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National Report
Question A: Competition Law

"Which, if any, agreements, practices or information exchanges about prices should be prohibited in vertical relationships"

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1. LEGAL FRAMEWORK

1.1 What is the legal framework in the national competition act applicable to vertical agreements, i.e. are these agreements in generally permissible or in part impermissible. Are vertical agreements or some of them illegal per se, presumed illegal or assessed on the basis of a type of rule of reason analysis? Does a block exemption apply to vertical agreements in your jurisdiction?

Legal framework applicable for vertical agreements

It was only in 2004 when Luxembourg introduced a completely new competition framework, the law of 17 May 2004 on competition (hereinafter the "Competition Act"). The Competition Act has been amended several times, but no major and substantial changes to the substantive rules have been adopted.

Regarding vertical restraints, the Competition Act does not contemplate any specific rules. Currently, a draft bill is pending before the Luxembourg Parliament to amend the Competition Act. The bill does not however introduce any specific rules concerning vertical restraints.

It is currently unclear whether the old grand-ducal decree of 9 December 1965 regulating imposed prices and refusal to supply[1]is still in force. The legislator will most likely clarify this legal uncertainty when the bill aiming to reform the Competition Act is adopted.

The Luxembourg Competition Council (hereinafter the "Council") has not released any communications on specific subjects in regard to vertical agreements.

As of today, the Competition Council has only adopted one decision sanctioning a cartel.

General rule

Under Art. 3 Paras. 1 and 2 of the Competition Act all agreements, decisions or concerted practices the *aim* of which is to restrict competition or which has this *effect* are per se illegal and void. This legal presumption can be rebutted if the company can prove that the four cumulative conditions set out in Art. 4 have been met.

1.2 Do these principles vary depending on the type of vertical practice considered?

No. The Luxembourg Competition Act does not contemplate any details.

1.3 Is there a specific prohibition in the national competition act on all vertical practices pertaining to prices? If not, which ways of controlling the prices applied to end-users are permissible?

No.

[1] Règlement grand-ducal du 9 décembre 1965 portant réglementation des prix imposés et du refus de vente, Màmorial A – N° 71 du 15 décembre 1965.

1.4 What is the de minimis / appreciability threshold, if any, applicable to vertical arrangements and practices?

Unfortunately, the Luxembourg Competition Act does not contemplate a "de-minimis" rule. Calls for introducing such a rule have not been accommodated (as of today) by the legislator.

1.5 Has the competition authority in your jurisdiction issued guidelines regarding exchanges of information and /or vertical price agreements?

No. However, the Competition Council complies with the communications and guidelines issued by the European Commission.

2. CRITERIA APPLICABLE TO PRICE RELATED VERTICAL AGREEMENTS

2.1 Is the national competition act declaring these or some of these practices as illegal under a per se rule, presumption or rule of reason?

The material Luxembourg competition law, as already mentioned in Section 1.1, is based on a per se rule.

2.2 Are only agreements pertaining to prices considered illegal? Which conditions have to be fulfilled in order to render "agreements" to be considered illegal?

The Competition Act does not contemplate any specific rules.

2.3 What is the assessment of vertical unilateral practices in relation to prices?

As mentioned above, the Competition Act provides for a per se presumption of elimination of competition. This legal presumption can be rebutted by the parties.

2.4 Are some of these practices not considered illegal merely as a result of a de minimis/appreciability rule?

As mentioned before, the Competition Act does not contemplate any "de-minimis" rule, nor has the Council issued any guidance.

3. ANTI-COMPETITIVE EFFECTS

3.1 Are the anti-competitive effects considered by the national competition act different for each of these practices, or is it always the same kind of anti-competitive effect which is considered and found more or less serious?

The Competition Act does not differentiate between anti-competitive practices.

3.2 To which extent is the national competition act considering only inter-brand effects or does it consider intra-brand effects?

The Competition Act does not differentiate between inter-brand and intra-brand effects.

3.3 Is also the anti-competitive intent of the vertical agreement considered?

Intent does not have to be proven. The term "agreements affecting competition" means binding or non-binding agreements and concerted practices between companies operating at the same or at different levels of the market the purpose *or* effect of which is to restrain competition.

