Luxembourg

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Legislation and jurisdiction

1 Relevant legislation

What is the relevant legislation?

The Law on Competition of 23 October 2011 (the 2011 Law) has abrogated the Law on Competition of 17 May 2004 (the 2004 Law) with effect as of 1 February 2012. The 2011 Law does not change the provisions of the prohibition of cartels (article 3 of the 2011 Law).

The 2011 Law provides for the enforcement of articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) (ex articles 81 and 82 of the EC Treaty) and basically mirrors EU Regulation No. 1/2003.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The 2004 Law authorised the setting up of the Council and the Investigation Division. The Council, an independent administrative authority composed of three members, was in charge of the decision-making process in order to enforce competition law.

The Investigation Division, a service of the Ministry of Economics and Foreign Trade, was in charge of the registration of the complaints of infringements of competition law, the investigation and the submission of reports to the Council. The Investigation Division was entitled to require the undertakings to provide all necessary information by simple request or decision, interview natural or legal persons and conduct all necessary inspections. Generally, the powers of the Investigation Division were similar to the powers of the European Commission, and were subject to the same conditions as set out in Regulation No. 1/2003.

The 2011 Law provides for the merger of the Investigation Division into the Council. The Council remains the decision-making body but is now also in charge of investigations. The members of the Council who will investigate competition law matters in the future are not entitled to take part in the decision-making process to decide whether an infringement of the competition law has occurred.

The 2011 Law provides for other changes to the competition law regime:

- the modification of the proceedings in order to make them more effective and less cumbersome;
- the differentiation of the maximum amount of the fines according to whether the undertaking was a party to a cartel or has abused its dominant position, or has refused to submit information to the Council during the investigation of the case; and
- the adaptation of the leniency regime to the European Competition Network Model Leniency Programme.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

The 2011 Law has abrogated the 2004 Law with effect as of 1 February 2012 (see question 1).

No bill of law is pending.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Articles 3 and 4 of the 2011 Law, which mirror article 101 TFEU, provide for the prohibition of cartels. According to article 3, a cartel is defined as being all agreements between undertakings, decisions by associations of undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition within a market and, in particular, those that:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical developments or investment;
- share markets or source of supply;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- make 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.

Such agreements, decisions or concerted practices are automatically null and void.

However, article 4 of the 2011 Law declares the provisions of article 3 inapplicable to agreements or categories of agreements between undertakings, decisions or categories of decisions by associations of undertakings and concerted practices or categories of concerted practices that contribute to improve the production or distribution of goods or to promote technical or economic progress, while allowing consumers a fair share of the resulting benefit, and that do not impose on the undertakings concerned restrictions that are not indispensable for the attainment of these objectives; and afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions?

There are no industry-specific offences, defences or exemptions regarding cartels.

In principle, competition law applies to all economic sectors. However, certain sectors are regulated by specific rules under the supervision of a regulator. The Luxembourg regulatory authority (ILR) is the regulatory body for:

- the postal sector (Law of 15 December 2000 on Postal Services and Financial Postal Services, as amended);
- the electronic communications sector (Law of 27 February 2011 on the Networks and Services of Electronic Communications);
- the electricity sector (Law of 1 August 2007 on the Organisation of the Electricity Market, as amended); and
- the gas sector (Law of 1 August 2007 on the Organisation of the Natural Gas Market, as amended).

Article 2(2) of the 2011 Law also authorises the government to employ price fixing in some sectors in certain circumstances, such as when competition on prices is too weak or when there is a cyclical market failure in one or more sectors.

6 Application of the law

Does the law apply to individuals or corporations or both?

The 2011 Law applies to undertakings, individuals and corporations. It also applies to entities other than corporations (eg, de facto associations, trade unions, professional organisations).

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The 2011 Law does not prevent the Council from taking into account behaviour or actions that occurred outside Luxembourg that have an effect on the territory of Luxembourg.

Investigation

8 Steps in an investigation

What are the typical steps in an investigation?

The Council may start its investigation either at its own initiative or as a result of a complaint lodged by a person having a legitimate interest or by the minister.

After a preliminary investigation, the Council may decide to close the file (due, for example, to the absence of jurisdiction in Luxembourg).

