

# Luxembourg vertical price-fixing decision overturned on appeal

## What is the context?

In 2015, the *Conseil de la concurrence* of Luxembourg (since renamed *Autorité de la concurrence*, "Authority") opened an investigation into the distribution of sweet and salted snacks, for which it suspected that several retail distributors had aligned resale prices. In 2020, the Authority issued three decisions sanctioning the supplier and three retail distributors for alleged vertical agreements on consumer prices. Judicial actions were introduced against all three decisions. On 14 December 2022, the Administrative Tribunal annulled one of the decisions, referring the case back to the Authority (Case N° 45635 + 45685, "Judgment"). The other two decisions were partially altered. The Authority did not appeal the judgments, which are final.

## Why is it important?

In the Judgment, the Administrative Court clarifies central elements regarding procedural rights of a company under investigation, in particular, the rights of the defence, as well as the methodology to be followed by the Authority and the standard of proof for establishing the existence of a vertical agreement infringing competition law. Two related judgments rendered on the same day provide guidance on the leniency procedure, referring in particular to the principle of legitimate expectations (*principe de confiance légitime*) (see cases N° 45684 and N° 45683).

## Key findings?

Some of the key findings are laid out below.

- Rights of the defence in competition proceedings

In decision F-2020-FO-04 at issue in the Judgment, the Authority allegedly had based the finding of an infringement on a new form of evidence (direct evidence), certain documents which had not been relied upon in the statement of objections, a modified product sample and a new methodology of price comparison. In the Judgment, the Administrative Tribunal found that the use of a modified product sample and a new price comparison methodology violated the parties' rights of the defence since the decision was partly based on them without a possibility for the parties to comment on them.

- Authority's dismissal of the parties' evidence deemed unjustified

The Authority refused to take into account certain pricing analyses submitted by the

companies under investigation arguing that, as they were produced as part of their defence, they were unreliable. In the Judgment, on the merits, after dismissing the allegation of sufficient direct evidence to establish an illicit agreement, the Administrative Tribunal held that the mere fact that evidence was produced as part of the defence was not sufficient to cast doubt on its reliability. The analyses produced by the companies were reliable and contradicted the Authority's findings regarding the body of evidence allegedly establishing an infringement. Hence, the Authority should have included them in its analysis instead of dismissing them.

- Denial of leniency altered

In the course of the investigation, the Authority had indicated that the supplier would be granted leniency in a leniency notice. However, in the decisions, the supplier was denied leniency. The Authority justified the leniency refusal, firstly, by the fact that the supplier allegedly forced other companies to participate in the cartel. In cases N° 45684 and N° 45683, the Administrative Court considered that no new facts had come to the Authority's knowledge in this respect following the leniency notice. Hence, the change in position infringed the principle of legitimate expectations (*principe de confiance légitime*). The Authority's second argument for refusing leniency, the alleged non-satisfactory cooperation of the supplier during the investigation, was also rejected. The Administrative Tribunal found that the obligation to cooperate did not prevent the leniency applicant from providing explanations on documents which it considered misinterpreted in the statement of objections or to point out reasonings in relation to the facts which it found erroneous.

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