3.4 Do the courts take into account the actual acts performed by the supplier, e.g. if the supplier, in practice encourages a recommended price to constitute a fixed price through punishments or remunerations? Please give examples from case law and/or legal doctrine.

There is no case law which is currently based on the Competition Act.

4. PRO-Competitive-EFFECTS

4.1 Does the national competition act recognize justifications in relation to these vertical practices regarding prices? Has the relevant case law taken into account practical justifications for the need of price agreements and/or pro competitive aspects in relation to the exchange of information regarding price?

The Competition Act does not contemplate any specific justifications. As mentioned before, currently there is no case law which is based on the Competition Act.

4.2 What are the types of pro-competitive effects recognized in relation to vertical practices on prices?

Although the Competition Act does not contemplate any details, it can be assumed that the Competition Council will consider:

(a) co-operation agreements relating to research and development

(b) specialization and rationalization agreements

(c) agreements granting exclusive rights to deal in certain goods or services

(d) agreements granting exclusive licences for intellectual property rights

(e) agreements with the purpose of improving the competitiveness of small and medium sized enterprises, in so far as they have only a limited effect on the market

4.3 Are the following types of justifications taken into consideration and if yes, in relation to which sort of practices and to which extent?

- **competitive oversight inside the distribution network**
- **price-level positioning of the products by a supplier**
- **consumers benefits in relation to a resale price cap**
- **consumers' interest in general (please specify)**

- **launching of a new product**
- **market positioning of a product**
- **promotional organization**
- **after sale services**
- **coordination with consumers' information**
- **short term promotional campaigns.**

Please give examples from case-law and/or legal doctrine.

Nothwithstanding the absence of any case law which is based on the Competition Act, it is however most likely that the Council would take the factors mentioned above into account.

4.4 Does the national competition act and case law take into consideration other justifications?

No.

4.5 Are pro-competitive effects automatically taken into consideration by the authorities / the courts or ought they be invoked by the interested parties?

No. The parties must prove the pro-competitive effects.

4.6 Might any of these justifications have anti-competitive effects and are they considered in the national competition act and case law ?

There is no relevant practice relating to this issue.

4.7 Have these justifications led to the conclusions that the agreement is not covered by a prohibition on anti-competitive agreements or to an exemption from the competition rules?

There is currently no case law which is based on the Competition Act.

4.8 In your opinion do the antitrust authorities sufficiently take into consideration the pro-competitive effects of some of these practices?

As no decisions have been adopted by the Council concerning vertical restraints to date, it is difficult to make any judgement.

5. SANCTIONS

5.1 Is the national competition legislation sanctioning vertical practices in general and if yes through which forms of sanctions; administrative and/or criminal or other?

Art. 18 Para. 2 of the Competition Act stipulates that an enterprise which participates in an unlawful agreement can face the sanction of an (administrative) fine, which can equivalent to

an amount up to 10 per cent of its global group turnover for one of the closed financial years preceding the year when the anti-competitive practices occurred.

When calculating the fine, the Council must take into consideration the severity and duration of the infringement and any damage that has been caused to the economy.

5.2 Are the above practices subject to sanctions as well?

Yes, but no specific sanctions exist. The Council may impose fines, as mentioned above.

5.3 Is the specificity of vertical relationships, for instance the lesser harm in relation to intra-brand restrictions, taken into consideration in the application of sanctions?

The fines are assessed by taking into account the circumstances of the individual case, with the duration and gravity of the infringement being of particular relevance. Further factors which are taken into account by the Council are the willingness of the company's corporate bodies to cooperate, any repeated infringement of the cartel prohibition, attempts to thwart the Council's investigation activities, etc. In this regard, administrative fines may be reduced (application of the leniency programme, Art. 18 of the Competition Act).

5.4 What are the major fines in your jurisdictions (in EUR) for vertical restraints? In which context have they been imposed? What is the major criminal or other sanction imposed?

The Council has not to date imposed any fines in relation to vertical restraints.

6. ASSESSMENT

6.1 Is the national competition act sufficiently taking into consideration the specificity of vertical agreements when dealing with price-related practices?

No.

6.2 Is the case law evolving? Towards which tendency? On which points are an evolution of the situation advisable?

The bill revising the Competition Act unfortunately mainly focuses on institutional framework and does not introduce any specific instruments which are necessary to accommodate the particularity of the Luxembourg market.