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Cartels & Leniency 2021

A practical cross-border insight into cartels & leniency

14th Edition

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1 The Legislative Framework of the Cartel Prohibition

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

The Competition Act of 23 October 2011 ("*loi du 23 octobre 2011 relative à la concurrence*") is the legal basis of the cartel prohibition in Luxembourg. The general nature of the cartel prohibition is administrative (with the potential imposition of administrative fines). Of course, the cartel prohibition also has civil aspects as arrangements and practices (potentially agreements) which are contrary to this prohibition are automatically null and void and of course can lead to damages claims (which are facilitated by the Competition Damages Actions Act of 5 December 2016 ("*Loi du 5 décembre 2016 relative à certaines règles régissant les actions en dommages et intérêts pour les violations du droit de la concurrence*") implementing Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union).

The Competition Act itself does not provide for criminal penalties for infringements of these provisions and/or Article 101 or 102 of the Treaty on the Functioning of the European Union (TFEU). However, some infringements of competition law could also amount to an infringement of Article 311 of the Luxembourg Criminal Code ("*Code penal*"). According to the latter provision, legal or natural persons (including the managers of a company) who, by whatever fraudulent means (e.g., cartel practices), have operated an increase or decrease of prices for commodities and goods, are punished with an imprisonment of one month to two years and with a fine of 500 EUR to 25,000 EUR (to be doubled for legal persons). Services do not seem to be concerned directly.

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

Article 3 of the Competition Act prohibits cartels on a national level and mirrors Article 101 TFEU with the exception that the latter provision requires there to be an effect on trade between EU Member States.

Article 3 of the Competition Act prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have as their object or their effect the prevention, restriction or distortion of competition on a market, and in particular those which:

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

The legislation applicable prior to the 2004 predecessor of the Competition Act, the 1970 Restrictive Commercial Practices Act, contained a condition that did not exist under EU competition law, namely that only anti-competitive agreements that affect the general interest in the economic sense are illegal. This condition related to the public order ("*ordre public*") character of competition law in Luxembourg but was abolished following the 2004 Competition Act.

If an agreement is anti-competitive and cannot be exempted, it is automatically void according to Article 3 of the Competition Act and, if having EU relevance, according to Article 101(2) TFEU. The illegality of a clause under Article 101(2) TFEU (or Article 3 of the Competition Act) does not necessarily affect the agreement in its entirety if the illegal clauses are severable from the rest of the agreement, a question which must be assessed under the law applicable to the agreement. If the applicable law is Luxembourg law, the entire agreement will – in the absence of a severability clause – be null and void, if the void clause is an essential clause that is intimately related to the other clauses of the agreement and, hence, constitutes an indivisible whole with the rest of the agreement. However, Luxembourg case law on anti-competitive clauses in distribution agreements accepts rather easily that an anti-competitive clause is not essential and thus can be severed from the rest of the agreement.

Article 4 of the Competition Act corresponds to Article 101(3) TFEU and contains the legal basis upon which anti-competitive agreements within the meaning of Article 3 can be exempted. More particularly, according to Article 4, the provisions of Article 3 do not apply to any agreement or category of agreements between undertakings, to any decision or category of decisions by associations of undertakings or to any concerted practices or category of concerted practices, which contributes 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, and which do not:

- impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; or
- afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

With the exception of the agreements that can be exempted on the basis of Article 4 of the Competition Act or an applicable EU block exemption, no other specific agreements have been excluded. The 1970 Restrictive Commercial Practices Act explicitly excluded agreements resulting from the application of a legislative or regulatory text, an exclusion ground removed by the Competition Act. It is possible that national courts would still apply this exclusion ground on a case-law basis, as it is the case on an EU level where a similar exclusion ground has been developed, the so-called "state action defence".

1.3 Who enforces the cartel prohibition?

The Competition Council ("*Conseil de la concurrence*") enforces the cartel prohibition.

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

The President of the Competition Council appoints another member of the Competition Council to be in charge of the investigation. The Competition Council can initiate proceedings of its own motion or following a complaint.

Once the latter has closed the investigation, (s)he sends a statement of objections to the undertakings concerned in which (s)he sets forth the facts and also proposes a legal assessment of the case. The undertakings concerned have at least one month to reply and a hearing takes place after a period of two years has lapsed.

