

Luxembourg

Patrick Santer



Elvinger, Hoss & Prussen

Léon Gloden



1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The legal basis of the cartel prohibition is the law of 17th May 2004 on competition (hereafter the “2004 Law”), which provides for the enforcement of Articles 81 and 82 of the EC Treaty and basically mirrors Regulation 1/2003. The general nature of the cartel prohibition is administrative. The 2004 Law applies to undertakings, individuals and companies.

1.2 What are the specific substantive provisions for the cartel prohibition?

Article 3 of the 2004 Law provides for the prohibition of cartels.

According to Article 3, a cartel is defined as being all agreements between undertakings, decisions by associations or undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition within a market and, in particular, those that:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical developments or investment;
- share markets or source of supply;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage have no connection with the subject of such contracts.

Such agreements, decisions or concerted practices are automatically null and void.

However, Article 4 of the 2004 Law declares the provisions of Article 3 inapplicable to agreements or categories of agreements between undertakings, decisions or categories of decisions by associations of undertakings and concerted practices or categories of concerted practices that (i) contribute to improving the production or distribution of goods or to promote technical or economic progress, (ii) allow consumers a fair share of the resulting benefit, and (iii) do not impose on the undertakings concerned restrictions that are not indispensable for the attainment of these objectives and afford such undertakings the possibility of

eliminating competition in respect of a substantial part of the products in question.

1.3 Who enforces the cartel prohibition?

The 2004 Law has created the Council for Competition Matters (hereafter the “Council”) and the Investigation Division for Competition Affairs (hereafter the “ID”).

The Council is an independent administrative body composed of three permanent members and five substitute members. The Council is the decision-making body: it declares whether undertakings have violated Articles 3 to 5 (prohibition of cartels and of abuse of dominant position) or Articles 81 or 82 of the EC Treaty and may impose fines.

The ID is a service of the Ministry of Economy. It registers complaints for infringements of the 2004 Law or Articles 81 or 82 of the EC Treaty, investigates the case and submits its report to the Council.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The ID may start its investigation as a result of a complaint lodged by a person having a legitimate interest, the Minister of Economy or the European Commission.

After a preliminary investigation, the ID may close the file (for example, due to absence of jurisdiction in Luxembourg).

If the ID decides to continue its investigation, it may ask for information from the relevant undertakings. It may also carry out searches, proceed to the seizure of documents and ask for expert opinions.

After such investigation, the ID may come to the conclusion that there is no proof of an anti-competitive practice. It will submit a proposal to the Council to close the file. The Council may either follow the report of the ID and close the file or ask the ID to undertake an additional investigation.

If the ID finds that there is sufficient proof of an anti-competitive practice, it will then notify the communication of the claim to the concerned undertakings. From such notification onwards, those undertakings have a right of access to the file and no request for leniency or immunity may be made. The relevant undertakings will be granted a deadline to reply to the communication of the claim (minimum one month). Thereupon, the ID will hand the file to the Council with its report. The Council will hear the undertakings, the complainant, the Minister of Economy (or a representative) and the ID. This hearing will take place not less than two months after the

notification of the communication of the claim. The Council may also hear any other person, whether legal or physical, that it deems necessary.

The Council may decide either to close the file due to an absence of proof of an anti-competitive practice or if an anti-competitive practice has been established to request the undertakings to terminate such practice and/or to levy a fine against all or some of the undertakings.

The decisions of the Council may be challenged before the administrative judge (see question 7.1).

1.5 Are there any sector-specific offences or exemptions?

In principle, there are no specific exemptions or offences regarding cartels. Some sector-specific legislation contains provisions on competition law, such as the law on the telecommunications sector. The 2004 Law also authorises the government to proceed to price fixing in some sectors under certain conditions (e.g. abnormal functioning of the market or period of economic crisis).

