

Dominance

Contributing editors

Patrick Bock, Kenneth Reinker and David R Little



2018

GETTING THE
DEAL THROUGH

GETTING THE
DEAL THROUGH 

Dominance 2018

Contributing editors

Patrick Bock, Kenneth Reinker and David R Little
Cleary Gottlieb Steen & Hamilton LLP

Reproduced with permission from Law Business Research Ltd

This article was first published in April 2018

For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

© Law Business Research Ltd 2018
No photocopying without a CLA licence.
First published 2005
Fourteenth edition
ISBN 978-1-78915-016-2

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between February and March 2018. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Global overview	7	India	97
Patrick Bock and Alexander Waksman Cleary Gottlieb Steen & Hamilton LLP		Shweta Shroff Chopra, Harman Singh Sandhu and Rohan Arora Shardul Amarchand Mangaldas & Co	
Australia	10	Indonesia	104
Elizabeth Avery, Adelina Widjaja and Liana Witt Gilbert + Tobin		Deny Sidharta, Verry Iskandar and Cameron R Grant Soemadipradja & Taher	
Austria	17	Ireland	110
Christian Mayer, Moritz Am Ende and Elisabeth Müller Starlinger Mayer Rechtsanwälte GmbH		Helen Kelly and Liam Heylin Matheson	
Belgium	23	Italy	117
Thomas Woolfson Cleary Gottlieb Steen & Hamilton LLP		Enrico Adriano Raffaelli and Alessandro Raffaelli Rucellai&Raffaelli	
Brazil	30	Japan	124
Lauro Celidonio Gomes dos Reis Neto, Ana Carolina Estevão and Renata Caied Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados		Atsushi Yamada and Yoshiharu Usuki Anderson Mōri & Tomotsune	
Bulgaria	36	Korea	131
Anna Rizova and Hristina Dzhevlekova Wolf Theiss		Cecil Saehoon Chung, Sung Bom Park and In Seon Choi Yulchon LLC	
Canada	42	Luxembourg	137
Arlan Gates, Yana Ermak and Eva Warden Baker McKenzie		Léon Gloden and Katrien Veranneman Elvinger Hoss Prussen	
China	48	Malaysia	143
Susan Ning King & Wood Mallesons		Sharon Tan Suyin and Nadarashnaraj Sargunaraj Zaid Ibrahim & Co	
Colombia	55	Mexico	149
Ximena Zuleta-Londoño and María Paula Macías Dentons Cardenas & Cardenas		Rafael Valdés Abascal and Agustín Aguilar López Valdés Abascal Abogados, SC	
Denmark	59	Morocco	154
Frederik André Bork, Søren Zinck and Olaf Koktvedgaard Bruun & Hjejle		Corinne Khayat and Maija Brossard UGGC Avocats	
Ecuador	65	Norway	160
Daniel Robalino-Orellana Ferrere		Siri Teigum and Eivind J Vesterkjær Advokatfirmaet Thommessen AS	
European Union	70	Portugal	164
Patrick Bock, David R Little and Henry Mostyn Cleary Gottlieb Steen & Hamilton LLP		Mário Marques Mendes and Pedro Vilarinho Pires Gómez-Acebo & Pombo	
France	78	Russia	171
Corinne Khayat and Maija Brossard UGGC Avocats		Anna Maximenko and Elena Klutchareva Debevoise & Plimpton LLP	
Germany	84	Singapore	176
Tilman Kuhn and Tobias Rump Cleary Gottlieb Steen & Hamilton LLP		Lim Chong Kin and Corinne Chew Drew & Napier LLC	
Hong Kong	91	Slovenia	182
Adam Ferguson and Jocelyn Chow Eversheds Sutherland		Irena Jurca and Katja Zdolšek Zdolšek Attorneys at Law	