1.5 Are there any sector-specific offences or exemptions?

No, with exception of course to any applicable EU block exemptions.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

Yes, as long as it is likely to affect (part of) the Luxembourg market.

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	N/A
Carry out compulsory interviews with individuals	Yes	N/A
Carry out an unannounced search of business premises	Yes*	N/A
Carry out an unannounced search of residential premises	Yes*	N/A
■ Right to 'image' computer hard drives using forensic IT tools	Yes*	N/A
■ Right to retain original documents	Yes*	N/A
■ Right to require an explanation of documents or information supplied	Yes*	N/A
■ Right to secure premises overnight (e.g. by seal)	Yes*	N/A

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

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

Contrary to what is the case in other countries, any on-site investigation (so both in the case of an investigation of business and private premises) is subject to an authorisation of the president of the competent district court.

On-site investigations must take place between 6.30am and 9.00pm, and the Competition Act explicitly foresees a procedure whereby objects and documents for which it is difficult to make an inventory on site (which may be the case if the investigators find too many documents on the system on the basis of their key word searches) will be sealed. In this event, the inventory will be continued, as the case may be, on the premises of the Competition Council, in the presence of the persons who assisted in the on-site investigation.

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

The Competition Act foresees very broad powers of inspection ("the Council may conduct all necessary inspections"). It cannot be excluded that bugging measures would be taken, but in practice they are not deployed in competition matters.

2.4 Are there any other significant powers of investigation?

The Competition Act explicitly confers the power to the Competition Council to conduct sector investigations when the trend of trade, the rigidity of the prices or similar circumstances suggest that the competition on a given market is restricted or distorted.

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

The member of the Competition Council who is in charge of the investigation (who is also considered to be a police officer) will carry out such searches, supported by members of the

grand-ducal police. The judge who delivered the authorisation is allowed to monitor the on-site investigation (but in practice this has not happened yet).

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

No (contrary to Belgian competition law).

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

As in most other jurisdictions, there are material limitations to the investigatory powers, such as:

- the privilege of the correspondence between a lawyer and his/her client; following an official position of the Luxembourg Bar, this privilege covers competition audit reports drafted after an on-site investigation (including the facts that have been established in this report); and
- the prohibition of self-incrimination.

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

The Competition Act only foresees the possibility to impose fines and penalties if the undertakings concerned do not reply (in a satisfactory manner) to a formal request for information. Nothing has been foreseen in the Competition Act for an obstruction during an on-site investigation. However, the general criminal procedure provisions apply in this respect as the officials of the Competition Council have the status of a police officer. So far, no criminal sanctions have been imposed for an alleged obstruction to an (on-site) investigation, it being understood that such an obstruction may of course be considered as an aggravating circumstance when the Competition Council sets the fine in its final decision.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

For competition infringements, the sanctions are: up to 10% of the worldwide turnover (based on a consolidated group basis) in the business year preceding the year in which the practices have been implemented. The Competition Council will also order the cessation of the practices and can impose a (daily) penalty payment of up to 5% of the average daily turnover in the preceding business year to put an end to the infringement.

For non-compliance with information requests, a fine of up to 5% of the worldwide turnover is possible, and in order to incite the undertakings concerned to comply with such requests, a daily penalty can be imposed.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

None, unless the anti-competitive practice would amount to the violation of a criminal provision and Article 311 of the Luxembourg Criminal Code in particular (please see question 1.1).

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

In the absence of its own fining guidelines, the Competition Council will apply the fining guidelines of the European Commission and is likely to follow the latter's position on financial hardship or inability to pay.

3.4 What are the applicable limitation periods?

The limitation periods are five years for anti-competitive practices and three years for non-compliance with a request for information. The time shall begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, the time shall begin to run on the day on which the infringement ceases.

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

This is not applicable.

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

Even when this question is not raised in practice, theoretically this would be possible in case of the employee's bad faith or serious fault.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

Yes. Where, in its earlier decision practice, the Competition Council had the tendency not to address the final infringement decision to the parent companies, it will most likely do so in the future in line with the case law of the Court of Justice of the European Union in this respect.

4 Leniency for Companies

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

Yes.

