Chapter 19

Luxembourg

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1 General

1.1 Please identify the scope of claims that may be brought in Luxembourg for breach of competition law.

An individual faced with a breach of competition law has two options. First, he may lodge a claim with the competition authorities, i.e: with the Investigation Division for Competition Affairs (the Investigation Division) or the Council for Competition Matters (the Council), both bodies created by the law of 17 May 2004 on competition law (the "2004 Law"). It is recommended to address the complaint to the Investigation Division as the Council may not take a decision without a preliminary investigation carried out by the Investigation Division. If the Council considers that an undertaking has breached competition law, it may request the undertakings to terminate such practice and/or to levy a fine against all or some of the undertakings but it cannot grant damages to the claimant.

Second, an individual may lodge a claim with a court, having ordinary jurisdiction in civil or commercial matters. In that case, the court may declare void an agreement or a practice or grant damages to the claimant but cannot impose fines on undertakings.

The claimant may also seek interim relief either before the summary judge or the Chairman of the Council.

1.2 What is the legal basis for bringing an action for breach of competition law?

The 2004 Law prohibits: (i) agreements which restrict competition, and (ii) any abuse by one or more undertakings of a dominant position within the market. Article 101 and 102 TFEU also provide a legal basis for actions for breach of competition law.

The law of 30 July 2002 regulating certain commercial practices and prohibiting unfair competition (the "2002 Law") prohibits anti-competitive practices such as sale at loss. These anti-competitive practices, prohibited as such, may be considered as an abuse of dominant position if exercised by one or several undertakings in a dominant position in the relevant market.

The law of 30 May 2005 on the telecommunications sector (the "2005 Law") contains provisions on competition law, such as the prohibition of squeeze-out practices or of entry barriers to the access of essential facilities.

Damages for breach of competition law may be granted under the common legal basis for contractual liability (article 1134 of the Civil Code) or liability in tort (article 1382 of the Civil Code).

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

Article 3 (prohibition of cartels) and 5 (abuse of dominant position) of the 2004 Law essentially mirror article 81 and 82 of the EC Treaty.

1.4 Are there specialist courts in Luxembourg to which competition law cases are assigned?

There are no specialised courts in Luxembourg to which competition law cases are assigned. Decisions of the Council may be appealed before the administrative court. The civil commercial courts are competent for any action for damages, including for damages resulting from violation of competition law.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

Any natural or legal person who can show a direct, certain and personal interest may sue for damages before the Luxembourg courts.

Luxembourg law generally ignores collective claims, class actions or public interest litigation. However, article 23 of the 2002 Law provides for that any representative association or professional groupment may introduce an "*action en cessation*" of an antitrust practice, even if it has not suffered any damage (representative action). Luxembourg procedural rules also authorise joint actions. However, no class actions are possible under Luxembourg law.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

Courts are fully competent to judge on the existence of a violation of competition rules when the breach took place or produced effects in Luxembourg. The lower courts (*tribunaux de justice de paix*) have jurisdiction to judge any cases where the amount claimed does not exceed 10,000 Euros and the district courts for an amount exceeding that threshold.

1.7 Is the judicial process adversarial or inquisitorial?

In Luxembourg, the judicial process is adversarial.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes, they are. The president of the Council or his delegate may, after a hearing of the involved parties, order interim measures which have been requested. Interim measures may only be ordered if the anti-competitive practice causes serious, imminent and irreparable harm to the public and/or economic order to the complainant. The interim measure must be proportional to the anti-competitive practice.

The summary judge may also grant interim measures as described at question 2.2.

2.2 What interim remedies are available and under what conditions will a court grant them?

The summary judge may award an interim injunction in order to put an end to a *prima facie* unlawful situation if: (i) the claim is urgent; (ii) the order is sought to avert a situation which would cause irreparable harm to the plaintiff; or (iii) the order is sought to remedy to an unlawful situation which has already occurred. Such an order is immediately enforceable and may be revoked or amended if new elements arise. The summary judge cannot award any compensation for the harm caused.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

A court may declare void a clause of a contract or a practice in breach of competition law. It may also grant damages to the claimant but it cannot impose fines. Finally, it may order the publication of the court decision in the press.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available?