Spain	187	Turkey	211
Juan Jiménez-Laiglesia and Alfonso Ois EY Abogados SLP		Gönenç Gürkaynak and Hakan Özgökçen ELİG, Attorneys-at-Law	
Sweden	193	United Kingdom	217
Fredrik Lindblom, Kristoffer Molin and Sanna Widén Advokatfirman Cederquist KB		David R Little and Alexander Waksman Cleary Gottlieb Steen & Hamilton LLP	
Switzerland	198	United States	224
Christophe Rapin, Mario Strebel, Renato Bucher and Jacques Johner Meyperlustenberger Lachenal Ltd		Kenneth S Reinker and Lisa Danzig Cleary Gottlieb Steen & Hamilton LLP	
Taiwan	206		
Aaron Chen and Emily Chueh Lee, Tsai & Partners			

Preface

Dominance 2018

Fourteenth edition

Getting the Deal Through is delighted to publish the fourteenth edition of *Dominance*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria, Belgium, Saudia Arabia, Sweden and Taiwan.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Patrick Bock, Kenneth Reinker and David R Little of Cleary Gottlieb, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
March 2018

Luxembourg

Léon Gloden and Katrien Veranneman

Elvinger Hoss Prussen

General questions

1 Legal framework

What is the legal framework in your jurisdiction covering the behaviour of dominant firms?

The law of 23 October 2011 on competition (the 2011 Law), as amended, governs the behaviour of dominant firms. Article 5 of the 2011 Law prohibits one or more undertakings from abusing a dominant market position and basically mirrors article 102 of the Treaty on the Functioning of the European Union (TFEU).

The law of 5 December 2016 on certain rules governing actions for damages for competition law infringements (the 2016 Law) aims at improving the effectiveness of private enforcement as to infringements of European Union and national competition law and fine tuning the interplay between private damages actions and public enforcement by the European Commission and national competition authorities.

2 Definition of dominance

**How is dominance defined in the legislation and case law?
What elements are taken into account when assessing dominance?**

The 2011 Law does not define dominance. The preparatory parliamentary documents expressly refer to the *Michelin* case (C-322/81 (1983 ECR 3503)) ruled by the Court of Justice of the European Union (the CJEU) 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 Competition Council (see question 26), which regularly refers in its decisions to the definition given by the CJEU and the Communication from the Commission regarding guidance on the Commission's enforcement priorities in applying article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (the Commission's guidance on article 102 enforcement priorities).

In its decision 2016-FO-04 *Utopia* (see question 24), the Competition Council stated that three elements are taken into account when determining the market power of an undertaking, namely: market shares; potential impact of expansion by actual competitors or entry by potential competitors; and countervailing buyer power. In the same decision, the Competition Council claimed that the undertaking in question held a (quasi-)monopoly position characterising a 'superdominance', so that it had even greater responsibility towards the other market players not to adopt behaviour that affects the competitive structure of the market, which is already affected by the presence of a (quasi-)monopoly.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

According to the preparatory parliamentary documents of the Law of 17 May 2004 on competition that has been repealed by the 2011 Law, which are not legally binding, the underlying standard is almost identical to the standard applicable under article 102 of the TFEU, which is an economic one.

The economic object of 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 micro-economic levels. The decisions rendered by the Competition Council confirm the economic approach.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

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

- the postal sector (Law of 26 December 2012 on postal services);
- the electronic communications sector (Law of 27 February 2011 on the networks and services of electronic communications) (the ILR Law);
- 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 market, 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 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. It should be noted that behaviour may be qualified as an abuse of a dominant position even though it had been approved by the ILR (decision 2014-FO-07 – *Entreprise des Postes et Télécommunications*, subsequently annulled, albeit on different grounds, see question 15).

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The 2011 Law applies to private entities, whether they are natural or legal persons, and to public entities. The determining criterion is whether an entity qualifies as an undertaking. In several decisions, the Competition Council expressly referred to the definition given by the CJEU in the judgment of 23 April 1991 in the *Höfner* case (C-41/90) according to which the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and its financing modus.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Because article 5 of the 2011 Law mirrors article 102 of the TFEU, only the abuse of a dominant position by one or several undertakings is prohibited by the 2011 Law. The 2011 Law does not cover the conduct of non-dominant companies attempting to become dominant.

