LUXEMBOURG

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I. Introduction

The general tendency in the Grand-Duchy of Luxembourg "*was to favour protective agreements and dominant positions*". This "antitrust" tendency of the Luxembourg authorities can be explained by the small size of the country and its dependence upon other countries. [1]

Few decrees and laws have been taken or passed in the field of competition law[2] and Parliament waited until 17th June, 1970 before enacting a law on anti-competitive practices (the "1970 Law").[3] However, this law has known very little success as it has been enforced only on rare occasions by the Minister for Economic Affairs. No case law exists in relation to the 1970 Law.

Until recently Luxembourg was the sole Member State of the European Union without (i) a legislation for enforcement of Articles 81 and 82 of the EC Treaty and (ii) an independent competition authority.

The law of 2nd September, 1993 only designated the Minister for Economic Affairs as the authority to assist the European Commission in investigations on infringements of Articles 81 and 82 of the EC Treaty (the "Law of 2nd September, 1993). [4]

Since 17th May, 2004, Luxembourg has a competition law (the " Law of 17th May, 2004"), which has come into effect on 29th May, 2004[5], providing for an independent authority and the enforcement of national and European competition law by this authority.

Indeed the Law of 17th May, 2004 provides for (i) an independent council for competition matters ("*Conseil de la concurrence*"), (ii) an investigation division for competition affairs ("*Inspection de la Concurrence*"), and (iii) has repealed the 1970 Law and the Law of 2nd, September 1993. The Law of 17th May, 2004 basically mirrors Council Regulation (EC) n° 1/2003 and provides for the prohibition of the concerted practices, agreements and decisions between undertakings and of the abuse of a dominant position as laid down by Articles 81 and 82. However it does not provide for any court action for damages for breach of competition law. In order to obtain compliance with and/or enforcement of competition law, economic actors must rely on the general provisions of the Civil Code and the Civil Code of procedure, but we are not aware of any Luxembourg court decision which has awarded damages for infringement of competition law.

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1 André Elvinger, *World Law of Competition, Unit B - Western Europe, Luxembourg, volume 3,* (1983), Matthew Bender, page LUX 3-1.

2 *inter alia*, the decree of 9th December, 1965 prohibiting for sanctions in case of refusal to sell goods as a result of non compliance with such price determination; this decree is no longer into force.

3 Law of 17th June, 1970 on anti-competitive practices, as amended by the law of 20th April, 1989, *Mémorial* A 1970, page 892 and *Mémorial* A 1989, page 504.

4 Law of 2nd September, 1993 "*créant les conditions requises pour l'application:*
1. de la loi modifiée du 17 juin 1970 concernant les pratiques commerciales restrictives,
2. du règlement No 17 du conseil de la communauté européenne du 6 février 1962, prise en exécution des articles 85 et 86 du traité de Rome, 3. du règlement (CEE) No 4064/89 du 21 décembre 1989 relatif au contrôle des opérations de concentration entre entreprises"; Mémorial A 1986, page 2214 as amended by the law of 14th May, 1992, *Mémorial* A 1992, page 1112; a consolidated version of the text has been published by the law of 29th May, 1992, *Mémorial* A 1992, page 1119.

5 *Mémorial* A 2004, page 1111.

The law of 30th July, 2002, duly amended, prohibits unfair competition practices, and implements directive 97/55 EC of the European Parliament and the Council of 6th October, 1997 amending directive 84/450 EEC concerning misleading advertising, so as to include comparative advertising (the "Law of 30th July, 2002).[6] The Law of 30th July, 2002 permits any economic actor, whether a natural or legal person, to introduce a "summary action" in order to obtain an order against a person infringing that law before a summary judge.

II. Actions for damages - status quo

A. What is the legal basis for bringing an action for damages?

(i) Is there an explicit statutory basis, is this different from other actions for damages and is there is a distinction between EC and national law in this regard?

a) Luxembourg competition law does not provide for any explicit statutory basis for damages actions.

The Law of 17th May, 2004 does not explicitly provide for the enforcement of EC competition law by the national courts. It only explicitly empowers the *Conseil de la concurrence* to enforce EC competition law. To our understanding, it is not necessary to insert the enforcement of Articles 81 and 82 by national courts, as the Regulation 1/2003 becomes *per se* part of national law. Anyway persons could already rely on Articles 81 and 82 before the coming into force of the Regulation. Finally we consider that the Regulation 1/2003 will not have any impact on the issue of the legal basis for bringing an action for damages, as the Regulation provides for the enforcement of Articles 81 and 82 but not for statutory basis for damage actions.

