, special laws and regulations might apply, such as those governing companies whose shares are publicly listed (these regulations are not merger-specific but stock exchange-specific).

16 What is the level of detail required in the preparation of a filing?

No details are required in the 2011 Law.

17 What is the timetable for clearance and can it be speeded up?

Not applicable in Luxembourg.

18 What are the typical steps and different phases of the investigation?

Not applicable as the Luxembourg the Council has no power to grant clearance of a merger.

Substantive assessment**19** What is the substantive test for clearance?

Please see question 18.

20 Is there a special substantive test for joint ventures?

Not applicable in Luxembourg, as there is no prior clearance of mergers or joint ventures.

21 What are the 'theories of harm' that the authorities will investigate?

The Council will only investigate if the merger leads to an abuse of dominant position or contributes to an agreement caught by article

3 of the 2011 Law. The Council uses the same or similar criteria as the European Commission investigating under articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) (formerly articles 81 and 82 of the EC Treaty).

22 To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?

Not applicable in Luxembourg, as there is no prior clearance of mergers or joint ventures.

23 To what extent does the authority take into account economic efficiencies in the review process?

Please see question 21.

Remedies and ancillary restraints**24** What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Not applicable in Luxembourg, as there is no prior clearance of mergers or joint ventures.

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Not applicable in Luxembourg, as there is no prior clearance of mergers or joint ventures.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Not applicable in Luxembourg, as there is no prior clearance of mergers or joint ventures.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Not applicable in Luxembourg, as there is no prior clearance of mergers or joint ventures.

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Not applicable in Luxembourg, as there is no prior clearance of mergers or joint ventures.

Involvement of other parties or authorities**29** Are customers and competitors involved in the review process and what rights do complainants have?

Not applicable in Luxembourg, as there is no prior clearance of mergers or joint ventures.

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

Not applicable in Luxembourg, as there is no prior clearance of mergers or joint ventures.

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Council may cooperate with antitrust authorities in other jurisdictions (including the European Commission), even though they do not have power for clearance of mergers and joint ventures

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 Competition Council plays actively its role: it has imposed fines on undertakings for non-competitive practices.

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

under the 2011 Law. The 2011 Law provides for a cooperation mechanism between the Council and the European Commission or the competition authorities of other member states of the EU.

For that purpose, the Council also belongs to different networks or organisations such as the European Competition Network, whose principal objective is cooperation between national competition authorities in all EU member states and the European Commission, or the International Competition Network and the European Competition authorities, whose objective is to provide a forum to discuss matters regarding the application of competition law.

Judicial review

32 What are the opportunities for appeal or judicial review?

Not applicable in Luxembourg, as there is no prior clearance of mergers or joint ventures.

33 What is the usual time frame for appeal or judicial review?

Not applicable in Luxembourg, as there is no prior clearance of mergers or joint ventures.

Enforcement practice and future developments

34 What is the recent enforcement record of the authorities, particularly for foreign-to-foreign mergers?

Not applicable in Luxembourg, as there is no prior clearance of mergers or joint ventures.

35 What are the current enforcement concerns of the authorities?

Not applicable in Luxembourg, as there is no prior clearance of mergers or joint ventures.

36 Are there current proposals to change the legislation?

No bill of law is pending.

Elvinger, Hoss & Prussen

Léon Gloden
Céline Marchand

leongloden@ehp.lu
celinemarchand@ehp.lu

2, Place Winston Churchill
L-1340 Luxembourg

Tel: +352 44 66 44 0
Fax: +352 44 22 55
www.ehp.lu

BP 425
L-2014 Luxembourg