7 Collective dominance

Is collective dominance covered by the legislation? How is it defined in the legislation and case law?

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

8 Dominant purchasers

Does the legislation apply to dominant purchasers? 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 it applies equally to both dominant suppliers and dominant purchasers. Owing to the absence of any decision of the Competition Council on this matter, no opinion can be expressed on whether the 2011 Law would be applied differently to dominant suppliers and dominant purchasers.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

The Competition Council regularly refers to the methodology used in EU law and in particular to the Commission notice on the definition of the relevant market.

With respect to the relevant product market, it results from the Competition Council's decision-making practice that the determining concept is substitutability, both of demand and supply. Regarding the geographic market, the Competition Council regularly makes reference to the concept of homogeneity as defined in the Commission's notice on the definition of the relevant market.

The 2011 Law does not define a market share threshold at which an undertaking will be presumed to be dominant. In its *Utopia* decision (see question 24), the Competition Council considered that a market share above 70 per cent will lead, unless there are exceptional circumstances, to a rebuttable presumption of dominance.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

The abuse of a dominant position is not defined by the 2011 Law, but it does provide a non-exhaustive list of examples that mirrors the list in article 102 of the 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.

In its *Tanklux* decision 2009-FO-02, the Competition 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 a foreclosure had, at least, potential negative effects on consumers. The Competition Council then concluded that the practice was an abuse of dominant position on the basis that the anticompetitive 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 Competition Council seemed to apply both approaches by referring to the object of the relevant practice and to its effect.

The Competition Council stated in its *Utopia* decision (see question 24) that an abuse of dominance must produce anticompetitive effects that cause prejudice to the consumers.

In its decision 2014-FO-07 (*Entreprise des Postes et Télécommunications*, see question 15), the Competition Council also adopted an effect-based approach by analysing whether the practices in question had anticompetitive effects on the market. During the subsequent proceedings before the administrative tribunal, the Competition Council argued, however, that fidelity rebates that have effects similar to exclusive dealing agreements constitute a per se violation of article 102 of the TFEU and article 5 of the 2011 Law. In its judgment of 21 November 2016, the administrative tribunal rejected the approach based on a per se violation and ruled that there should be a concrete assessment of foreclosure effects. This analysis was confirmed by the administrative court (see question 15).

11 Exploitative and exclusionary practices

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

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

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

Given that the 2011 Law mirrors article 102 of the TFEU, the assessment is the same as under EU law, so that the existence of a dominant position is a necessary condition for the application of article 5 of the 2011 Law. However, there does not need to be a causal link between the dominant position and the conduct in question. Furthermore, dominance, the abuse thereof by one or several undertakings and the effects of the abuse must not necessarily occur in the same market.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

The 2011 Law does not provide for any defences. As article 5 of the 2011 Law mirrors article 102 of the TFEU, the Competition Council in principle follows the approach adopted in EU law.

In its 2007-FO-01 *Tanklux* decision relating to a refusal to grant access to heating fuel storage facilities, the Competition 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 Competition Council.

In its *Tanklux* decision 2009-FO-02 on an alleged abuse of dominance on the market for transport of petroleum products, the Competition Council expressly referred to the Commission's guidance on article 102 enforcement priorities. The Competition 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 Competition 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 Competition Council in the decision 2010-FO-02 *Coditel* (see question 15). Nevertheless, the Competition Council decided that the mitigating factors raised by the undertaking did not objectively justify the practices of tying and exploitative prices. Therefore, it considered that the undertaking abused its dominant position.