One legal basis for introducing a claim for damages for infringement of competition law before the Luxembourg courts is article 1134 of the Civil Code which is the common legal basis for all actions relating to contractual liability. Article 1134 provides that the agreement entered into between parties is the law governing the relationship between the parties. The agreement may only be revoked by mutual consent or for a cause as provided for by law. Any agreements entered into between parties shall be executed in good faith.[7]

Article 1134 can be invoked by a party to an agreement or a concerted practice if his partner adopts an anti-trust behaviour which causes harm to him even if that behaviour forms part of the agreement. The court will however discretionary analyse whether damages are due for violation of article 1134. In this respect the court will take into consideration to what extent a party has contributed to the infringement of Articles 81 and 82, *inter alia* the economic power of each party being of relevance.

b) Any third party wishing to introduce a court action either against the parties to an anti-trust agreement or against an economic entity committing an abuse of a dominant position must base its action on article 1382 of the Civil Code providing for liability in tort. Indeed, article 1382 provides that any damage caused by fault entails the liability of the persons who committed that fault.[8]

c) The Law of 30th July, 2002[9] provides for a specific procedure called "*action en cessation*". The action is introduced before the president of the district court and follows the same procedure as the summary procedure provided for by the articles 932 to 940 of the Civil Code of procedure. This law might be relevant in the present context as for example the practice of sales at a loss is prohibited by the Law of 30th July, 2002 and may also qualify as an abuse of a dominant position if the practice is committed by an economic actor occupying

6 *Mémorial* A 2002, page 1829 , *Mémorial* A 2003, page 3989.

7 Article 1134: "*Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi.*"

8 Article 1382: "*Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer.*"

9 *op. cit.*

a dominant position in the relevant market. It should be stressed that this procedure does not allow for financial compensation but only a court order prohibiting the unfair commercial practice as well as the publication of that order. Article 23 of the Law of 30th July, 2002 provides for criminal sanctions and permits any person, professional grouping or representative consumer protection associations 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 "partie civile" in criminal proceedings is the claim of damages. We confirm that the purpose of constituting partie civile is to claim of damages. This is a general principle and not specifically related to competition matters. The major aim however of article 23 of the Law of 30th July, 2002 is not the claiming of damages but the possibility for any concerned person or any approved association or groupment to request the "*cessation*" of the antitrust practice without having to prove any damage. In case the proceedings are initiated by the public prosecutor, the burden of proof relies on him, being understood that the "parties civiles" may bring further evidence in order to support the action introduced by the public prosecutor and their claim for damages.

Furthermore the Law of 30th July, 2002 only applies to the antitrust practices as set forth therein.[10]

B. Which courts are competent to hear an action for damages?

(i) Which courts are competent?

The lower courts, the "*tribunaux de 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 lower courts have jurisdiction to judge any cases where the amount claimed does not exceed 9,915 ¤. These courts are fully competent to judge on the existence of a violation of competition rules.

The summary judge may award an interim injunction if: (i) the claim is urgent[11]; or (ii) if the order is sought to avert a situation which would cause irreparable harm to the plaintiff; or (iii) if the order is sought remedy to an unlawful situation which has already occurred. [12] Such an order is immediately enforceable notwithstanding any appeal lodged against it. The interim order does not have any influence on the substance of the case. Such an order may be revoked or amended if new elements, whether legal or factual, arise. The summary judge cannot award any compensation for the harm caused. The summary judge will only assess *prima facie* whether a violation of competition law has occurred or not.

(ii) Are there specialised courts for bringing competition-based damages actions as opposed to other actions for damages?

There are no specialised courts for bringing competition-based damages actions.

10 The list of the anitrust practices is as follows: non respect of the conditions of the sales (*ventes en solde), of* the liquidation of stock, of the sales on sidewalks (*ventes sur trottoir), of* the auctions of new goods (*ventes aux enchères, of* the misleading publicity, of the sales at a loss.

11 Article 932: *"Dans les cas d'urgence, le président du tribunal d'arrondissement, ou le juge qui le remplace, peut ordonner en référé toutes les mesures qui ne se heurtent à aucune contestation sérieuse ou que justifie l'existence d'un différent (...)."*

12 Article 933: *"Le président, ou le juge qui le remplace, peut toujours prescrire en référé les mesures conservatoires ou de remise en état qui s'imposent, soit pour prévenir un dommage imminent, soit pour faire cesser un trouble manifestement illicite. Pour empêcher le dépérissement des preuves, il peut ordonner toute mesure d'instruction utile, y compris l'audition de témoins (...)."*

C. Who can bring an action for damages?

(i) Which limitations are there to the standing of natural or legal persons, including those from other jurisdictions? What connecting factor(s) are required with the jurisdiction in order for an action to be admissible?