If the Council decides to continue its investigation, it may ask for information from the relevant undertakings or their employees (article 14 of the 2011 Law). It may also carry out searches, proceed to the seizure of documents (see question 8) and ask for expert opinion (article 18 of the 2011 Law).

The investigation by the Council takes approximately six to 18 months depending on the complexity of the matter and the number of undertakings involved.

After such investigation, the Council's officer in charge of the investigation might come to the conclusion that there is no proof of an anti-competitive practice. If the Council's officer finds that there is sufficient proof for an anti-competitive practice, he or she will then notify the communication of the claim to the concerned undertakings. From such notification onwards, those undertakings have a right of access to the file and no request for leniency or immunity may be made (see questions 22 and 23). The relevant undertakings will be granted a deadline to reply to the communication of the claim (a minimum of one month) (article 25 of the 2011 Law). Thereupon, the Council will hear the undertakings, the complainant, the minister of economy (or a representative) and the Council's officer who were in charge of the investigation. This hearing will take place not less than two months after the notification of the communication of the claim. The Council may also hear any other person, whether natural or legal, that it deems necessary. The hearing is not public.

The members of the Council who were in charge of the investigation are not entitled to take part in the decision-making process.

The Council may decide either to close the file due to an absence of proof of an anti-competitive practice or, if an anti-competitive practice has been established, to levy a fine against all or some of the undertakings or to request the undertakings to terminate such practice (with or without penalty).

The decision rendered by the Council is notified to the parties and usually published very quickly on the Council's website (www.concurrence.public.lu).

The decisions of the Council may be challenged before the administrative judge.

9 Investigative powers of the authorities

What investigative powers do the authorities have?

Generally, the powers of the Council are similar to those of the European Commission and subject to the same conditions as set out in Regulation No. 1/2003.

According to article 16(2) of the 2011 Law, the Council can visit business premises, review documents and demand explanation or information without any judicial authorisation. Prior authorisation by the president of the competent district court is requested if the Council intends to carry out searches (perquisition) and seizures of documents and company books (article 16(3) to (13) of the 2011 Law).

The searches will be carried out by investigators of the Council, who may be assisted by experts and by police officers. The searches have to be made in the presence of the representative of the undertaking or the owner of the premises (or a representative). The attendance of a lawyer during the search is allowed.

The Council may appoint experts and hear any person, although the witness has a right to remain silent and the Council cannot compel anyone to testify. Witnesses may be assisted by a lawyer.

The Council may further ask any undertaking or association of undertakings for information either through a request for information or by way of a formal decision compelling the undertaking or association of undertakings to provide information. Only the formal decision may be challenged in court. The incompleteness of information may only be subject to a fine in case of a formal decision (see question 16).

International cooperation

10 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

The Council may cooperate with antitrust authorities in other jurisdictions (including the European Commission). The 2011 Law provides for a cooperation mechanism between the Council and the European Commission or the competition authorities of other member states of the EU.

Furthermore, article 19 of the 2011 Law authorises the Council to request information, including confidential information, from other regulatory bodies of the various sectors as well as all public institutions or administrative bodies.

In the case of searches and seizures authorised by the judge (see question 9), one or more police officers need to attend the search and inform the judge of the progress of the investigation measures (article 16(4) of the 2011 Law).

The Council also belongs to different networks or organisations such as the European Competition Network, whose principal objective is the cooperation between national competition authorities

in all EU member states and the European Commission, or the International Competition Network and the European Competition Authorities, whose objective is to provide a forum of discussion regarding the application of competition law.

11 Interplay between jurisdictions

How does the interplay between jurisdictions affect the investigation, prosecution and penalising of cartel activity in the jurisdiction?

Such interplay should not affect the investigation and punishment of cartel activity.

However, pursuant to EU Regulation No. 1/2003, the Council can no longer investigate a case on the basis of article 101 TFEU if the European Commission has initiated its own investigation. However, in that case, the European Commission shall only initiate proceedings after consulting with the Council.

Cartel proceedings

12 Adjudication

How is a cartel proceeding adjudicated?

After having heard the involved undertakings, the Council will make its decision as to whether anti-competitive practices have occurred. The investigation and the adjudication on cartels are both made in the public interest, on the basis of administrative law procedures.

