# The Public Competition Enforcement Review

Fourth Edition

Editor
Shaun Goodman

Law Business Research

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# Chapter 16

# LUXEMBOURG

*Léon Gloden*[1]

## I OVERVIEW

The Law on Competition of 23 October 2011 ('the 2011 Law')[2] provides for the enforcement of article 101 of the Treaty on the Functioning of the European Union ('the TFEU'). The 2011 Law has abrogated the Law on Competition of 17 May 2004 ('the 2004 Law') with effect from 1 February 2012.

The 2004 Law set up the Council and the Investigation Division ('the ID'). The Council, an independent administrative authority composed of three members, was in charge of the decision-making process to enforce competition law. The ID, a service of the Ministry of Economics and Foreign Trade, was in charge of the registration of the complaints of infringements of competition law, investigations and the submission of reports to the Council. The ID 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 ID 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 ID into the Council. The Council remains the decision-making body but is also now in charge of investigations; however, the members of the Council in charge of the investigation of a case are not entitled to take part in the process of deciding whether a violation of competition law has occurred. As with the 2004 Law, the Council declares whether undertakings have violated Articles 3 to 5 of the 2011 Law or Articles 101 and 102 of the TFEU and may impose fines. The fine will be set in view of the gravity and duration of the anti-competitive practice, the harm caused to the Luxembourg economy, the situation of the concerned undertaking and the reiteration of any anti-competitive practices. The maximum fine must not exceed

1 Léon Gloden is a partner at Elvinger, Hoss & Prussen.

2 Mémorial A 2011, No. 218, p. 3755.

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. The Council may also order the publication of its decision. Decisions of the Council may be challenged before the administrative judge.

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

*a* the modification of the proceedings in order to make them more effective and less cumbersome;

*b* 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

*c* the adaptation of the leniency regime to the European Competition Network model leniency programme.

According to the Council's website, the main goal of competition law is to ensure and protect fair competition on the market in order to stimulate innovation and research and development, and to guarantee an optimal allocation of resources. Fair competition should lead to an increase in the choice of the products and services, in terms of quantity and quality, and a reduction in the prices of the products and services. The final beneficiary of competition law rules is the consumer and thus such consumers as well as the process of competition need to be protected but not the individual competitors.

The Council has not expressed its intention to prioritise the research and prosecution of certain types of infringement of competition law; however, as it tends to follow the European Commission ('the Commission') in its application of competition law, it is very likely that they will have the same priorities in the enforcement of competition law as the Commission. The Council's enforcement policy is thus likely to prioritise practices that are particularly harmful to consumers such as cartels and exclusionary practices by dominant undertakings (such as exclusive dealing, rebates, tying and bundling, predatory practices, refusal to supply and margin squeeze) as they are potentially depriving customers of choice, more innovative goods or services and lower prices. In this respect, the Council recently ordered a company active in the TV cable distribution sector to stop tying practices (see Section III.i, *infra*).

## II CARTELS

Article 3 of the 2012 Law prohibits all agreements between undertakings, decisions by associations of 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:

*a* directly or indirectly fix purchase or selling prices or any other trading conditions;

*b* limit or control production, markets, technical developments or investment;

*c* share markets or source of supply;

*d* apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or

*e* 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 2011 Law exempts such agreements when they (1) contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, (2) that do not impose on the undertakings concerned restrictions that are not indispensable for the attainment of these objectives, and (3) do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 19 of the 2011 Law provides for a leniency regime. The Council may exempt the undertaking from fines if the undertaking is the first to report the existence of a cartel of which the Council has no 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 condition that the undertaking:

*a* provides the Council with all the documents and information in its possession regarding the existence of the alleged cartel;

*b* provides total and permanent cooperation until the final decision has been taken by the Council; and

*c* immediately ceases participation in the cartel, at the latest when it reports the existence of a cartel to the Council.

Finally, the Council must not be in possession of elements that prove that the undertaking has compelled other undertakings, by exercising its economic power or by any another means, to participate in the prohibited activity.

There are no scales according to which fines may be reduced and no guarantees of leniency if a party cooperates; even if the conditions are met, leniency may not be awarded. Leniency awards are not binding on the public prosecutor (in case of a criminal action) or on the civil courts (in case of a claim for liability).