The Competition Council may grant immunity to an undertaking from any fine where:

a. this undertaking is the first to submit information and evidence which enable the Competition Council to carry out targeted inspections in connection with the alleged cartel; and
b. the Competition Council did not have, at the time of the application, sufficient evidence to adopt a decision to carry out an inspection.

If, until then, there has been no other valid immunity application, the Competition Council may still grant immunity to an undertaking after the Council has collected sufficient evidence to adopt a decision in order to carry out an inspection where:

a. this undertaking is the first to submit information and evidence which enable the Competition Council to find an infringement in connection with the alleged cartel; and

b. the Competition Council did not have, at the time of the application, sufficient evidence to find an infringement in connection with the alleged cartel.

Full immunity shall be excluded from undertakings which have coerced one or more undertakings, by their economic power or any other ways, to participate in the alleged cartel. In its decision practice, the Competition Council excludes the existence of such coercion if there is evidence that the other undertaking(s) concerned have an own interest in complying with the common practices (Competition Council, decision 2013-FO-03 of 23 October 2013, in the *rail switch* cartel case).

The Competition Council also has the possibility to grant a reduction of a fine to an undertaking which provides, before the notification of the statement of objections, evidence of the alleged cartel which represents significant added value with respect to the evidence already in the Council's possession at the time of the application.

In order to benefit from a reduction or immunity, the undertaking concerned must end its involvement in the alleged cartel immediately following its application. However, the Competition Council may waive the undertaking of this duty, for the time it determines, if the undertaking's continued participation is reasonably necessary to preserve the integrity of the inspection. Very recently, it has applied this last rule for the first time.

After the leniency application, the Competition Council shall adopt a leniency notice which sets out the conditions under which such immunity or reduction of the fine is granted; this notice shall be forwarded to the undertaking and will not be published. It can only be appealed together with the final infringement decision on the merits.

Please note that the Competition Council tries to keep its leniency programme in line with the ECN Leniency Model Programme, but in its practice can deviate therefrom on some points. For example, the Competition Council has opened its leniency programme to vertical anti-competitive practices.

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

Yes, provided that at least the following information is provided:

- the applicant's corporate object and its address;
- the circumstances underpinning the leniency application;
- the participants in the alleged cartel;
- the product and service markets concerned;
- the affected territories;
- the total duration and the nature of the alleged cartel; and
- all leniency applications already filed or to be filed to another competition authority, including to a non-EU competition authority, with respect to the alleged cartel.

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

Yes, if duly justified.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

The principle is that leniency applications are treated confidentially. The non-confidential version will, in principle, be communicated to the other addressees of the statement of objections, and it can happen in practice that they are also granted access to some relevant information from the confidential version. Third parties and/or private litigants do not get access to leniency applications, as confirmed by the Competition Damages Actions Act of 5 December 2016.

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

The continuous cooperation requirement ceases to apply after the final decision.

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

This is not applicable.

5 Whistle-blowing Procedures for Individuals

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

This is not applicable.

6 Plea Bargaining Arrangements

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

The only official early resolution mechanism is the commitment procedure.

Where the Competition Council intends to adopt a decision with a request to end an infringement and when the undertaking(s) concerned offer commitments in order to meet the concerns expressed in the statement of objections, the Council may, by decision, make those commitments binding on the undertaking(s). Such a decision may be adopted for a specific period of time and shall conclude that there are no longer grounds for action by the Competition Council. Normally, the commitment procedure is reserved for non-hard core anti-competitive practices, but exceptionally, the Competition Council has accepted commitments in horizontal price-fixing cases (e.g., decision 2014-E-02 of 5 February 2014 in the case *Order of Engineers and Architects*).

7 Appeal Process

7.1 What is the appeal process?

Decisions of the Competition Council and decisions of its president can be challenged before the Administrative Tribunal ("*Tribunal administratif*") within a period of three months as from the notification of the decision. Judgments of the Administrative Tribunal can be appealed before the Administrative Court ("*Cour administrative*"). In order to introduce an action for annulment, the challenged decision must be susceptible to affect directly the personal and legal situation of the plaintiff. In this respect, the Administrative Court has held in a judgment of 24 January 2008 that the letter, by which the Competition Council dismisses a request for leniency, is a merely preparatory act in view of the

adoption of a final decision and does not in itself directly affect the personal or legal situation of the undertaking concerned. However, the Administrative Tribunal has in another judgment of 20 May 2009 considered that a decision ordering interim measures does not constitute a preparatory act in view of a final decision, but directly affects the situation of the undertakings on which the measures are imposed.