In its *Utopia* decision by which it decided that the acquisition of a competitor may constitute an abuse of dominance (see question 24), the Competition Council applied the 'failing firm' defence set out in the Commission's guidelines on the assessment of horizontal mergers and considered that the acquisition did not have anticompetitive effects on the market. Furthermore, the Competition Council considered that the acquisition was in line with the objectives of the TFEU, by stressing in particular the fact that it helped to maintain jobs. However, this factor was only found relevant in the specific merger context.

To our knowledge, the Competition Council has not yet expressly taken a position on the question of whether it would accept defences if exclusionary intent is shown.

Specific forms of abuse

14 Rebate schemes

Rebate schemes may constitute an abuse of dominance under article 5 of the 2011 Law. In 2013, the Competition Council ruled on a case that dealt with an alleged abuse of dominant position related to retroactive fidelity rebates and other financial incentives granted by Luxair, the Luxembourg national airline, in favour of travel intermediaries. In this case, the Competition Council decided not to analyse the practices as no dominant position was found (2013-FO-04, *Luxair*).

15 Tying and bundling

Tying and bundling are caught by article 5 of the 2011 Law. In the *Coditel* decision 2010-FO-02, a cable TV operator was found to have abused its dominant position in the market by, inter alia, using tying practices. The operator had used 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, the tied product), without having the choice to purchase a decoder from a competitor. Further, 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 these technical functions did exist but was deliberately not offered by the operator to its subscribers.

In its *Entreprise des Postes et Télécommunications* decision 2014-FO-07, the Competition Council stated that bundled discounts (ie, discounts that only apply if the customer purchases all the services or products making up the offer) may be regarded as loyalty rebates because they may have the same restrictive effects on competition. The Competition Council came to the conclusion that the bundled discount in question is an exclusionary practice as it was an incentive for customers to exclusively purchase from the dominant undertaking. The decision was challenged before the administrative tribunal, which issued a ruling on 21 November 2016 annulling the Competition Council's decision. The judges considered, inter alia, that bundled discounts cannot be assimilated with loyalty rebates or exclusive agreements and that bundled discounts rather constitute a mixed bundling, also called multi-product rebate. Hence, the Competition Council applied, in the judges' view, the wrong methodology when assessing whether there is an abuse of dominance. The judgment was confirmed on appeal by the administrative court (judgment of 1 June 2017, case 238930C), albeit on different grounds.

In the case of decision 2015-RP-04 *B&J Engineering v BMW*, the plaintiff claimed that a car manufacturer had organised tying practices by selling its cars with an integrated board computer. The Competition Council found that the car manufacturer was not in a dominant position but also stressed that such practice cannot be considered as tying because there are no separate markets, neither for cars without board computers nor for board computers that are not integrated in a car.

Most recently, the Competition Council considered that a tying practice consisting of renting out a performance venue together with auxiliary services (security, cleaning, sale of food and beverages, etc) was justified, given that, without the auxiliary services, the renting out of the performance venue would be an activity generating losses (2016-FO-02 *Rockhal*).

16 Exclusive dealing

Under Luxembourg law, exclusive dealing may amount to an abuse of dominance. In 2012, the Competition Council rendered a commitment decision that 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 appointed councillor 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 of the TFEU and article 5 of the 2011 Law. The undertaking proposed several commitments addressing the concerns raised by the plaintiffs and the statement of objections, so that a commitment decision was rendered by the Competition Council on 23 November (2012-E-04 Valora).

In its *Entreprise des Postes et Télécommunications* decision 2014-FO-07, the Competition Council set out that bundled discounts may have effects similar to exclusive dealing agreements insofar as they incite customers to purchase exclusively from the dominant undertaking. This decision was subsequently annulled (see question 15).

In 2015, the Competition Council accepted commitments offered by a TV operator to modify its clauses contained in a contract concluded with the Luxembourg Basketball Federation (2015-RP-03 *Simba Pro v CLT-UFA*). The TV operator agreed that its exclusive broadcasting rights would not prohibit the transmission of sport events by another undertaking the following day of the transmission.