The damages will be assessed on the basis of the injury suffered by the plaintiff. The amount of the damages is equivalent to the amount necessary to put the claimant in the position he would have been in if the breach of competition law had not been committed. The evaluation will be made as of the day of the decision of the court determining the indemnity to be allocated to the plaintiff is rendered. If it is impossible to calculate the damage, the judges will assess the damage "*ex aequo et bono*".

Luxembourg law recognises only the reparatory character of the allocation of the damages and thus does not allow the damages to be of an exemplary nature.

3.3 Are fines imposed by competition authorities taken into account by the court when calculating the award?

The 2004 Law provides that the Council may impose fines on undertakings that are in breach of the 2004 Law or article 101 and 102 TFEU. One could consider that the fines which will be imposed by the Luxembourg competition authority have at least an indirect consequence on the determination of the damages to be awarded by the courts in case of a competition litigation between parties. Indeed the other party will submit to the judge the decision of the Council as means of proof so as to guide the judge on the amounts to be allocated.

4 Evidence

4.1 What is the standard of proof?

The evidence submitted to the court need to win the entire conviction of the court.

4.2 Who bears the evidential burden of proof?

The burden of proof rests upon the party who invokes a legal or factual point to validate his claim or defence. Traditionally, the burden of proof is laid upon the plaintiff.

4.3 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

Evidence can take the form of written documents, whether official or private, affidavits or testimonies. Expert evidence is also accepted by the court and may even be ordered by the court. The report of the expert is not binding on the judge.

4.4 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

(i) Article 350 of the New Code on civil procedure provides for a pre-trial summary procedure called *référé préventif* if there are legitimate reasons for preserving or establishing evidence of any facts before starting a procedure and provided that the solution of the litigation will depend on such facts. In this context, any investigation may be ordered at the request of any party having an interest in the conservation or the establishment of such evidence.

(ii)/(iii) At the request of the parties or *ex officio*, the judge can order the production of documents such as official deeds or private documents before or during the trial where these documents are held by the parties or third parties whatever they are. The documents to be produced must be precisely identified. Moreover, at the request of the judge or the parties, the Investigation Division may produce minutes or investigative reports in court proceedings.

4.5 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

For legitimate reasons, an individual can refuse to be heard as witness (for instance, due to professional secrecy). Other persons must appear if summoned by the court and if they do not appear, the court may order that they be forced to appear.

The judge conducts the hearing of the witness and parties are not allowed to address queries directly to the witness. Cross-examination does not occur as questions are always addressed by the judge who discretionarily decides whether the question raised by the parties is relevant.

4.6 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

A decision by a national or international competition authority, or an authority from another EU Member State, will qualify as an element of proof which may be discussed by the parties involved. The above applies if a party produces documents, for example decisions or judgments rendered in cases similar to the case pending before a Luxembourg court, in order to sustain its arguments. However, if a party introduces a compensation action before a Luxembourg court for the occurrence of an antitrust practice which the EU Commission or a national or foreign authority has considered as being or not contrary to article 101 and/or 102 TFEU, a Luxembourg court would be unlikely to adopt a counter-decision.

4.7 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

In principle, all evidence used by the parties during the judicial proceedings must be inserted in the court's file, even if it contains information covered by commercial confidentiality. The parties have access to the entirety of the judge's file. Thus commercial confidentiality is not protected, but the party which has submitted evidence containing confidential information may request that once the trial is finished, it shall receive back such evidence. According to article 24 of the 2004 Law, a request can be made in order that all information used in an investigation by the Investigation Division remains totally or partially confidential.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

The defendant may invoke the individual exemptions as provided for by article 4 of the 2004 Law for agreements, decisions or concerted practices which improve the production or distribution of goods or promote technical or economic progress while respecting the consumers' interest.