Any person who can show a direct, certain and personal interest may sue for damages before Luxembourg courts. This principle also applies for persons from outside provided Luxembourg courts would have jurisdiction to rule on their claim in accordance to private international law.

A legal person may only act before a court if it has legal personality. However, the absence of any legal personality cannot lead to the immunity of a group or association without any legal personality. Pursuant to Luxembourg case law a group without any legal personality has a passive capacity, i.e. it may be sued before courts.[13]

(ii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

As provided for by article 23 of the Law of 30th July, 2002, any representative association or professional groupment may introduce an "*action en cessation*" of an antitrust practice, even if it has not suffered any damage. Furthermore any professional groupment or representative consumer protection association may constitute *partie civile* provided they have suffered a damage. In the light of the definitions provided for by the comparative report, this action will, to our understanding, fall within the category of representative actions.

Luxembourg procedural rules authorises joint actions in the meaning as set forth in the comparative report.

Luxembourg law ignores class actions, public interest litigation and collective claims.

D. What are the procedural and substantive conditions to obtain damages?

(i) What forms of compensation are available?

Under Luxembourg law two types of compensation are available: (i) compensation for material damages and (ii) compensation for moral damages.

(ii) Other forms of civil liability (e.g. disqualification of directors)?

Article 2, paragraph 4 of the law of 28th December, 1988 regulating the access to the profession of artisans, traders, industrials and certain liberal professions[14] provides that the authorisation of doing business granted to a physical person may be withdrawn in case of a condemnation of the relevant person by the criminal court for infringement of anti-competitive practices.

Furthermore a director/manager of a company can be revoked *ad nutum*[15] or for legitimate reasons by the shareholders. Consequently one may consider that if a director/manager has participated in a breach of competition law, he can be revoked *ad nutum* or for legitimate reasons by the shareholders of the company.

Finally, the court may, upon the request of the plaintiff, order the publication of the court decision in the press.

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13 Court of Appeal (n°20949), 11th August, 1997, cited by Thierry Hoscheit in "*La représentation en justice des personnes morales de droit privé: A propos de l'arrêt de la Cour de Cassation du 21 mars 1996, Pasicrisie*, volume 31, n° 3/1999, page 66.

14 *Mémorial* A 1988, page 1493, amended by: the law of 21st September, 1990, *Mémorial* A 1990, page 734; the law of 4th November 1997, *Mémorial* A 1997, page 2682; the law of 12th February, 1999, *Mémorial* A 1999, page 190; the law of 31st May, 1999, *Mémorial* A 1999, page 1681; the law of 10th June, 1999, *Mémorial* A 1999, page 1770; the law of 22nd June, 1999, *Mémorial* A 1999, page 1859; the law of 25th July, 2002, *Mémorial* A 2002, page 2740

15 Article 191 of the law concerning commercial companies of 10th August, 1915: The manager(s) of a *société à responsabilitée limitée* may be removed for legitimate reasons only, unless otherwise provided.

(iii) Does the infringement have to imply fault? If so, is fault based on objective criteria? Is bad faith (intent) required? Can negligence be taken into account?

Articles 1382 and 1383 of the Civil Code provide that compensation is due for any fault, act, negligence or imprudence committed by the author.[16] Consequently bad faith is not required. However if the defendant has acted with bad faith, this might have a consequence on the scope of condemnation.

The assessment of any fault/act/negligence/imprudence will be analysed *in abstracto*, i.e. the judge will assess the fault by referring to the concept of an "*homme normalement diligent, prudent et avisé, le bon père de famille*" (any normally diligent, prudent and wise person).[17] Notwithstanding the objective analysis, the judge has to take into consideration the external circumstances, i.e. the judge compares the behaviour of the author of the act with any wise individual who would be confronted with a similar situation.

However if legislation has been infringed by a person, such infringement automatically implies fault.

E. Rules of evidence

(a) General

(i) Burden of proof and identity of the party on which it rests (covering issues such as rebuttable presumptions and shifting of burden to other party etc.)

Pursuant to article 58 of the Civil Code of procedure the burden of proof rests upon the party who invokes a legal or factual point to validate his claim or defence. Evidence is produced to explain, support and confirm the party's claim or defence.[18] Traditionally, the burden of proof is laid upon the plaintiff.