17 Predatory pricing

Predatory pricing may constitute an abuse of dominance under Luxembourg law. In its decision 2013-RP-02 *Entreprise des Postes et Télécommunications*, the Competition Council dealt with predatory prices in the internet service providers sector. Following a complaint lodged by an undertaking operating in the market, the Competition 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. The Competition Council considered that the relevant concept for cost analysis for network industries was the 'Long Run Incremental Cost'. It follows from this decision that recoupment does not seem to be a necessary element for the Competition Council but may, however, be taken into account in case predation does not unambiguously result from the cost analysis.

Most recently, the Competition Council dealt with a case where the plaintiff claimed that an undertaking applied predatory prices for industrial laundry services (2016-RP-08 *Forum pour l'Emploi*). The Competition Council analysed whether the allegedly dominant undertaking systematically applied prices that are below average variable costs by using the 'as-efficient-competitor test'. The Competition Council applies average variable cost as the benchmark.

18 Price or margin squeezes

Price or margin squeezing are covered by article 5 of the 2011 Law. The Competition Council's *Entreprise des Postes et Télécommunications* decision 2014-FO-07 dealt, inter alia, with margin squeezing. The plaintiff claimed that a telecommunications service provider abused its dominant position by leaving an insufficient margin between the wholesale and the retail rates applied to telephone subscriptions. This argument was, however, rejected by the Competition Council because there was no proof that the wholesale rate resulted in a margin squeeze.

19 Refusals to deal and denied access to essential facilities

In its very first decision (2007-FO-01 *Tanklux*), the Competition Council confirmed that the refusal by a dominant undertaking to enter into commercial relations with another undertaking may be considered

Update and trends

No specific changes are foreseen to the 2011 Law. Considering the judgment of the administrative court of 1 June 2017 in case *Entreprise des Postes et Télécommunications*, specifically stressing the importance to render competition law decisions within a reasonable time, it can be expected that the Competition Council will pay particular attention to the length of administrative procedures in the future. This judgment also confirmed the need of an effects-based analysis in abuse of dominance cases, an approach that is, however, already adopted by the Competition Council.

as a form of abuse of dominant position in the absence of any objective justification for such refusal.

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

In a 2017 decision (2017-C-02 *Amazon Services Europe*), regarding an alleged abuse of dominance resulting from a unilateral decision by Amazon to put an end to the contractual relationship with a company selling through its internet platform without prior notice, the Competition Council considered, in essence, that the unilateral termination of a contractual relationship without objective justification, as such, is not sufficient to establish an abuse of a dominant position consisting in the exclusion of a competitor from the market. In the case at hand, no evidence was found of any exclusionary intention on Amazon's side. Also, an objective justification was given for the termination of the agreement, namely the repeated infringement of Amazon's terms and conditions by the complainant. The Competition Council rejected the argument that Amazon's platform was to be considered as an essential facility since it was not established that it was indispensable for the complainant's business activity given the existence of numerous competing platforms.

20 Predatory product design or a failure to disclose new technology

The Competition Council has not yet rendered a decision on this issue.

21 Price discrimination

Price discrimination is expressly referred to in article 5 of the 2011 Law as an example of abuse: applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

In its *POST Telecom* decision 2014-E-05, the Competition Council reached the preliminary conclusion that a mobile provider was likely to have committed an abuse of dominant position by applying discriminatory prices in favour of existing clients (discrimination between calls made within the provider's network and calls made to other providers), which led to network effects. The Competition Council finally accepted the commitments offered by the provider.

22 Exploitative prices or terms of supply

Exploitative prices or terms of supply may constitute an abuse of dominance. In the *Coditel* decision 2010-FO-02, a 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). The Competition Council concluded that the billing practices were anticompetitive and, therefore, constituted an abuse of dominant position.

