The International Comparative Legal Guide to:

Competition Litigation 2016

8th Edition

A practical cross-border insight into competition litigation work

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Contributing Editors
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Suzie Levy

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the eighth edition of *The International Comparative Legal Guide to: Competition Litigation.*

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of competition litigation.

It is divided into two main sections:

Four general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting competition litigation, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in competition litigation in 36 jurisdictions.

All chapters are written by leading competition litigation lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Euan Burrows and Mark Clarke of Ashurst LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Luxembourg

DSM DI STEFANO MOYSE

Gabriel Bleser

1 General

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

The law of 23 October 2011 on competition (the Competition Act) entered into force on 1 February 2012. The new Competition Act replaced the law of 17 May 2004 on competition and mainly merged the two former competition authorities into one new Competition Council (*Conseil de la concurrence*) with new powers.

The substantive rules introduced by the law of 17 May 2004 on competition were not changed.

Currently, a complainant can lodge a complaint with the Competition Council.

A complainant may also lodge a claim with a court having ordinary jurisdiction in civil or commercial matters.

It should be noted that the Competition Act does not provide an explicit statutory basis for damages actions.

With respect to breaches of EC or national competition law, according to the circumstances, plaintiffs may seek annulment/voidness/cancellation of a contract restricting competition, damages or restitution in the case of sums paid pursuant to a contract violating competition rules. Finally, a complainant may also seek interim relief either before the summary judge or before the chairman of the Competition Council.

As far as we are aware, no case law referring to damages for a breach of national or EC competition law exists in Luxembourg.

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

Actions for breach of EC competition law are directly based on Articles 101 and 102 of the TFEU. Articles 3-5 of the Competition Act, which mirror Articles 101 and 102 of the TFEU, also provide a legal basis for actions for a breach of national competition law. Damages claims for a breach of competition law are governed by the common legal basis for contractual liability and liability in tort, as well as by the common procedural provisions.

In the case of claims raised in relation to a contractual relationship, Article 1134 of the Civil Code would be the legal basis for introducing a claim for damages. Any third party wishing to introduce a court action against a company infringing Articles 101 and 102 of the TFEU and/or Articles 3-5 of the Competition Act would need to introduce a court action on the basis of Articles 1382 and 1383 of the Civil Code providing for liability in tort.

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

As stated above, the legal basis for competition law claims derive both from EC and national competition law. In Luxembourg, specialised courts to which competition cases are assigned do not exist.

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

The decisions of the Competition Council (*Conseil de la concurrence*) may be appealed before the administrative courts (*Tribunal administratif* and *Cour administrative*).

Private competition law litigation (for example, damages claims) is not assigned to specialised courts.

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? If collective claims or class actions are permitted, are these permitted on an "opt-in" or "opt-out" basis?

An action for a breach of competition law can be introduced before a Luxembourg court by any person who can show a direct, certain and personal interest. Luxembourg law ignores class actions, public interest litigation and collective claims. However, Article 23 of the law of 30 July 2002, as amended, prohibiting unfair commercial practices, foresees the possibility for any person, professional grouping or representative consumer association to constitute a *partie civile* in the trial before the criminal courts, which may be initiated either by the public prosecutor or by the parties themselves. The purpose of constituting a *partie civile* in criminal proceedings is to claim damages. This general principle is not specifically related to competition matters. Article 23 of the aforementioned law does not aim to claim damages, but to request that unfair commercial practices are stopped (*action en cessation*). Depending on the circumstances, some anti-competitive practices could be qualified as unfair commercial practices, and therefore result in an *action en cessation*.

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

Private actions based on EC or national competition rules may be brought before Luxembourg courts if they refer to infringements taking place or producing their effects in the territory of Luxembourg. The lower courts (*Justice de paix*) of Luxembourg city, Diekirch and Esch-sur-Alzette, as well as the district courts of Luxembourg city and Diekirch, sitting in civil and commercial matters, are competent for any claims for damages.

The summary judge may award an interim injunction if the claim is urgent or if the order is sought to avert a situation that could cause irreparable harm to the plaintiff, or if the order is sought to remedy an unlawful situation that has already occurred. The summary judge cannot award any compensation for the harm caused and will only assess *prima facie* whether a violation of competition law has occurred.

1.7 Does Luxembourg have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction and if so, why?

No. Luxembourg does not have a reputation for attracting claimants.

1.8 Is the judicial process adversarial or inquisitorial?

The civil judicial process in Luxembourg is adversarial.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes, based on Article 12 of the Competition Act, interim measures (*mesures conservatoires*) may be requested before the President of the Competition Council. Since 2004, the former President of the Competition Council has adopted one decision adopting interim measures in a telecommunications case. Unfortunately, this decision has been annulled by the administrative court on procedural grounds.

Interim injunctions ordered by the courts can only be granted if the plaintiff brings evidence of a *prima facie* case and proves that its rights are likely to be irreparably damaged during the course of ordinary civil proceedings.