However the Court of Appeal has ruled that a distributor of perfumes which is not a member of the closed channel of selective distribution of the perfume manufacturers and who sells their perfumes without authorisation is presumed to have acquired these products from a member of the distribution channel. Thus, the burden of proof was reversed in this case and the distributor not being a member of the closed selective distribution channel, had to prove that his supply were legally obtained.[19] The action introduced by the perfume manufacturer was an "*action en cessation*" of the anti-trust behaviour of the unauthorised dealer. Notwithstanding this shift of burden of proof, in case of a claim for damages for breach of competition law, the burden of proof of the allegated damage remains with the plaintiff.

The principle remains that the burden of proof is laid upon the plaintiff. The case law mentioned here above cannot be considered as having reversed this principle, even in competition cases. We have no knowledge on any exception to the principle in relation to franchise agreements.

(ii) Standard of proof

The evidence submitted to the court needs to win the entire conviction of the court. Evidence can take the form of written documents, whether official or private, affidavits or testimonies.

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16 Article 1382, *op. cit.*
Article 1383: "*Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence.*"

17 *C. Cass.*, 9th May, 1984 quoted in Georges Ravarani, *La responsabilité civile des personnes privées et publiques*, *Pasicrisie (*2000), page 46.

18 Article 58: *"Il incombe à chaque partie de prouver conformément à la loi les faits nécessaires au succès de sa prétention.*"

19 See point (V), page 17, National case law summaries, case n° 1. *Auchan Luxembourg-Textiles S.A.-Parfums Christian Dior S.A. et consorts*, Court of Appeal, 22nd October, 1997, *Pasicrisie,* volume 30, page 273; *C. Cass*. 29th October 1998, *Pasicrisie*, volume 312, page 7.

(iii) Limitations concerning form of evidence (e.g. does evidence have to be documentary to be admissible. Which witnesses can be called, e.g. the CEO of a company? Can evidence/witnesses from other jurisdictions be admitted/summoned?)

a) For 'legitimate reasons' ("*motifs légitimes*"), an individual can refuse to be heard as witness, (mainly people subject to rules of professional secrecy) as can the parents and any person related in direct line to a party or to his spouse/her husband (article 406 of the Civil Code of procedure). Anyone other than the parties themselves can be heard as witness.

b) Verbal testimonies are secondary to written evidence. The judge has an important role in deciding whether or not a witness shall be heard, and subsequently in organizing the hearings. It is the judge alone who questions the witnesses, possibly at the request of the parties. The judge may decide on the relevance of the questions submitted by the parties.

The Luxembourg legal system provides for a compulsory oath by the witness before his testimony except for persons unable to testify. [20] To a certain extent, the judge has the power to decide whether oral testimonies were given thoroughly and sufficiently.

The genuineness and authenticity of written proof may only be challenged by the other party following to a specific procedure called "*Du faux incident civil*" as laid down by article 310 of the Civil Code of Procedure.[21] Unless such proceedings are initiated, written documents will be deemed to be genuine.

c) Evidence or witnesses from other jurisdictions can be admitted before Luxembourg courts if they meet the legal criteria as laid down in the Civil Code and/or Civil Code of procedure. Please refer to points E a) and b).

d) The capacity of a shareholder, director or manager of a company to testify before court depends on the facts.[22] Pursuant to case law, a shareholder holding between 20 and 50 % of the share capital of a company is authorised to testify before a court provided that he is not a director or a majority shareholder.[23]

Furthermore the Luxembourg courts have ruled that a shareholder holding 999 shares out of 1000 shares of a company is allowed to testify provided he has no mandate to represent the company before court.[24]

The courts have ruled that a manager of a "*société à responsabilité limitée*" is not authorised to testify before court because he represents the company before court as there is an identification of the manager with the personality of the company, which is party to the lawsuit.[25]

If the management of a company is assumed by a collegial body, the case law is not unanimous. Sometimes Luxembourg courts have ruled that the managing director of a "*société anonyme*" cannot be allowed to testify[26], sometimes they allow the managing director to testify before court. [27]

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20 Article 405: "*Chacun peut être entendu comme témoin, à l'exception des personnes qui sont frappées d'une incapacité de témoigner en justice. Les personnes qui ne peuvent témoigner, peuvent cependant être entendues dans les mêmes conditions, mais sans prestation du serment. (...)*".