13 Appeal process

What is the appeal process?

Decisions of the Council are subject to a two-stage appeal process.

The undertaking may challenge the decision of the Council before the Administrative Tribunal (action for annulment of the decision). An appeal against a judgment of the Administrative Tribunal may be lodged before the Administrative Court of Appeal (article 28 of the 2011 Law). In this case, the appellate body may confirm or alter the judgment of first instance.

The appeal process takes approximately nine to 12 months (first instance) plus nine to 12 months if an appeal is lodged against the judgment of first instance.

The court order authorising the carrying out of searches and seizures of documents and company books may be challenged before the Court of Appeal (article 16(5) of the 2011 Law).

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

The burden of proof rests with the competition authorities, which shall bring sufficient evidences according to the normal civil standards (balance of probabilities).

Sanctions

15 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions?

There are no criminal sanctions provided in the 2011 Law.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The Council may order an undertaking involved in a cartel to terminate the anti-competitive practices within a determined period or impose particular conditions. The Council may also levy fines and penalties against the undertaking.

Pursuant to article 20 of the 2011 Law, in case of a breach of articles 3 (prohibition of cartels) and 5 (abuse of dominant position), the Council may levy fines against undertakings in case of a breach of article 3 or 5, as well as in case of refusal to provide correct information or communication by the undertaking of misleading or wrong information.

In the case of refusal to provide correct information or where the undertaking has provided misleading or wrong information to the Council, the maximum fine shall not exceed 5 per cent of the highest worldwide turnover (excluding taxes) that has been realised during the latest full financial year.

In the case of cartel activity or abuse of dominant position, the maximum fine shall not exceed 10 per cent of the highest worldwide turnover (excluding taxes) that has been realised during the last full financial year preceding the year during which the anti-competitive practices have been committed. In cases of consolidated accounts, the turnover to be considered is that stated in the consolidated accounts of the mother company.

The fine will be set by the Council in view of the importance and duration of the cartel, the situation of the concerned undertaking and the reiteration of the anti-competitive practices.

Until now, the Council has only found in two cases the existence of a cartel and levied fines against companies in this respect.

The first case was initiated by the minister of public works, who lodged a complaint with the Investigation Division against several companies for having entered into price-fixing and market-sharing agreements with respect to public contacts for tiling works awarded through a public procurement procedure. In the decision rendered on 5 March 2010 (2010-FO-01), based on the investigation of the Investigation Division, the Council found that seven tiling companies met in order to set up temporary associations to submit offers for public contracts and to ensure that such public contracts would be awarded to the temporary association that had been previously designated by them. In this regard, the other temporary associations submitted cover offers of a higher amount to the public authority, which were prepared by the leader of the temporary association designated to be awarded the contract.

The Council found the seven companies guilty of having entered into market-sharing and price-fixing agreements and considered that the conditions set out in article 4 of the 2004 Law in order to be granted an exemption were not met.

In order to set the amount of the fine, the Council decided that:

- the infringement was serious despite the fact that the cartel had not (by object or effect) led to an increase of the price offered by the temporary associations for the realisation of the tiling works because cartels are one of the most serious breaches of competition law, which are by their very nature anti-competitive;
- the cartel occurred in the framework of a public tender procedure, the objective thereof being to ensure a prudent administration of public financial resources and that is based on the loyalty of all participants, and a high number of companies with high market shares in the tiling sector participated in the cartel;
- the infringement started on the day of the first meeting that organised the cartel, held on 13 June 2005, and ended on 7 December 2005, the day when investigations were launched against certain companies;
- the damage caused to the economy was important because an anti-competitive practice such as a cartel may have an impact in the long term on prices, quality, diversity and the innovative character of products and services, and is thus of such a nature as to have a negative effect on the economy; such practice was also prohibited by the law on public tenders and thus rendered the procedure void, which triggered additional expenses for the public authority and forced it to award the contract to another company for a higher price; and the participants in the cartel were the most important tiling companies in Luxembourg and thus constituted a bad example; and
- no mitigating or aggravating circumstances applied.