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

Plaintiffs may seek interim injunction before the *juge des référés*. The *juge des référés* cannot award damages. As the absence of any serious contestation is a condition for obtaining interim relief, we believe that it would be quite difficult to obtain an interim relief injunction in the case of claims raised in relation with competition law infringements.

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.

Plaintiffs may be granted compensation for damages (either material or moral) suffered as a consequence of the defendant's breach of competition law. Courts will grant damages pursuant to the general civil liability principles. As of today, we are not aware of any Luxembourg court decision which has awarded damages for infringement of EC or national competition law.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

As already mentioned, damages must be personal, certain and direct. Any future damage can also be indemnified, provided that it is proven to be certain. Courts can also indemnify a loss of a chance, provided the damage is proven. As a general principle, damages will be assessed on the basis of the injury suffered by the plaintiff. In the case it is impossible to assess the quantum of the damage precisely, the court will assess the damage *ex aequo et bono*. Luxembourg law does not allow punitive or exemplary damages. For the time being, no damage cases have been brought to the Luxembourg courts.

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

It would be expected that the fines imposed by the Competition Council would serve as a reference to the courts when calculating the damages to be awarded.

4 Evidence

4.1 What is the standard of proof?

Evidence submitted to the court must be approved by the whole court. Evidence can take the form of written documents (whether official or private), affidavits or testimonies.

4.2 Who bears the evidential burden of proof?

The burden of proof lies with the plaintiff, who must prove the facts on which the claim is based.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in Luxembourg?

It could be expected that evidential presumptions could play a role in damage claims, but for the time being, no damage cases have been brought to Luxembourg courts.

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

Plaintiffs may prove their claims by presenting all the types of evidence normally admitted in civil proceedings, including witnesses, affidavits, testimonies and expert opinions. The judge

can order an opinion of an expert if a point has not been sufficiently clarified by personal verification or consultation. Each party may also appoint its own expert. According to Luxembourg case law, a court may only rely on a unilateral report provided that this report has been duly communicated to the other party and that the other party was able to comment on it.

4.5 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)?

Discovery is not available in Luxembourg litigation. However, Article 350 of the Civil Code of Procedure provides for a pre-trial procedure, called a *référé préventif*, if there are legitimate reasons for preserving or establishing evidence of any facts before starting a procedure, and provided that the outcome of the litigation will depend on such facts. In the context of a *référé préventif*, any investigations may be ordered at the request of any party having an interest in the conservation or the establishment of such evidence. Third parties may also request to intervene voluntarily regardless of their involvement within the lawsuit.

Article 33 of the Competition Act expressly allows the Competition Council to submit written observations to the court or, with the court's authorisation, to present oral observations. The Competition Council may also produce minutes or reports in court proceedings.

Furthermore, based on Articles 284 and 288 of the Civil Code of Procedure, a judge can order the production of documents, whether official deeds or private documents, before or during the trial, where these documents are held by the parties or third parties regardless of what they are. The documents to be produced must be precisely identified. It is unclear whether a judge could request the competition authorities to produce documents. We believe that the competition authorities could refuse to submit documents as they are legally obliged not to disclose any confidential information.

Finally, Luxembourg rules on civil procedure do not prevent a national or foreign authority from being involved in court proceedings, but it is doubtful whether competition authorities could be forced by a Luxembourg court to produce documents.

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

Pursuant to general civil procedure rules, if witnesses do not attend a hearing to which they are summoned, the judge may, under certain conditions, order that they be forced to appear before the court. Individuals subject to professional secrecy may legitimately refuse to testify.

Witnesses are heard directly by the judge. Cross-examination (where one party's witness is being questioned by the other party) is not allowed in Luxembourg civil proceedings.

4.7 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?

An infringement decision by the Competition Council or any other competition authority has evidential value, provided that such evidence complies with the formal criteria as laid down in the Civil Code of Procedure and/or the Civil Code regulating the various types of evidence. Decisions of the Competition Council or other national competition authorities will be considered as an element of proof, even though this may be criticised by the parties.

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

In principle, all documents or pieces of evidence that the parties intend to rely on must be inserted in the judge's file, to which each party is granted access.

Confidential information contained in documents produced before the court is available to all the parties.

4.9 Is there provision for the national competition authority in Luxembourg (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

As mentioned, Article 33 of the Competition Act expressly allows the Competition Council to submit written observations to the court or, with the court's authorisation, to present oral observations. The Competition Council may also produce minutes or reports in court proceedings. To the best of our knowledge, this specific procedure has never been applied before.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

The parties may of course invoke the individual exemption provided by Article 101, paragraph 3 of the TFEU and/or Article 4 of the Competition Act. They may also invoke that the agreement, decision or concerted practice falls within the scope of any EC block exemption regulation or does not fall within the scope of application of Articles 101 and 102 of the TFEU and/or Articles 3-5 of the Competition Act.

No specific defence justification or public interest justification is available under Luxembourg law.

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

To the best of our knowledge, no case law referring to the "passing on defence" theory has been rendered by Luxembourg courts. However, there are no legal obstacles to prevent a court from considering that the alleged damages are mitigated if any overcharging resulting from the breach of competition law were passed on to subsequent purchasers.