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

In principle, no, but in practice, the authority in charge of the collection of the fine will wait to recover the fine until the appeal procedures are terminated.

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

Theoretically, yes.

8 Damages Actions

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

Such actions are brought on the basis of common (contractual or tort) liability law before the territorially competent district court (in principle, before the commercial chamber). On some points, the general liability rules have been accommodated to cartel-related damages claims in the Competition Damages Actions Act of 5 December 2016, which implements Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. These rules also, on the one hand, restrict the use of some evidence that is or has been the object of pending procedures before the competition authorities and, on the other hand, facilitate follow-on claims, such as the reversible presumption of the existence of a prejudice in case of a cartel.

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

No, they do not.

8.3 What are the applicable limitation periods?

The applicable limitation periods are for 10 years.

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

Yes, it does.

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

Article 240 of the New Civil Procedural Code provides that the courts can determine at their discretion compensation in the event that the losing party must bear costs (such as lawyer fees) other than the procedural costs (the latter being, in principle, rather low) and this would be inequitable. Normally such compensation remains quite low (between 500 and 7,500 EUR).

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

There have been no civil damages claims for cartel conduct so far.

We are not aware of any out-of-court settlements but suspect that one particular case has involved the same.

9 Miscellaneous

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

Directive (EU) 2019/1 of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market will need to be implemented in Luxembourg by 4 February 2021. This directive requires EU Member States to ensure at a minimum that national competition authorities have a sufficient number of qualified staff and sufficient financial, technical and technological resources that are necessary for the effective performance of their duties, and for the effective exercise of their powers for the application of Articles 101 and 102 TFEU. This should lead to an increase of the budget and resources of the Competition Council and should further foster the public enforcement initiatives of the latter. A law proposal has been pending since September 2019.

Furthermore, several suggestions have been made as to the introduction of a Luxembourg merger control scheme. Such a scheme would currently be useful because Luxembourg's economy has become more diversified and mature. This has been underscored by several acquisitions in the energy sector. The introduction of a Luxembourg merger control scheme would, in any event, put an end to the risk that the Competition Council would block mergers on the basis of the prohibition of abuse of dominance as interpreted by the Court of Justice of the European Union in the seminal *Continental Can* case in the absence of any merger control rules. It must be noted, however, that the discussions as to the introduction of such a scheme remain in a very embryonic phase and that no law proposal has been made to date.

Finally, the Luxembourg economy has not only developed significantly in markets other than the financial sector, but is starting to play a central role in the larger cross-border region. This region, also called the Grande Région – which includes the Walloon Region in the south of Belgium, the French Lorraine region and the German Länder Rheinland-Pfalz and Saarland – is tending to develop towards a single economic area in some markets at least. This tendency will most probably raise interesting issues from a competition law point of view, in particular in terms of the determination of the geographic scope of the relevant product markets.

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

There are no further issues.

Vincent Wellens is a partner with NautaDutilh and head of the Luxembourg Intellectual Property, Information & Communication Technology and Competition practice groups.

His core practice areas are:

- IT and outsourcing projects and contracts (including related litigation and preparation for litigation), with a particular focus on the financial and public sectors;
- data protection with a focus on contracts and representation in judicial and administrative proceedings (including on-site investigations and data breach notifications);
- IP litigation with a focus on patent litigation in the pharma sector and trademark and design litigation for luxury, consumer goods and media brands;
- telecom and media regulatory advice (including broadcasting licensing issues); and
- competition law with a focus on hard-core cartels, abuse of dominance in the telecom and postal sectors, vertical restraints in the retail sector and state aid.

Vincent is member of, *i.a.*, the Luxembourg Competition Association, the Luxembourg Bar Association's IP and ICT law committee, the Luxembourg Association of IT Professionals and the French-Luxembourg organisation of archiving professionals. Furthermore, he is a member of the board of the Benelux Association for Trademark and Design Law.

Prior to joining NautaDutilh, Vincent gained in-house experience with POST Luxembourg, the largest Luxembourg telecom and postal operator. Vincent also practised at other first-tier Luxembourg and Brussels law firms.

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