1.6 Is cartel conduct outside Luxembourg covered by the prohibition?

The 2004 Law does not prevent the ID or the Council from taking into account actions that occurred outside Luxembourg if such conduct has an effect on the territory of Luxembourg.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	No
Carry out compulsory interviews with individuals	No, only with their consent	No
Carry out an unannounced search of business premises	Yes*	No
Carry out an unannounced search of residential premises	Yes*	No
■ Right to 'image' computer hard drives using forensic IT tools	Yes	No
■ Right to retain original documents	Yes*	No
■ Right to require an explanation of documents or information supplied	Yes	No
■ Right to secure premises overnight (e.g. by seal)	Yes*	No

Please Note: * indicates that the investigatory measure requires the authorisation by a Court or another body independent of the competition authority.

2.2 Please list specific or unusual features of the investigatory powers referred to in the summary table.

According to Articles 15 (1) and (2) and 16 (1) and (2) of the 2004 Law, the ID can visit business or other premises (i.e. residential

premises) without external authorisation, review documents and demand an explanation or information.

Prior authorisation by the president of the competent district court (which is a civil court) is only necessary if the ID intends to carry out searches and seizures of all documents and company books.

2.3 Are there general surveillance powers (e.g. bugging)?

No, there are none.

2.4 Are there any other significant powers of investigation?

The ID may appoint experts. The ID may further ask any undertaking or association of undertakings for information either through a request for information or by way of a formal decision compelling the undertaking or association of undertakings to provide information. Only the formal decision may be challenged in court. The incompleteness of information may only be subject to fine in case of a formal decision.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

The searches will be carried out by investigators of the ID, who may be assisted by experts and by police officers. The search has to be made in the presence of the representative of the undertaking or the owner of the premises (or a representative). The attendance of a lawyer during a search is allowed. The ID has however no legal obligation to wait for the arrival of legal advisors in order to start the search.

2.6 Is in-house legal advice protected by the rules of privilege?

The 2004 Law is silent on this topic. We consider that if such issue arises in a competition law case before a Luxembourg court, the court will apply the principles as set out in the Akzo case rendered by the European Court of Justice ("ECCJ"), i.e.: in-house legal advice is not protected by the rules of privilege.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

The ID may hear any person. However, the witness has a right to remain silent and the ID cannot compel anyone to testify (right against self-incrimination).

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

On several occasions, the Council has imposed fines on undertakings which refused to submit complete information.

The decisions rendered are not numerous and the Council makes a case-by-case assessment in accordance with the provision of the 2004 Law.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

There are no criminal sanctions provided in the 2004 Law.

Pursuant to Article 18 of the 2004 Law, in case of a breach of Articles 3 (prohibition of cartels) and 5 (abuse of dominant position), the Council may levy administrative fines and penalties against undertakings.

The maximum fine shall not exceed 10 per cent of the highest worldwide turnover (excluding taxes) that has been realised during the latest full financial year preceding the year during which the anti-competitive practices have been committed. In case of consolidated accounts, the turnover to be considered is the one stated in the consolidated accounts of the mother company.

The fine will be set by the Council in view of the importance and duration of the cartel, the harm caused to the Luxembourg economy, the situation of the concerned undertaking and the reiteration of the anti-competitive practices.

In a recent decision the Council has, for the first time, found the existence of a cartel and levied fines against companies in this respect.

Based on the investigation of the ID, the Council found that seven tiling companies met in order to set up temporary associations to submit offers for public contracts with respect to tiling works and to ensure that such public contracts would be awarded to the temporary association which had been previously designated by them. In this regard, the other temporary associations submitted cover offers of a higher amount to the public authority, which were prepared by the leader of the temporary association designated to be awarded the contract.

The Council found the seven companies guilty of having entered into market sharing and price fixing agreements and considered that the conditions set out in article 4 of the 2004 Law in order to be granted an exemption were not met.