Several companies had requested the application of the leniency regime. However, only one of them met all the conditions required by article 19 of the 2004 Law (now article 21 of the 2011 Law) and was granted leniency. The Council explained that the scale of the reduction depended on the exactitude and relevance of the information and evidence provided by the applicant, and therefore granted a 50 per cent reduction of the fine.

Considering the above, as well as the 2005 turnover of each company (which ranged between approximately €776,000 and €7.4 million), the Council imposed fines from €15,000 to €25,000 on the infringers.

The second case was initiated in 2011 by the Luxembourg Consumers' Union, who lodged a complaint with the Council against several companies and the ACA (the association of Luxembourg insurance companies) for having entered into a price-fixing agreement with respect to insurance contacts in the motor vehicle insurance sector. Several insurance companies had signed an 'interpretative note' in relation to the interpretation of an article of a grand-ducal decree adopted further to the 2003 law on motor vehicle insurance. In the decision rendered on 20 September 2012 (2012-FO-08), the Council ruled that the insurance companies agreed on a uniform application of the 'bonus-malus' motor vehicle insurance scheme leading to an infringement article 3 of the 2011 Law (prohibition of anti-competitive agreements) and considered that the conditions set out in article 4 of the 2004 Law for exemption were not met.

As to the fines, the Council took into consideration some adverse and mitigating circumstances, such as:

- the importance of the infringement given the fact that as a result of the application of the 'interpretative note', an element of price competition in the motor vehicle insurance sector was neutralised;
- the high number of companies with high market shares in the motor vehicle insurance sector involved in the cartel (close to 100 per cent of market share);
- the publicity of the cartel (the interpretative note was published on the ACA website) and the absence of intentional wrongdoing; and
- the active role of the insurance sector regulator in the redaction of the interpretative note by the ACA and the undertakings.

Based on the above, the Council imposed a fine of €200 on the Luxembourg insurance companies' association and fines ranging from €212 to €235,863 to insurance companies, depending on their turnover realised in the motor vehicle insurance sector during the last full financing year preceding the year during which the anti-competitive practices occurred.

The Council may also impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5 per cent of the average daily turnover in the preceding business year per day calculated from the date appointed by the decision, in order to compel an undertaking:

- to put an end to an infringement of article 101 or article 102 TFEU or articles 3 to 5 of the 2004 Law (cartel or abuse of dominant position), in accordance with its decision;
- to comply with a decision ordering interim measures;
- to comply with a commitment made binding by its decision; and
- to supply complete and correct information to the competition authorities.

Moreover, the Council may impose on undertakings or associations of undertakings daily fines up to 5 per cent of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel an undertaking:

- to put an end to an infringement of articles 101 or 102 TFEU or articles 3 to 5 of the 2010 Law, in accordance with its decision;
- to comply with a decision ordering interim measures;
- to comply with a commitment made binding by its decision; or
- to supply complete and correct information to the competition authorities.

Furthermore, any person or undertaking may introduce a claim in the civil court on the basis of liability in tort or contractual liability to obtain indemnification for the claimant who has suffered harm as a result of the existence of a cartel (see questions 19 and 20).

17 Sentencing guidelines

Do sentencing principles or guidelines exist? Are they binding on the adjudicator?

There are no sentencing principles or guidelines provided by the Council.

However, in the decision rendered on 20 September 2012 (2012-FO-08) (see question 16), the Council referred for the first time to the EU Guidelines on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation No 1/2003 (OJEU, C 210, 1.09.2006) when setting the fines to be imposed on the undertakings.

18 Debarment

Is debarment from government procurement procedures automatic or available as a discretionary sanction for cartel infringements?

Debarment for government procurement procedures is neither automatic nor available as a discretionary sanction for cartel infringements under the 2011 Law.

19 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

As stated in question 15, no criminal sanctions are provided for in the 2011 Law.