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

### i Significant cases

Until now, the Council has only found in one case the existence of a cartel and levied fines against companies in this respect.[3] This decision was rendered in 2010 under the 2004 Law.

The case was initiated by the Minister of Public Works, who lodged a complaint with the ID against several companies for having entered into price-fixing and

3 Decision N 2010-FO-01 of 5 March 2010.

market-sharing agreements with respect to public contracts for tiling works awarded through a public procurement procedure.

Based on the investigation of the ID, the Council found that, on 13 June 2005, seven tiling companies met in order to set up temporary associations to submit offers for the public contracts in question and to ensure that such public contracts would be awarded to the temporary association that 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.

Considering the large scale of the works, the availability of the labour force, the geographically localised building sites and the specialisation and technical or material capacities of certain companies, the Council did not find any infringement to competition law concerning the setting up of temporary associations. The Council, however, 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.

To set the amount of the fine, the Council decided on 5 March 2010 that:

*a* the infringement was serious despite the fact that the cartel had not (by object or effect) led to an increase of the price offered by the temporary associations for the realisation of the tiling works because:
- cartels are one of the most serious breaches of competition law, which are by their very nature anti-competitive;
- the cartel occurred in the context of a public procurement procedure, the objective being to ensure a prudent administration of public financial resources and which is based on the loyalty of all participants; and
- a large number of companies with high market shares in the tiling sector were participating in the cartel;

*b* the infringement started the day of the first meeting that organised the cartel, held on 13 June 2005, and ended on 7 December 2005, the day investigations were launched against certain companies;

*c* the damage caused to the economy was important because:
- an anti-competitive 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;
- such practice was also prohibited by the law on public tenders and thus rendered the procedure void, which triggered additional expense for the public authority and forced it to award the contract to another company for a higher price; and
- the participants to the cartel were the most important tiling companies in Luxembourg and thus constituted a bad example; and

*d* 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. As the scale of the reduction depends on the accuracy and relevance of

the information and evidence provided by the applicant, the Council granted a reduction of the fine of 50 per cent.

Considering the foregoing as well as the 2005 turnover of each company (ranging from approximately €776,000 to €7.4 million), the Council imposed fines from €15,000 to €25,000 on the infringers.

### ii Trends, developments and strategies

The Council considers that cartels, which are usually secret, are by their very nature among the most harmful restrictions of competition because they eliminate the essential prerequisite that is at the root of competitive functioning of the markets, according to which each undertaking must determine its behaviour according to its own situation, and thus organise itself in the best possible manner in order to ensure the sustainability of its activities. The Council thus considers that cartels are anti-competitive by their object and that it is not required to demonstrate their anti-competitive effect to find the existence of an infringement of competition law. Such position is in line with the position taken by the Commission with respect to cartels.

## III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

As previously explained, Article 3 of the 2011 Law prohibits restrictive agreements. Article 5 of the 2011 Law prohibits abuses of dominant position. Dominance is defined by the Council in the same manner as the ECJ: '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'. A high market share compared to the market shares of the competitors for a relatively long period of time is generally an important element for proof of dominance. Other criteria can also be taken into account such as entry barriers, the financial resources and the size, technical resources or industrial property rights of the undertaking. The Council considered that 31 to 32 per cent of market will generally be considered as insufficient to characterise a dominant position[4] and that a market share above 60 to 70 per cent will generally lead to the presumption of dominance.[5]

There is no definition of an abuse in the 2011 Law. Instead, the 2011 Law provides a non-exhaustive list of examples. For instance, abuse may consist of:

*a* directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

*b* limiting production, markets or technical development to the prejudice of consumers;

*c* applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and

4 Decision No. 2007-FO-03 of 5 September 2007.

5 Id.

*d* making the conclusion of contracts subject to the 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.

### i Significant cases

On 10 December 2010 the Council decided that Coditel, a Luxembourg company operating on the TV cable distribution market, had abused its dominant position.[6] This decision was rendered under the 2004 Law.

The investigation was focused on two potential anti-competitive practices: the billing without justification of subscription fees for any additional connection (practice of unfair prices) and the obligation of Coditel's subscribers to purchase a decoder ('set-top box') commercialised by Coditel, leaving the consumer without the opportunity to purchase a decoder from a competitor (tying practice).