In order to set the amount of the fine, the Council decided that:

- the infringement was serious despite the fact that the cartel had not, for object or effect, lead to an increase of the price offered by the temporary associations for the realisation of the tiling works because: (i) cartels are one of the most serious breaches of competition law, which are by their very nature anti-competitive; (ii) the cartel occurred in the frame of a public tender procedure, the objective thereof being to ensure a prudent administration of public financial resources and which is based on the loyalty of all participants; and (iii) a high number of companies with high market shares in the tiling sector participated in the cartel;
- the infringement started the day of the first meeting, which organised the cartel, held on 13 June 2005 and ended on 7 December 2005, the day where investigations were launched against certain companies;
- the damage caused to the economy was important because: (i) an anticompetitive practice such as a cartel may have an impact in the long term on prices, quality, diversity and the innovative character of products and services and is thus of such a nature as to have a negative effect on the economy; (ii) such practice was also prohibited by the law on public tenders and thus rendered the procedure void, which triggered additional expenses for the public authority and forced the public authority to award the contract to another company for a higher price; and (iii) the participants to the cartel were the most important tiling companies in Luxembourg and thus constituted a bad example; and
- no mitigating or aggravating circumstances applied.

Several companies had requested the application of the leniency regime. However, only one of them met all the conditions required by article 19 of the 2004 Law and was granted leniency. The Council explained that the scale of the reduction depends on the exactitude and relevance of the information and evidence provided by the applicant and therefore granted a reduction of the fine to 50%.

Considering the above, as well as the 2005 turnover of each company (being from approximately EUR 776,000 to EUR 7,400,000), the Council imposed fines from EUR 15,000 to EUR 25,000 to the infringers.

A fine, calculated as described above, may also be imposed on the undertaking or association of undertakings in case of refusal to provide correct information to the ID (whether such information has been requested by formal decision or not) or in its absence to provide correct information within the time limit indicated in the formal decision made by the ID.

Moreover the Council may impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5% of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel an undertaking:

- to put an end to an infringement of Article 81 or Article 82 of the EC Treaty or Articles 3 to 5 of the 2004 Law (cartel or abuse of dominant position), in accordance with its decision;
- to comply with a decision ordering interim measures;
- to comply with a commitment made binding by its decision; and/or
- to supply complete and correct information to the competition authorities.

Furthermore, any person or undertaking may introduce a claim in the civil court on the basis of liability in tort or contractual liability to obtain indemnification for the claimant who has suffered harm as a result of the existence of a cartel (see section 8).

3.2 What are the sanctions for individuals?

Under the 2004 Law, fines may not be levied against an employee. Employees do not have to bear the financial consequences of the cartel activity by their employer. Further, the 2004 Law does not provide for personal criminal exposure. If an individual is acting as an economic undertaking and is involved in a cartel, such individual may be subject to the same sanctions as a company involved in a cartel.

Directors, managers or employees cannot suffer any sanction under the 2004 Law. However, if those persons have committed any act or fault which have led to the involvement of the company/employee in a cartel without the approval or the acknowledgment of the board or the employee, they may be subject to the sanctions provided by the Law of 10th August, 1915 on commercial companies or the Labour Law Code, as applicable.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

The 2004 Law does not provide for such possibility.

3.4 What are the applicable limitation periods?

Regarding infringements of the provisions of the 2004 Law concerning enquiries, the limitation period is 3 years. For all the other infringements the period is 5 years. It starts to run the day of

the violation or, in case of a continuous violation, the day when the violation ends.

The limitation period regarding the enactment of a sanction is set at 5 years.

These limitation periods are subject to discontinuation.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

Generally a company may pay the legal costs and/or financial penalties imposed on a manager, director or employee if such payment is in line with its corporate interest. However, under the 2004 Law, no fines may be levied against an employee.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

Pursuant to Article L.121-9 of the Labour Law Code, the employer bears the risks of his business and consequently is held liable unless the employee has committed a voluntary act or a gross negligence. Hence the employer has to prove a voluntary act or gross negligence which we consider being rare in a competition case, as an employee would act on instruction of his employer.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

Article 19 of the 2004 Law provides for a leniency and immunity regime.

The Council may exempt the undertaking from fines if the undertaking is the first to report the existence of a cartel of which neither the Council nor the ID have any knowledge.

The Council may reduce the fines provided the undertaking reports the existence of the cartel prior to the notification of the communication of the claim.

The exemption or reduction of fines is subject to the conditions that: (i) the undertaking provides the Council and the ID with all the documents and information in its possession regarding the existence of the alleged cartel; (ii) the undertaking provides total and permanent cooperation until the final decision has been taken by the Council; (iii) the undertaking immediately stops participation in the cartel, at the latest when it reports the existence of a cartel to the Council or the ID; and (iv) the Council or the ID shall not be in possession of elements that prove that the undertaking has compelled other undertakings, by exercising its economic power or by any other mean, to participate in the cartel. The Council is not obliged to grant an exemption or a reduction even if the above conditions are met.

There are no scales according to which fines may be reduced. No fines, reductions of fines or exemptions have been levied so far.

The decision of the Council on the award of leniency or immunity may only be challenged in court with a decision on the merits of the infringement.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

No marker system is provided by the 2004 Law.

Nevertheless, the Luxembourg authorities apply the marker system model as provided by the European Competition Network relating to leniency. To obtain a marker, the undertaking must, during the first contact, provide a minimum of information: its corporate name; address; the circumstances that lead to the leniency application; the participants to the presumed cartel; the market(s) involved; the affected territory(ies); the total duration of the presumed cartel; and information on any other leniency application which has been or will be introduced to other competition authorities (EU or non-EU).

If these conditions are met, the undertaking will get an acknowledgment containing the date and time of the first contact. From such acknowledgment, the undertaking has 2 weeks to complete the file and provide the Council and the ID with all the information and evidence in its possession.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

Yes, they can.

4.4 To what extent will a leniency application be treated confidentially and for how long?

There are no provisions in the 2004 Law on the confidentiality of the leniency or immunity applicant and any cooperating party. Article 24 of the 2004 Law only deals with the request made by undertakings or persons that information used in the investigation remain partially or totally confidential (i.e. business secrets).

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

Article 19 of the 2004 Law provides total and permanent cooperation until the final decision has been taken by the Council. The few decisions rendered by the Council are silent on the ongoing cooperation obligations.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

The second undertaking to report the existence of a cartel may only be granted a reduction of the fine provided that the other conditions are met. The 2004 Law is silent with respect to a "leniency plus" or "penalty plus" policy. Each infringement with the same agreement should be treated separately.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

No whistle-blowing procedure is laid down by the 2004 Law. A letter from employees (or other persons who are not entitled to act in the name and on behalf of the undertaking) may be considered not binding on the undertaking, while at the same time revealing the existence of a cartel to the ID or the Council. No specific procedure is provided for.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

Plea bargains or similar mechanisms are not allowed under Luxembourg law.

7 Appeal Process

7.1 What is the appeal process?

The undertaking may challenge the decision of the Council before the administrative court (*tribunal administratif*). An appeal against a judgment of the administrative court may be lodged before the administrative court of appeals (*cour administrative*).

The authorisation granted by the president of the district court (which is a civil court) to allow the ID to carry out searches and seizures of all documents and company books may be challenged before the court of appeals (*cour d'appel*).

7.2 Does an appeal suspend a company's requirement to pay the fine?

The appeal before the administrative court suspends the obligation to pay the fine.

7.3 Does the appeal process allow for the cross-examination of witnesses?

Cross-examination of witnesses is in principle not allowed under Luxembourg law. The process has an inquisitorial nature. The judge questions the witnesses. A party may only ask the judge to pose a particular question to the witness.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Any person or undertaking may file a private damage claim with the civil courts on the basis of liability in tort (Articles 1382 *et seq.* of the Civil Code) or contractual liability. The purpose of such action is to obtain indemnification by the claimant who has suffered any harm from the existence of a cartel, provided the claimant proves the prejudice and a direct link between such prejudice and the existence of the cartel.

To our knowledge no civil damage claims for cartel conduct have been introduced up to now.

8.2 Do your procedural rules allow for class-action or representative claims?

Luxembourg procedural rules do not allow for class-action or representative claims.

Notwithstanding, the Luxembourg Union of consumers can bring

cessation suits to protect the collective interests of consumers.

8.3 What are the applicable limitation periods?

Regarding liability in tort or in contract the general statute of limitation is 30 years according to Article 2262 of the Luxembourg Civil Code. In case of a commercial contractual relationship, such statute of limitation is 10 years (Article 189 of the Commercial Code).

8.4 Does the law recognise a "passing on" defence in civil damages claims?

To our knowledge, no case law referring to the "passing on" theory has been rendered by Luxembourg courts. Notwithstanding, there are no legal objections to the fact that a Luxembourg court would consider that the alleged damages are mitigated if any overcharging resulting from the breach of competition law were passed on to subsequent purchasers. The burden of proof of the "passing on" defence would be borne by the defendant.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

To our knowledge, no civil damage claims for cartel conduct have been introduced up to now.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

Please see question 8.1. As settlement agreements are in principle confidential, we have no knowledge whether settlement agreements have been entered into or not.

9 Miscellaneous

9.1 Please provide brief details of significant recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

The 2004 Law will be amended by Bill of Law n° 5816, which was filed with parliament on 20th December 2007. The main provisions of this Bill of Law are:

- the merger of the ID into the Council;
- the proceedings will be made more effective and less cumbersome;
- the maximum amount of the fines will be differentiated according to whether the undertaking (i) was a party to a cartel or has abused its dominant position, or (ii) has refused to submit information to the Council during the investigation of the case; and
- the leniency regime will be adapted to the European leniency programme.

The Bill of Law n° 5816 may be amended in the course of the parliamentary process.

The Commission for economic affairs of the Parliament has made some amendments to the Bill of Law. The State Council ("*Conseil d'Etat*") has objected to the same provisions of the Bill of Law. Currently the Bill of Law is still in the process of being reviewed.

9.2 Please mention any other issues of particular interest in Luxembourg not covered by the above.

There is nothing of particular interest to be mentioned.



Patrick Santer

Elvinger, Hoss & Prussen
2, Place Winston Churchill
L-1340 Luxembourg

Tel: +352 44 66 44 0
Fax: +352 44 22 55
Email: patricksanter@ehp.lu
URL: www.ehp.lu

Patrick Santer is "*maître en droit*" and holds a DESS in European law.

He became a member of the Luxembourg Bar in 1995. In 2001 he became a partner of Elvinger, Hoss & Prussen.

He specialises in European law and commercial litigation. He is also active in corporate restructuring and generally in corporate law.

He is member of the Council of State of Luxembourg and was member of the Luxembourg Parliament from October 1999 until March 2009.

He has presented a memorandum to the "University of Tours" on the subsidiarity principle under EU law.

He is fluent in French, English, German and Luxembourgish.



Léon Gloden

Elvinger, Hoss & Prussen
2, Place Winston Churchill
L-1340 Luxembourg

Tel: +352 44 66 44 0
Fax: +352 44 22 55
Email: leongloden@ehp.lu
URL: www.ehp.lu

Léon Gloden became a member of the Luxembourg Bar in 1999 and joined Elvinger, Hoss & Prussen the same year. He became a partner in July 2007.

He is a member of the Parliament since 28th July 2009.

His principal fields of activity are litigation, employment law, real estate law and EC law.

He is "*maître en droit*" from the "Université d'Aix-Marseille III" and holds a DEEA ("*Diplôme d'Etudes Européennes Approfondies*") in EC law of the "College of Europe" in Bruges.

He is fluent in English, French, German and Luxembourgish.

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