Any person or undertaking may introduce a claim in the civil court on the basis of liability in tort or contractual liability. The purpose of such action is to obtain indemnification for the claimant who has suffered harm as a result of the existence of a cartel, provided the claimant proves the prejudice and a direct link between such prejudice and the existence of the cartel. A person may introduce an action in parallel before the administrative court on the basis of the 2011 Law and an action before the civil court in order to obtain indemnification. In such a case, it is very likely that the civil court will postpone its decision, as it will consider the judgment rendered by the administrative court as an element of proof in order to take a decision on the indemnification.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

The Council is not competent to award damages to private parties. However, as stated in question 19, any person or undertaking may file a private damage claim with the civil courts on the basis of liability in tort (article 1382 et seq of the Civil Code) or contractual liability in order to obtain indemnification for the entire prejudice suffered by the claimant as a result of the existence of a cartel, provided the claimant proves the prejudice and a direct link between such prejudice and the existence of the cartel.

21 Class actions

Are class actions possible? What is the process for such cases?

Class actions are not possible under the 2011 Law.

Cooperating parties

22 Leniency/immunity

Is there a leniency/immunity programme?

Article 21 of the 2011 Law provides for a leniency and immunity regime. Such regime does not apply to abuse of a dominant position.

23 Elements of the leniency/immunity programme

What are the basic elements of the leniency/immunity programme?

Pursuant to article 21(1) of the 2011 Law, the Council may exempt the undertaking from fines if the undertaking is the first to submit evidence that, in the Council's view, permits the carrying out of targeted investigation in connection with an alleged cartel and the Council did not, at the time of the application, already have sufficient evidence to decide to investigate the alleged cartel. Furthermore, pursuant to article 21(2) of the 2011 Law, in cases where no undertaking had been granted immunity from fines, the Council may still exempt the undertaking from fines after it has sufficient evidence to take an investigation decision if the undertaking is the first to submit evidence that, in the Council's view, enables the finding of an infringement of article 101 TFEU or article 3 of the 2011 Law in respect of an alleged cartel and at the time of the communication of the information by the applicant undertaking, the Council did not have sufficient evidence to find an infringement of article 101 TFEU or article 3 of the 2011 Law in connection with the alleged cartel.

The Council may reduce the fines provided the undertaking reports the existence of the cartel prior to the notification of the communication of the claim. In order to qualify for a reduction of fines, the undertaking must provide the Council with evidence of the alleged cartel that represents significant added value relative to the evidence already in the Council's possession at the time of the leniency application (article 21(3) of the 2011 Law).

Pursuant to article 21(4) of the 2011 Law, an undertaking that has compelled other undertakings, by exercising its economic power or by any other means, to participate in the cartel will not be eligible for the immunity or leniency programme.

The exemption or reduction of fines is subject to the condition that the undertaking provides total and permanent cooperation until the final decision has been taken by the Council and immediately stops participation in the cartel, at the latest when it reports the existence of a cartel to the Council.

The Council is not obliged to grant an exemption or a reduction even if the above conditions are met.

The decision of the Council to award leniency or immunity may only be challenged in court with the decision on the merits of the case.

There are no scales according to which fines may be reduced. In its decision of 5 March 2010 referred to above (decision 2010-FO-01), the Council explained that the scale of the reduction depends on the accuracy and relevance of the information and evidence provided by the applicant.

24 First in

What is the importance of being 'first in' to cooperate?

Only the undertaking that is 'first in' may be granted immunity from a fine, provided the other conditions for such immunity are also met (see question 23).

25 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

The second undertaking to report the existence of a cartel may only be granted a reduction of the fine provided that the other conditions are met (see question 23).

The 2011 Law is silent with respect to 'leniency plus'. Each infringement in relation to the same agreement should be treated separately.

26 Approaching the authorities

Are there deadlines for applying for immunity or leniency, or for perfecting a marker?

In order to be able to benefit from immunity, the undertaking must be the first to report the existence of a cartel about which the Council had no information. Therefore, the approach has to be made as soon as the undertaking becomes aware of the existence of a cartel.

There is no particular deadline for applying for leniency, but it may not be granted after the notification of the communication of the claim. Thus, again, it is important to act as quickly as possible.

27 Cooperation

What is the nature and level of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

The applicant has to prove that the conditions of the 2011 Law regarding the award of a leniency or immunity regime have been met (see question 23). Such proof can be made by any means. As stated in question 25, only the undertaking first in may be granted immunity from a fine, provided the other conditions for such immunity are also met (see question 21).

Even if a party fully cooperates and if the conditions as set forth in article 21 of the 2011 Law are met, there are no guarantees that the Council will grant leniency or immunity and it has no obligation to do so.