The concept of exploitative prices was further recalled by the Competition Council's *Editus* decision 2014-RP-01. In this case, a complaint was lodged for alleged exploitative prices charged by a leading undertaking operating in the publishing sector. After an analysis of the prices charged by the undertaking, the Competition Council considered that in order to qualify the concerned pricing practices as exploitative, the costs actually incurred by the undertaking and the price actually charged for the service rendered must be excessive. As such evidence was not found, the Competition Council dropped the case.

In the case having led to the *Rockhal* decision 2016-FO-02, the Competition Council also examined whether the dominant undertaking charged excessive prices for the renting out of a performance venue

but came to the conclusion that this was not the case in view of the costs to be borne by the undertaking.

23 Abuse of administrative or government process

The Competition Council has not yet rendered a decision on this issue.

24 Mergers and acquisitions as exclusionary practices

In the absence of a specific merger control regime under national law, mergers and acquisitions are caught by article 102 of the TFEU and article 5 of the 2011 Law. According to the Competition Council's *Utopia* decision, the EU Merger Regulation does not reduce the scope of article 102 of the TFEU or of article 5 of the 2011 Law. In this decision, the Competition Council stressed its authority to exercise an ex post control of mergers that strengthen a dominant position by using, in the absence of a specific merger control regime at national level, the provisions prohibiting the abuse of a dominant position. On the basis of the judgment of the CJEU of 21 February 1973 in *Continental Can* (C-6/72), the Competition Council stated that the acquisition of a competitor may constitute an abuse of a dominant position if it affects the structure of the market to such an extent that the dominant undertaking faces no competitive pressure from its remaining competitors as they do not represent a real counterweight. The Competition Council applied the 'failing firm defence' and closed the case without further action on the grounds that the acquisition did not have anticompetitive effects.

25 Other abuses

No specific abuses are excluded by the 2011 Law.

Enforcement proceedings

26 Enforcement authorities

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

The Competition Council, a collegial body composed of four members, namely the President and three councillors, is responsible for enforcement of article 5 of the 2011 Law and article 102 of the TFEU. The councillor in charge of the investigation of a case is not entitled to take part in the deliberations and decisions of the Competition Council regarding that case. The members of the Competition Council are assisted by investigators in the performance of their duties.

The Competition Council can issue requests for information, interview natural or legal persons and conduct inspections as well as dawn raids. Failure to comply with a request for information made by decision pursuant to article 14(2) of the 2011 Law may lead to a fine of up to 5 per cent of the total turnover of the last financial year. The Competition Council may also impose periodic penalty payments per day of non-compliance of up to 5 per cent of the daily turnover of the last financial year.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

If an abuse of dominant position by one or several undertakings has been ascertained, in accordance with Article 11 of the 2011 Law, the Competition Council may order the undertaking to stop the conduct by imposing any coercive measures proportionate to the infringement committed and necessary to stop the infringement. Given that the 2011 Law does not expressly provide for structural remedies, it is unclear whether the Competition Council has the power to impose such remedies. From our practice, it appears that the measures proposed by the Competition Council are in principle complied with by firms.

In case the practice could cause irreparable harm to the public economic order or to the plaintiff, Article 12 of the 2011 Law allows the Chairman of the Competition Council to award interim injunctions and impose periodic penalty payments in order to compel the undertaking to comply.

Pursuant to article 20(2) of the 2011 Law, the Competition Council may fine undertakings that are in breach of the 2011 Law or of article 102 of the TFEU. The amounts of the fines are to be fixed on a case-by-case basis and will depend, inter alia, on the duration and the gravity

of the infringement. The maximum fine shall not exceed 10 per cent of the highest worldwide turnover (excluding taxes) that has been realised during one of the full financial years since the financial year preceding the year during which the anticompetitive 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.

In 2014, the Competition Council imposed a fine of €2.52 million on a telecommunications service provider for abuse of dominance. This decision was, however, annulled (see question 15).