After having concluded that the relevant product market is the market of the TV programmes distributed by cable, satellite and DSL, and the geographical market is the one on which Coditel offers its TV cable distribution services, the Council concluded that in such markets, Coditel occupies a dominant position as its market share is between 70 and 85 per cent.

Furthermore, the Council concluded that the financial barriers are very high so that it is unlikely that one or several competitors would become active in such a market. In order to determine whether Coditel had abused its dominant position, the Council has analysed the two particular reproaches mentioned above.

Regarding the tying practice in relation to the purchase of a decoder from Coditel, the Council considered that the company compelled its subscribers to purchase its decoder whereas technically and commercially it would have been possible for the subscribers to purchase decoders from competitors.

Furthermore, Coditel offered to its subscribers a few types of decoders containing some technical functions that not all of Coditel's clients wanted to have whereas it has a decoder without these technical functions but which is not offered to Coditel's subscribers. Hence Coditel deliberately restrained the consumers' choice.

Regarding the billing practices, the Council concluded that Coditel's billing practice was anti-competitive. Hence, the Council ordered it to cease such anti-competitive practices within a two-month period from notification of the decision. The Council also ordered a daily penalty of €1,000 if Coditel did not cease its anti-competitive practices.

Finally the Council did not use its right to pronounce any fines as permitted by Article 18 of the 2004 Law as it concluded that a violation of the law is not of such extreme seriousness and because the investigation took nearly four years.

On 18 July 2011 – more than six months after the decision – the Council released an 'assessment notice'; as Coditel had not implemented such measures on due date, the Council enforced the daily penalties incurred by Coditel as from February 2011 on.

6 Decision No. 2010-FO-02 of 10 December 2010.

Also on 10 December 2010 the Council rendered another decision in relation to practices on the tobacco market in Luxembourg.[7] A Luxembourg wholesaler claimed that the sole Luxembourg tobacco producer abused its dominant position by refusing to offer the same supplying terms and conditions for cigarettes and tobacco as those offered to other wholesalers.

During the procedure before the competition authorities, the two undertakings came to a settlement agreement. However the ID continued its investigation for the period preceding such settlement agreement.

The Council has defined the relevant product market as being the market of any tobacco products that are cigarettes and tobacco to be smoked. Such products can be substituted without regards to their origin or place of production and there is no specific market limited to the products produced in Luxembourg or by a producer located in Luxembourg.

Having defined the product and geographical market, the Council concluded that the unique Luxembourg producer of tobacco products does not occupy a dominant position as five other competitive producers are active on the Luxembourg market and that the Luxembourg producer occupies the smallest market share among these five producers. Hence it cannot act unilaterally without taking into consideration the behaviour of its competitors.

Coming to the conclusion that the unique Luxembourg producer does not occupy a dominant position, the Council has determined not to analyse the claim of the supply refusal alleged by the plaintiff.

### ii Trends, developments and strategies

With respect to abuse of dominant position, in a decision rendered on 3 August 2009 under the 2004 Law (Decision No. 2009-FO-02 of 3 August 2009, discussed in the second edition of *The Public Competition Enforcement Review*), the Council examined whether the conduct in question may be justified on efficiency grounds by the dominant undertaking. In the *Coditel* decision, the Council did not recognise any justification alleged by Coditel to justify its conduct.

## IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

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 ('the ILR') is the regulatory body for:

*a* the postal sector (Law of 15 December 2000 on postal services and financial postal services, as amended);

*b* the electronic communications sector (Law of 21 February 2011 on the networks and services of electronic communications);

7 Decision No. 2010-FO-03 of 10 December 2010.

*c* the electricity sector (Law of 1 August 2007 on the organisation of the electricity market, as amended); and

*d* the gas sector (Law of 1 August 2007, as amended on the organisation of natural gas).

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

All sector-specific laws mentioned provide that the ILR should not interfere with the jurisdiction of the competition authorities. However, in practice such interference may occur (for instance, 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 the access of essential facilities). In this regard, the Law on the electronic communications sector requires the prior consent of the Council before the ILR takes a decision to (1) create a competitive situation on a market, (2) ensure access and interconnectivity or (3) guarantee the universal services to a final user, which affects the market. If the Council refuses on competition law grounds to give its consent to the measure proposed by the ILR, the ILR must renounce the measure in question.