No presumption exists 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.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

To the best of our knowledge, no case law concerning damage claims has been rendered by Luxembourg courts.

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 law matters, is 30 years (Article 2262 of the Civil Code). In practice, as commercial companies would be implicated in damages claims, the limitation period of 10 years will be applicable (Article 189 of the Code of Commerce). In the case of damage claims, the limitation period for introducing claims begins from the date the claimant has knowledge of the harmful act.

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?

As we are not aware of any Luxembourg case law concerning damage claims, we can only refer to non-competition cases. On average, it can take three months to one year to obtain a decision of the *Justice de paix*. Proceedings before the District Court (*Tribunal d'Arrondissement*) generally last between one to four years. The duration of the procedure depends largely on the complexity of the case, the diligence of the lawyers to instruct the case, the potential appointment of an expert and witness hearings. The proceedings before the Court of Appeal last approximately 18 months.

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, the parties do not need the permission of the court to discontinue the action brought before the court.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted and if so on what basis?

As already mentioned, Luxembourg law ignores class actions, public interest litigation and collective claims, except collective claims of consumer associations in the case of unfair commercial practices. We do not see on which basis collective settlements by representative bodies would be permitted.

8 Costs

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

The judge may instruct one of the parties to pay to the other party an indemnity if he considers that it would be unfair for one of the parties to bear costs which are not included in the judicial expenses (*frais et dépens*). The indemnity does not include the legal costs. On average, the judge imposes an indemnity between EUR 500 and EUR 2,000 on the successful party.

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

Lawyers are prohibited from fixing 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 does not exclusively fix the fees by reference to the result obtained on the services rendered, does constitute a *quota litis*. Such an agreement would therefore be permitted.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

A third party funding of claims is not permitted under Luxembourg law. It should be noted that persons with low income may be granted legal aid by the State upon justification.

9 Appeal

9.1 Can decisions of the court be appealed?

Decisions of the *Justice de paix* cannot be appealed where the amount of the claim does not exceed EUR 2,000.

Except in the case of a preliminary judgment (*jugement avant dire droit*), a party can appeal a court decision. The appeal must be lodged within 40 days of the service of the decision, before the District Court (for claims under EUR 10,000) or before the Court of Appeal (for claims above EUR 10,000). On appeal, both matters of fact and matters of law are judged.

Finally, a party may lodge proceedings before the Luxembourg Supreme Court (*Cour de Cassation*) within two months of the service of the decision. The Supreme Court does not rule on matters of fact but only on matters of law.

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 21 of the Competition Act offers parties immunity or a reduction from fines. However, no immunity is given from civil claims in the case leniency has been granted from the Competition Council.

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 Competition Act does not provide specific protection for the evidence disclosed by leniency applicants. Accordingly, upon request from one of the parties to the civil proceeding, a judge might order a leniency applicant to bring that evidence before the court.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

As Luxembourg does not yet have any specific rules concerning damage claims, the procedural rules will most likely have to be adapted in Luxembourg.

11.2 Have any steps been taken yet to implement the EU Directive on Antitrust Damages Actions in Luxembourg?

To the best of our knowledge, no concrete steps have been taken to implement the EU Directive on Antitrust Damages Actions. The Competition Council announces in December 2014 that it will issue an opinion concerning the implementation of this directive into Luxembourg law.

11.3 Are there any other proposed reforms in Luxembourg relating to competition litigation?

The new government coalition programme mentions that a possible merger between the sectoral regulator (*Institut Luxembourgeois de Régulation*) and the Competition Council should be explored. As it took nearly 10 years to introduce the first modern competition law in 2004, this ambitious reform project may take several years. At the time of going to press, a draft bill does not yet exist, but the Competition Council announced in December 2014 that the Council will present some ideas on how the law could be amended.

Gabriel Bleser
DSM DI STEFANO MOYSE
55-57, rue de Merl
L-2146 Luxembourg

Tel: +352 262 562-1
Fax: +352 262 562-2
Email: gbleser@dsmlegal.com
URL: www.dsmlegal.com

Gabriel advises on EU law, with a particular focus on European competition law and Luxembourg competition law (cartels, abuse of dominant positions, joint-ventures, State aid, merger control and distribution issues). He also advises on unfair competition law, public law and telecommunications law. He counsels local and international companies on all non-financial public regulatory issues they may face in Luxembourg, with a particular focus on highly regulated sectors (postal services, gas and electricity and telecommunications).

Gabriel was the first general rapporteur of the Luxembourg Competition Inspectorate, where he gained significant experience in European and Luxembourg competition law. In 2004, he contributed to the establishment of the Luxembourg competition authorities.

Gabriel has an excellent knowledge of the Luxembourg institutions. He is a founding member and President of the Luxembourg Competition Law Association and a board member of APSI. He is a regular speaker at conferences on competition law and regularly published articles on competition law.

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GLG
Global Legal Group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk