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The Luxembourg Competition Law

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I. INTRODUCTION: COMPETITION LAW IN LUXEMBOURG

Till the end of 2004, prices of products and services had been regulated, in Luxembourg, by an office on price control, a department of the Ministry of the Economy. However, with European Regulation (EC) No 1/2003, which was enacted on December 16, 2002, competition enforcement and policy was allocated to the national EU Member States. At that time, Luxembourg was the sole European country where modern competition law, as such, did not exist. The former Act on Restrictive Business Practices dated June 17, 1970 had to be modernized. The Luxembourg competition law was adopted on May 17, 2004[2] and has been operational since November 2004 when two national competition authorities were created: the Competition Inspectorate and the Competition Council. Since then, prices of products and services have been almost exclusively determined by the free interplay of market supply and demand. Maximum prices are only fixed as regards petroleum products, taxi services, and pharmaceutical products, through contract programs between the Ministry of the Economy and economic market operators, or through regulation by the Grand-Duke.

II. THE COMPETITION ACT

The national competition law of May 17, 2004 constitutes the legal backing for competition enforcement in Luxembourg. This law literally reproduces the provisions of the corresponding articles of the EC treaty, namely Articles 81 and 82 (apart from the references to the effects of such practices on intra-Community trade). Articles 3 and 4 of the national competition law correspond to article 81 concerning unlawful agreements such as cartels and tacit collusion, whereas Article 5 treats the abuses of dominant positions in identical terms as Article 82 of the EC treaty.

There are no criminal proceedings foreseen by the law.

If an infringement has a potential effect on trade between EC Member States, Articles 81 and 82 of the EC treaty are applied. The application of the national law is restricted to the scope of the local market.

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[1] Rapporteur General - Luxembourg Competition Inspectorate

[2] The law merely exists in French language: http://www.concurrence.public.lu/legislation/nationale/loi/loi_du_17_mai_2004_a_la_concurrence.pdf

Currently, a draft bill regarding a merger of the two authorities is under consideration in the Luxembourg parliament. Since it has not yet been adopted, it is too early to describe and comment on it.

III. UNLAWFUL AGREEMENTS

The Luxembourg law foresees (Article 3), similarly to community law, that unlawful agreements, decisions, and practices that may prevent, restrict, or distort fair competition, may consist in:

- fixing, in a direct or indirect way, purchase and selling prices or other trading conditions;
- limiting or controlling production, outlets, investments, or technical development;
- sharing markets or the sources of supply (e.g. regarding public tenders);
- applying, with respect to business partners, unequal conditions for equivalent services which give them a competitive disadvantage;
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Exemptions (Article 4) may be possible only where agreements or concerted practices contribute to the improvement of the production or the distribution of products or to the promotion of the technical or economic progress, thereby providing the users a fair share of the resulting profit, and

- without imposing restrictions on the parties that are not indispensable in order to reach these objectives, and
- without giving undertakings the opportunity to eliminate free competition with regard to a substantial part of the concerned products and services.

IV. ABUSE OF DOMINANT POSITION

Article 5 of the competition act prohibits the abuse of a dominant position and indicates that such an abuse may mainly consist of:

- imposing, in a direct or indirect way, purchase and selling prices or other unfair trading conditions;
- limiting production, outlets, or technical development to the detriment of the consumers;
- applying, with respect to business partners, unequal conditions for equivalent

services giving them a competitive disadvantage;

- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

These criteria are quite similar to those applied for tacit collusion.

V. THE COMPETITION AUTHORITIES

The two competition authorities are charged with the enforcement of the national and the European competition law in Luxembourg. Their powers and procedures are largely based on Regulation (EC) No 1/2003.

The Competition Inspectorate is a department attached to the Minister in charge of the economic affairs portfolio (actually the Minister of the Economy and Foreign Trade). Its main mission is to receive complaints and to undertake and carry out inquiries, inspections, and investigations relating to competition law, both national and Community. Therefore, the Inspectorate has extensive powers of inquiry, similar to those of the European Commission. This power includes requests for information, taking of statements, inspections and searches in business premises and means of transport, the seizure of documents (requiring a preliminary judicial authorization), and the appointment of experts.

The Inspectorate is also responsible for assisting the Directorate General of Competition of the European Commission during the planning and execution of surprise inspections on Luxembourg territory in a European competition case involving firms located in Luxembourg.

Moreover, regarding administrative cooperation, the Inspectorate is competent to work with the NCAs of other EU Member states—DG Competition included—in multinational cases including Luxembourg companies. At the end of the last year such cooperation was, for the first time, successfully performed with the Dutch competition authority NMa.

The Competition Inspectorate cooperates with the national courts.

The Competition Inspectorate is composed of three full-time members: the "Rapporteur general," who is the head of the authority, a "Rapporteur"(or case handler) as well as an "Inspector." They are nominated by decree by the Minister of the Economy with a mandate of seven years which can be renewed.

The Competition Council is an independent administrative body which is tasked with monitoring the application of competition law. It makes decisions concerning competition cases. These decisions consist mainly in obligations intended to end an

infringement of the competition rules and in fines.

The Council consists of one full-time member, its President, and two part-time members, as well as five substitute members. Their nomination by decree of the Grand-Duke lasts also for seven years and is also renewable.

So, beside Liechtenstein, the Luxembourg competition authority is among the smallest in the world. The number of members has remained unchanged since the birth of the NCAs. Financial resources are quite limited as well, with the amount showing a slightly negative trend over the years.

VI. AREAS OF COMPETENCE

As seen above, the two Luxembourg competition authorities are competent for acting against cartels and tacit collusion on the one hand, and against the abuse of a dominant position on the other, on Luxembourg territory.

Sector inquiries were not foreseen by the current competition law. Further, highly-limited human resources wouldn't allow undertaking such a type of inquiry, since the Inspectorate has determined its main priority to be tackling the current competition cases and issues under investigation.

Neither are the competition authorities competent for state aid issues. These are dealt with by another department of the Ministry of the Economy and Foreign Trade. The same applies as regards intellectual property rights.

Unfair competition also isn't a matter for the competition authorities. It is handled partly by the Ministry of the Economy and Foreign Trade and partly by the Ministry of the Middle Classes.

And Luxembourg is the sole European country without a merger control regulatory scheme. A merger or acquisition deal reaching a community dimension implies a control at the EC level. When such a restructuring takes place in Luxembourg and has an effect on the Luxembourg market, there don't exist any controls—pre-merger notifications or filing requirements—at all. Some domestic markets are, however, tending to become oligopolistic or even duopolistic markets, bearing the risk of transforming into monopolistic markets, in a more or less short period of time. That's why it is currently important and the right moment to discuss whether to introduce merger control in Luxembourg. Discussions are, however, still at the very beginning.

It should be noted that the authorities, however, assist the European Commission in the application of Regulation (EC) No 139/2004 on the control of concentrations.

VII. NATIONAL, EUROPEAN, AND INTERNATIONAL COOPERATION

Cooperating with European as well as other NCAs has become an important part

of the enforcement of competition law in Luxembourg. Both authorities are members of the European Competition Network ("ECN"), the European Competition Authorities Association ("ECA"), and the International Competition Network ("ICN").

It is highly important for still young authorities to broaden their relationship with other NCAs and to deepen their knowledge relating to competition matters by exchanging information and documents with their European and international counterparts. These contacts have been very useful regarding a number of issues encountered during investigations.

Participating in the meetings of sectoral subgroups of the ECN allows us to develop a better understanding of the structure and the functioning of a given market. This is especially important and inevitable as, given the rare opportunities for competition enforcement; enforcers don't have and cannot have an in-depth knowledge of every economic sector. In that sense, the Inspectorate is very grateful to DG Competition that its three members have received useful insights into the Commission's methodology of work by performing an internship inside DG Competition.

The economist of the Inspectorate also attends the meetings of the Competition Chief Economists of the ECN.

At the national level, the authorities are allowed to gather information, even of a confidential nature, from the national sector regulators.

VIII. MANAGING CASES

A. Launching a Case

The Inspectorate can initiate a case two ways. First, a plaintiff, who can be a moral or a physical person, may address a formal complaint to the Inspectorate, which examines the complaint and decides whether to launch an investigation or not. Second, the Inspectorate can start an investigation on its own initiative on the basis of market information which it considers convincing enough to raise the question of a potential infringement of the competition law. In this sense, the Council cannot act on its own initiative.

Relatively often, informal contact with undertakings or associations of undertakings, be it directly with their managers or indirectly through their lawyers, allows us to respond to questions and gather relevant information on a given market. Nevertheless, such contacts rarely lead to the submission of a formal complaint.

B. Requests of Information and Information Gathering

The Inspectorate mainly collects the information it needs from the concerned parties by sending requests for information. Such a request can be addressed in the form

of a decision by the Inspectorate. A decision allows the Inspectorate to notify the Council whenever the responses are incorrect, denatured, or incomplete, or if they are not provided in due time. The Council may then impose a fine and daily penalty payments.

The Inspectorate has the power to take statements with the consent of the respective persons. It may also ask an expert to carry out a specified mission, which it defines in relation to technical aspects, as well as surprise inspections.

C. Dawn Raids

When the Inspectorate has strong suspicions regarding an undertaking participating in a cartel or some type of tacit collusion, the Inspectorate may, on its own, decide to undertake surprise inspections in the premises of the undertaking that is the subject of its investigation.

It may take copies of any type of documents that it considers as relevant. A seizure of documents presupposes a prior authorization from the President of the local district court. An authorization is also necessary when the undertaking refuses access to its premises.

During such an inspection, the Inspectorate can even collect oral information related to the investigation from the undertaking's employees.

D. Request of Confidentiality and Secrecy

If a firm wants to safeguard confidential information and business secrets when it answers questions raised by the Inspectorate, it may do so by a written request to the President of the Competition Council.

The members of the two authorities, as well as the experts appointed by the Competition Inspectorate, are bound by professional secrecy.

E. Statement of Objections and End of the Investigation

When sending out a statement of objections, the Inspectorate informs the concerned party of the time period during which it may provide observations or disagreements. The law requires a minimal period of one month. If, in the meantime, there appear new facts or if the party provides a convincing argument, then the Inspectorate may modify its statement of objections or draft a new one.

The rights of defense are guaranteed by: the receipt by the concerned parties of the statement of objections addressed to them by the Competition Inspectorate; their access to the file from the day on which they receive the statement of objections (where the parties may take copies of the file in the premises of the Inspectorate); the hearing by the Competition Council prior to the adoption of a decision; and the right of appeal from any decision before the administrative court.

At the end of the investigation, when the statement of objections is finalized, the Inspectorate transmits it, together with the file, to the Council to take a final decision in the case.

The Inspectorate proposes to the Council the measures that seem to be appropriate and, eventually, the sanctions and fines that the Council decides should be pronounced in order to end the infringement.

F. Commitments and Interim Measures

At the moment when the Council is about to adopt a decision concerning the end of an infringement, the referred company may propose any type of commitment that is likely to remedy the anticompetitive practices and concerns expressed by the Council in its preliminary assessment. If the Council accepts the commitments offered by the undertakings, they may be rendered binding.

In urgent cases with a risk of immediate, serious, and irreparable damage to the economic or legal order, or to the plaintiff, the president may order interim or protective measures, but solely at the request of the harmed undertaking or of the Inspectorate. These measures have to be proportionate to the infringement and can only be temporary until a final decision regarding the case is being taken. They can consist of the suspension of the concerned practices till a fixed date or simply of a return to the previous situation.

IX. LENIENCY

The Luxembourg competition authorities adopted a leniency program that resembles very much the ECN model leniency program. The undertaking may benefit from immunity or from a reduction of fines in a cartel case according to the common criteria also applied by the other European competition authorities.

An undertaking may be granted immunity from a fine if it is the first to submit evidence of the existence of a cartel previously unknown to both authorities. It may benefit from a reduction of a fine in the case of submitting information of the existence of a cartel (prior to the sending of a statement of objections by the Inspectorate).

In order to be eligible for immunity or a reduction of fines, the undertaking must:

- provide all the information regarding the cartel available to the undertaking to the authorities;
- fully cooperate with the authorities till a final decision has been taken;
- end its involvement in the cartel simultaneously with providing the information to the authorities, and
- not have been the undertaking that coerced other undertakings to participate in

the cartel.

The application for leniency can be made by contacting the Rapporteur General of the Inspectorate or the President of the Council.

X. DECISIONS, SANCTIONS, AND FINING POLICY

Three main types of sanctions may be imposed. These are any proportionate coercive measures needed in order to bring an infringement to an end and include fines as well as periodic penalty payments.

The Council may, by decision, impose fines on the infringing parties not exceeding 10 percent of the highest total annual turnover realized since the business year preceding that of the beginning of the infringement, where the undertakings intentionally or negligently:

- infringe articles 81 and/or 82 of the EC treaty or the corresponding national provisions; and
- supply incorrect, incomplete, or misleading information in the required time frame in response to a formal decision of information request by the Inspectorate.

The Council may, by decision, impose periodic penalty payments per day on the infringing parties not exceeding 10 percent of the average daily turnover in the preceding business year, from the day of the decision compelling the parties to:

- put an end to the infringement of articles 81 and/or 82 of the EC treaty or the articles 3-4 and/or 5 of the national law;
- comply with a decision ordering interim measures; and
- supply complete and correct information requested by the Inspectorate.

The decisions mainly consist in forcing the undertaking to cease or modify its anticompetitive behavior. Structural measures would only be applied in very exceptional circumstances; till now, that has not been the case.

Even if the Council doesn't publish clear guidelines on its fining policy, fines are calculated according to the gravity and the duration of the infringement, the current financial situation of the concerned firm, as well as a possible recidivism of the infringement.

An appeal against any decisions can be lodged with the Luxembourg Administrative Court. Every decision of the Council can be subject to annulment. Decisions concerning fines as well as immunity or reduction of fines can also be subject of an application for review.

Decisions of the Administrative Court are subject to review by the Luxembourg

Administrative Court of Appeal.

XI. CONCLUSION: COMPETITION ADVOCACY

Although competition enforcement is still relatively new in Luxembourg, we are highly committed to develop a robust competition culture in a market in which a lot of actors are still unaware of the existence of a competition act. We have to raise public awareness as regards the benefits of free and fair competition in the market. More and more we see that undertakings are advised by their lawyers to carry out internal audits in order to verify that their practices comply with the newly existing competition law. Promoting competition advocacy is an important part of our daily work.

More detailed information on the application and enforcement of the Luxembourg competition law may be found on our Internet site, www.concurrence.lu (in French language).