Article 30 of the 2011 Law authorises the competition authorities to request information, including confidential information, from other regulatory bodies of the various sectors and the ILR must cooperate with them.

Furthermore in the'European Competition Network ('ECN') special issue of December 2010 'A look inside the ECN: its members and its work', the Council expressly insists that 'Cooperation with sectoral regulators is of particular relevance as a complement to the cooperation with other NCAs' and refers in this context to Article 30 of the 2011 Law.

## V STATE AID

Luxembourg has no specific rules in relation to state aid. Article 107(1) of the TFEU (formerly Article 87 of the EC Treaty) thus applies, which provides that 'any aid granted by a Member State or through state resources in any form whatsoever that distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'. Article 107(2) of the TFEU provides for a list of aid that is always considered as compatible with the internal market and Article 107(3) a list of the TFEU for aid, which, after having been notified to the Commission, may be considered compatible with the internal market provided that they meet certain criteria.

### i Significant cases

***Dexia Banque Internationale Luxembourg SA***[8]

Dexia Banque Internationale Luxembourg is a subsidiary of Dexia SA ('Dexia'), a Belgian company. Dexia was facing difficulties due to the deterioration in market conditions and the financial difficulties faced by some other financial institutions. In order to avoid the collapse of Dexia, Luxembourg, France and Belgium decided to set up a joint and non-several guarantee covering all financing obtained by Dexia and its subsidiaries from credit institutions and institutional depositors, and the bonds and debt instruments issued by Dexia to institutional investors falling due before 31 October 2011. The guarantee was valid for six months, limited to €150 billion, and would be remunerated by a commission to be paid every month by Dexia.

The Commission considered that given its size, market shares and the prevailing financial crisis the group's collapse would have given rise to a systemic crisis. Indeed, considering its important role in the financing of local authorities in Belgium, it could have paralysed every one of their activities. Moreover, it could have created a loss of confidence of Belgian households towards the banking sector in general, leading to a run on the other banks established in Belgium. Finally, it could have amplified the mistrust of foreign banks towards Belgian banks, preventing interbanking loans. The Commission then considered the aid as appropriate to ensure the survival of Dexia, limited to the minimum necessary to allow the continuation of its activities and proportionate since Dexia committed itself to respect compensatory measures in order to avoid undue distortions of competition. The Commission concluded to the compatibility of the aid based on Article 107(3)(b) of the TFEU and the Member States have undertaken to submit a restructuring plan in order to ensure the long-term viability of the group. The prolongation of the guarantee has been approved by the Commission on 30 October 2009 (N583/2009).

***Fortis Bank Luxembourg SA***

*Case NN46/2008 of 3 December 2008*

Fortis Bank Luxembourg was a subsidiary of Fortis Bank, a Belgian company. Fortis Bank was facing serious difficulties resulting from a combination of several factors, such as its participation in the purchase of ABN Amro, which required a vast financing plan that proved difficult to implement successfully (especially due to the sub-prime crisis), the successive asset impairments of its investment in structured credits and the liquidity crisis.

Fearing a failure of the Fortis Group, which could have given rise to a systemic risk in the financial sector, Belgium, the Netherlands and Luxembourg invested €11.2 billion in the banking activities of the Fortis Group in exchange for approximately a 49 per cent stake in the Fortis Group. In this regard, the Luxembourg government granted to Fortis Bank Luxembourg a three-year convertible loan of €2.4 billion, whose conversion would enable the Luxembourg government to acquire 49.9 per cent of Fortis Bank Luxembourg's capital. The loan was converted immediately after the signing of the loan agreement.

8 Case NN45/2008 of 19 November 2008.

As it did not restore confidence in the bank and the liquidity crisis worsened, Belgium put in place a special liquidity assistance of €10 billion, the Dutch operations of Fortis Bank were sold to the Dutch state and the remaining operations of Fortis Bank were sold to the Belgian state, which immediately sold 75 per cent to BNP Paribas (thereby also acquiring control of 50 per cent of Fortis Bank Luxembourg). Luxembourg sold 16 per cent of Fortis Bank Luxembourg to BNP Paribas, increasing BNP Paribas's stake in Fortis Bank Luxembourg to 67 per cent.