Pursuant to the 2011 Law, the fines and sanctions are imposed on the undertaking having committed the infringement. As undertakings, especially those with significant market power, are organised in the form of companies, individuals may not, in principle, be fined or sanctioned.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The Competition Council may directly impose sanctions.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

In 2015 and 2016, the Competition Council rendered eight decisions regarding allegations of abuse of dominance. The Competition Council either dismissed the cases without further action or accepted the commitments offered by the undertaking. In 2017, one decision was rendered on an alleged abuse of dominance (see question 19).

The length of dominance proceedings varies considerably, depending on the complexity of the case. A decision of the Competition Council may be rendered within less than a year from the referral of the case to the Competition Council, but it may also take several years.

In the case having led to the *Entreprise des Postes et Télécommunications* decision 2014-FO-07, it took more than seven years from the filing of the complaint to the decision by which the Competition Council imposed a fine of €2.52 million. This is the highest fine ever imposed by the Competition Council for an abuse of dominance. In its ruling of 21 November 2016, the administrative tribunal stressed that the proceedings exceeded a reasonable period and annulled the Competition Council's decision for several procedural and substantive reasons. This judgment was confirmed on appeal (see question 15), the administrative court stressing in particular the unreasonable length of the administrative procedure as one of several determining factors justifying annulment.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

The 2011 Law does not contain provisions concerning the consequences of infringements of article 5 of the 2011 Law or article 102 of the TFEU on the validity of contractual clauses. In principle, a clause that constitutes an abuse of dominance is void. In such case, the courts would consider the entire contract void only if the relevant clause is not separable from the remainder of the contract.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

The 2011 law does not contain provisions on private enforcement. Ordinary courts are competent for the private enforcement of competition rules. Only courts have jurisdiction to invalidate a provision or contract and to grant damages. In this respect, the 2016 Law contains provisions aiming at facilitating actions for damages through the introduction of specific procedural rules before the court. The claimant may also seek interim relief before the summary judge in order to put an end to a prima facie unlawful situation if: the claim is urgent; the order is sought to avert a situation that would cause irreparable harm to the plaintiff; or the order is sought to remedy an unlawful situation that has already occurred.

In accordance with article 11 of the 2011 Law, the Competition Council may impose any remedy on an undertaking that has abused its dominant position that is proportional to the infringement and necessary to stop the infringement. Consequently, the Competition Council may, for example, grant access to essential facilities to a competitor of the dominant undertaking or order the dominant undertaking to supply goods and services.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Companies harmed by abusive practices have a claim before civil and commercial courts pursuant to Luxembourg tort law. Hence, the claimant will need to prove a fault, damage and a causal link between the two. The 2016 Law implementing Directive 2014/104/EU of 26 November 2014 on antitrust damages actions aims, however, at facilitating actions for damages and introduces a set of presumptions with respect to the existence of an infringement of competition law and its effects.

To our knowledge, Luxembourg courts have not yet ruled on actions for damages for abuse of dominance.

**ELVINGER
HOSS**

LUXEMBOURG LAW

Léon Gloden
Katrien Veranneman

leongloden@elvingerhoss.lu
katrienveranneman@elvingerhoss.lu

2 Place Winston Churchill
1340 Luxembourg
Luxembourg

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

33 Appeals**To what court may authority decisions finding an abuse be appealed?**

Decisions of the Competition Council finding an abuse may be challenged before the administrative tribunal. An appeal against the judgment of the administrative tribunal may be lodged with the administrative court. Both the administrative tribunal and the administrative court review the facts and the law.

Unilateral conduct**34 Unilateral conduct by non-dominant firms****Are there any rules applying to the unilateral conduct of non-dominant firms?**

The 2011 Law does not provide for any rules applying to the unilateral conduct of non-dominant firms. Article 5 of the 2011 Law mirrors article 102 of the TFEU, so that Luxembourg law relating to the unilateral conduct of undertakings is as strict as article 102 of the TFEU.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments

Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust

Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com