The 2004 Law also provides for the same negative conditions as in article 101(3) TFEU.

Other grounds of justification will be *inter alia* that the agreements, decisions or concerted practices fall within the scope of any block exemption regulations or do not fall within the scope of Articles 101 and 102 TFEU or the 2004 Law.

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

To our knowledge, no case referring to the "passing on" theory has been rendered by Luxembourg courts. 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 was passed on to subsequent purchasers. The burden of proof of the "passing on" defence would be borne by the defendant.

Under Luxembourg law, there are three cumulative conditions for civil liability (fault, damage and a direct link between fault and damage), whether liability is contractual or in tort. The damage must be certain, real and personal to the plaintiff. Every plaintiff, whether a direct or indirect purchaser, who can prove a fault/act/negligence/imprudence, a damage and a direct link between the violation of competition law and his damage, can claim for compensation.

There is no presumption that higher prices have been passed on to indirect purchasers. Indirect purchasers would therefore have to prove that higher prices had been passed on to them.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

The time limit for bringing an action before a court unless specified otherwise by law, which is not the case for competition matters, is 30 years. However, with respect to commercial matters, the limitation period is 10 years.

It has to be noted that the 2004 Law provides for prescription periods in relation to the imposing of sanctions and their execution by the competition authorities.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

On average, a case before a first instance court will last 18 months, except before the lower courts ("*tribunaux de justice de paix*"), where cases are normally judged within 10 months. The proceedings before the Court of Appeals also last approximately 18 months. These periods may be longer where an investigation is ordered by the court.

In the context of proceedings before the district court on civil matters or on commercial matters pursuant to the civil procedure and the Court of Appeal, a "*juge de la mise en état*" is designated. This judge fixes the time limits necessary for the instruction of the case on basis of the nature, the urgency and the complexity of the case. He determines the procedural organisation of the case. He may accelerate the proceedings by imposing shorter time limits.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

No, they do not. The parties always have the option to conclude a settlement agreement without the permission of the court.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

In principle, the legal costs are borne by the party which has lost the case unless the court has decided that both parties shall bear part of the legal costs. The legal costs do not include the lawyers' fees, which are borne in principle by their clients.

8.2 Are lawyers permitted to act on a contingency fee basis?

The rules of procedure of the Luxembourg Bar Association prohibit lawyers to fix their fees by reference to a *quota litis* agreement. A *quota litis* agreement refers to an agreement entered into between the lawyer and his client before the judicial outcome of the matter is known, which exclusively fixes the entirety of the fees by reference to that outcome. However, an agreement which not only gives right to fees fixed by reference to the services rendered but also additional ones determined by reference to the result obtained on the services rendered, is not considered as constituting a *quota litis*. Such an arrangement would therefore be permitted.

8.3 Is third party funding of competition law claims permitted?

Persons with low income will be granted legal aid by the State for upon justification. Legal aid insurance is available irrespective of the relevant branch of law. However, a business man or a self-employed person is, in principle, not entitled to legal aid if the litigation relates to his business, but nothing prevents a person to enter into a private insurance contract covering legal costs.

9 Appeal

9.1 Can decisions of the court be appealed?

Decisions of the lower courts are appealable except for the decisions of the lower courts (*tribunaux de justice de paix*) where the amount of the claim does not exceed 2,000 Euros.

Judgments of the administrative court are appealable before the court of appeal for administrative matters.

10 Leniency

10.1 Is leniency offered by a national competition authority in Luxembourg? If so, is (a) a successful and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Article 19 of the 2004 Law provides for a leniency and immunity regime for cartels (excluding abuse of dominant position). However it does not give immunity to the (successful or unsuccessful) applicant from civil claims and will not have any influence on a subsequent damages action against the same firm.

10.2 Is (a) a successful and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

The 2004 Law and the case-law do not provide any information on such issue. It is likely that no specific protection exists and thus the evidence might be requested to be disclosed before the court.

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