With respect to the Luxembourg part of the transaction, the European Commission considered that the measures were necessary to avoid the paralysis of banking activities in Luxembourg for a considerable time for basically the same reasons as those stated in the *Dexia* decision (except the reasons relating to the financing of the local authorities, which were not applicable in this case). It then considered that the aid was well-targeted as Fortis Bank was likely to return to long-term viability since BNP Paribas was one of the world's largest and highest rated banks. The aid was also considered as proportionate and limited to the minimum required. As the sale to the Dutch state had reduced Fortis Bank's market presence and as Fortis Bank had made a certain number of commitments, the Commission considered that the measures would not unduly distort competition and concluded to the compatibility of the measure with the internal market based on Article 107(3)(b) of the TFEU.

*Case N274/2009 of 12 May 2009*

On 12 December 2008, the Court of Appeal of Brussels suspended the sale of Fortis Bank to BNP Paribas and requested a consultation of the shareholders, which rejected the transaction triggering a renegotiation of the deal between the Belgian and Luxembourg authorities, Fortis Holding and BNP Paribas. In the new agreement, it was *inter alia* provided for that the Luxembourg state would subscribe to €100 million of bonds to be issued by Banque Générale de Luxembourg (formerly Fortis Bank Luxembourg) ('BGL'), which would then be transferred to BGL against the issue of new BGL shares. The European Commission considered that such measures being a slight extension of the loan of €2.4 billion it has authorised in its decision of 3 December 2008, was necessary, and did not create unreasonable distortions of competition. It thus concluded to the compatibility of the measure with the internal market based on Article 107(3)(b) of the TFEU.

***Kaupthing Bank Luxembourg***[9]

Kaupthing, a Luxembourg private bank, was a subsidiary of the Icelandic Kaupthing Bank. Kaupthing Bank encountered serious financial difficulties and solicited from the Icelandic banking authority that it assumes the powers of the shareholders. Such decisions have immediately caused the impossibility for Kaupthing to refinance itself through its mother company or on the interbank market.

Consequently, on 9 October 2008, the directors of Kaupthing requested the district court of Luxembourg to declare Kaupthing in suspension of payment in view

9 Case N344/2009 of 9 July 2009.

of its restructuring. In this context, the Luxembourg state granted a €320 million loan to Kaupthing. The restructuring plan, which was established by the administrators of Kaupthing, provided that the deposits with the Belgian branch of Kaupthing would be sold to Crédit Agricole Belgique/Keytrade Bank and the Luxembourg-based private bank part of the Havilland Bank. The bank's other assets would be wound up in a hive-off vehicle and the revenue used to compensate creditors and repay the state aid. The granting of the loan was submitted to the Commission, which considered that since the primary purpose of the loan was to compensate depositors of the Belgian branch of Kaupthing, the proposed measure was appropriate. Then, it stated that the aid was proportionate because it would not result in compensation being unduly paid to Kaupthing's former shareholders. Finally, the fact that the bank's activities would be scaled down and the break up of its assets following an open transparent sale procedure would ensure that the aid does not give rise to distortions of competition. Consequently, the Commission concluded that the loan would contribute to the stability of the financial system while avoiding undue distortions and was therefore compatible with Article 107(3)(b) of the TFEU.

### ii Outlook

In its Communication of 6 December 2011, the Commission extended the application, as of 1 January 2012, of the special state aid rules to support measures in favour of banks for the sake of financial stability.[10]

## VI CONCLUSIONS

### i Pending legislation

No bill of law is pending.

### ii Analysis

The application of competition law in Luxembourg is in line with the application of competition law at EU level.

10 Communication from the Commission on the application, from 1 January 2012, of state aid rules to support measures in favour of banks in the context of the financial crisis (2011/C 356/02).

## Appendix 1

# ABOUT THE AUTHORS

**LÉON GLODEN**

*Elvinger, Hoss & Prussen*

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

He is the author of various publications on EU law issues. He is a *maître en droit* from the Université d'Aix-Marseille III and holds a DEEA in EC law from the College of Europe in Bruges. In January 2012 he became a member of the advisory committee of master's degrees in European general law and European private law at the University of Luxembourg.

Mr Gloden has been a member of Parliament since July 2009 (*inter alia*, member of the Commission for legal affairs and institutional matters) and on 7 November 2011 he became mayor of the City of Grevenmacher.

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

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