Leniency or immunity awards are not binding on the public prosecutor (in the case of a criminal action) or on the civil courts (in the case of a claim for liability).

28 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties?

There are no provisions in the 2011 Law on the confidentiality of the leniency or immunity applicant and any other cooperating party. Article 26 of the 2011 Law only deals with the request made by undertakings or persons that information used in the investigation remains partially or totally confidential (ie, business secrets).

29 Settlements

Does the enforcement authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

Plea bargains or similar mechanisms are not allowed under Luxembourg law.

30 Corporate defendant and employees

When immunity or leniency is granted to a corporate defendant, how will its current and former employees be treated?

Whether the Council has imposed a fine on an undertaking because of its participation in a cartel or has awarded the immunity or leniency regime to an undertaking has no bearing on its employees. Employees do not have to bear the financial consequences of cartel activity by their employer.

31 Dealing with the enforcement agency

What are the practical steps in dealing with the enforcement agency?

There is no specific procedure to be followed when requesting leniency or immunity. The application can be made orally. Nevertheless, as only the first in may be awarded immunity, the request should be made by registered letter or courier to get a proof of the date on which the request was made.

Counsel may act in the name and on behalf of an undertaking. A letter from employees (or other persons who are not entitled to act in the name and on behalf of the undertaking) may be considered as not being binding on the undertaking, while at the same time revealing to the Council the existence of a cartel.

32 Ongoing policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There is no immunity policy assessment or review ongoing.

Defending a case

33 Representation

May counsel represent employees under investigation and the corporation? Do individuals require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

Employees are not party as such to the investigation. They may, however, be assisted by a lawyer if they are being interrogated by the Council. A lawyer may represent the undertaking and assist an employee provided he or she has no conflict of interest and there is no risk that such conflict may arise (see question 34).

Update and trends

With the 2011 Law, the investigation and decision-making proceedings were modified in order to make them even more effective and less cumbersome. The newly composed Competition Council actively plays its role; it has imposed fines on undertakings for anti-competitive practices (decision 2012-FO-08).

On the other hand the Competition Council rendered for the first time two commitment decisions in cases involving abuse of dominant position (decisions 2012-E-04 of 23 November 2012 and 2012-E-07 of 18 December 2012). By those decisions the Competition Council demonstrates its willingness to discuss with undertakings in order to agree on binding commitments rather than imposing fines.

34 Multiple corporate defendants

May counsel represent multiple corporate defendants?

A lawyer may represent multiple corporate defendants if, while doing so, he or she will not be subject to a conflict of interest. If such conflict arises, the counsel has to stand down and may not act for any defendant in the same case. Therefore, it is not advisable to have one lawyer represent multiple corporate defendants if each such undertaking intends to adopt a different strategy (as regards, for example, cooperation with the Council, requesting leniency, involvement in the cartel or inception of the cartel).

35 Payment of legal costs

May a corporation pay the legal costs of and penalties imposed on its employees?

No fines may be levied against an employee under the 2011 Law. Employees do not have to bear the financial consequences of cartel activity by their employer. Pursuant to article L.121-9 of the Labour Law Code, the employer bears the risks of his or her business and consequently is held liable unless the employee has committed a voluntary act or a gross negligence. Hence, the employer has to prove a voluntary act or gross negligence, which we consider to be rare in a competition case, as an employee would likely act on the instruction of his or her employer.

There is no prohibition against having the employer take care of the legal costs of its employees. The decision should be taken on a case-by-case basis if, for example, the corporation intends at a later stage to dismiss employees for their actions in relation to the cartel.

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36 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions?

The Council has not addressed this issue yet. However, the 2011 Law does not prevent the Council from taking into account any penalties imposed in other jurisdictions as mitigating circumstances when setting fines.

37 Getting the fine down

What is the optimal way in which to get the fine down?

As plea bargains or similar negotiations are not allowed under Luxembourg law, the best way to get the fine down is to fully cooperate with the Council. Indeed, the cooperating undertaking may benefit from leniency or even immunity. Even if no leniency or immunity is granted, the fines are levied according to the individual behaviour of the concerned undertaking.