21 Article 310: "*Celui qui prétend qu'une pièce signifiée, communiquée ou produite dans le corps de la procédure, est fausse ou falsifiée, peut s'il y échet, être reçu à s'inscrire en faux, encore que ladite pièce ait été vérifiée, soit avec le demandeur, soit avec le défendeur en faux, à d'autres fins que celles d'une poursuite de faux principal ou incident, et qu'en conséquence il soit intervenu un jugement sur le fondement de ladite pièce comme véritable."*

22 Thierry Hoscheit, *Chronique de droit judicaire privée: Les témoins, Pasicrisie,* volume 32, 2/2002, pages 3-21.

23 Court of Appeal, (n° 15015), 9th June, 1994; Court of Appeal 22nd March, 1995; Court of Appeal (n° 18704), 1st October, 1997 Thierry Hoscheit, *op. cit.*, page 11.

24 Court of Appeal (n° 18796), 3rd February, 1999, Thierry Hoscheit, *op. cit.*, page 11.

25 Court of Appeal (n° 14991), 9th January, 1997, Thierry Hoscheit, *op. cit.*, page 12.

26 Court of Appeal (n° 124067), 15th February, 2001, Thierry Hoscheit, *op.cit.*, page 12.

27 Court of Appeal (n° 15675), 14th March, 1996, Thierry Hoscheit. *op. cit.*, page 12

The president of a board of managers is not authorised to testify before court. [28] A director who is neither shareholder of the company nor its legal representative is allowed to testify before court.[29]

The prohibition on testimonies by directors and managers does not extend to managers/directors of companies in the same group provided they have no managing power within the company being sued.

Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis defendants, third parties and competition authorities (national, foreign, Commission).

- Article 350 of the Civil Code of procedure provides for a pre-trial procedure called "*référé préventif*" if there are legitimate reasons for preserving or establishing evidence of any facts before starting a procedure and provided that the solution of the litigation will depend on such facts. In the context of the "*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. [30]

- Third parties may request to intervene voluntarily whatever they are in the lawsuit ("*intervention volontaire*").

- The Luxembourg rules on civil procedure do not prevent a national or a foreign authority from being involved in court proceedings on (i) request of the parties, provided the judge authorises such involvement, and (ii) on request of the judge. The Law of 17th May, 2004 provides that the "*Inspection de la Concurrence*" may submit written observations to the court or with the court's authorisation, present oral observations. It may also produce minutes or investigative reports in court proceedings.[31]

  Besides the information already given, a judge can order pursuant to the articles 284 and 288 of the Civil Code of procedure the production of documents being official deeds or private documents before or during the trial where these documents are held by the parties or third parties whatever they are.[32] Either the judge may order *ex officio* the production of such documents if he considers the documents to be relevant or the parties to the litigation may request the production of the documents. However the judge is not obliged to follow the request of the parties.[33] One may only request the production of a document from the person who is legitimately assumed to be in possession thereof. Furthermore no class of documents can be requested. The documents to be produced must be precisely identified.

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28 Court of Appeal (n° 15572), 15th May, 1997, Thierry Hoscheit, *op. cit.*, page 13: "*Le conseil d'administration représente la société à l'égard des tiers, voire devant les juridicitions devant lesquelles la société est appelée. Le président représentant le conseil d'administration qu'il préside doit dès lors être considéré comme partie en cause.*"

29 Court of Appeal (n°14680 and 14721), 30th November, 1992, Thierry Hoscheit, *op.cit.*, page 11

30 Article 350: "*S'il existe un motif légitime de conserver ou d'établir avant tout procès de la preuve de faits dont pourrait dépendre la solution d'un litige, les mesures d'instruction légalement admissibles peuvent être ordonnées à la demande de tout intéressé sur requête ou en référé.*"

31 Article 29 of the Law of 17th May, 2004 : « *Pour l'application de la présente loi, l'Inspection peut, devant les juridictions de l'ordre judiciaire et administratif, déposer des conclusions. Avec l'autorisation de la juridiction en question, l'Inspection peut aussi présenter des observations orales. Elle peut également produire des procès-verbaux et des rapports d'enquête.* »

32 Article 284: "*Si dans le cours d'une instance, une partie entend faire état d'un acte authentique ou sous seing privé auquel elle n'a pas été partie ou d'une pièce détenue par un tiers, elle peut demander au juge saisi de l'affaire d'ordonner la délivrance d'une expédition ou la production de l'acte ou de la pièce.*"
Article 288: "*Les demandes de production des éléments de preuve détenus par les parties sont faites, et leur production a lieu, conformément aux dispositions des articles 284 et 285.*"

33 Article 285: « *(…) le juge s'il estime cette demande fondée, ordonne la délivrance (…).*

(b) Proving the infringement

(i) Is expert evidence admissible?

Pursuant to article 461 of the Civil Code of procedure, the judge can order an expert's opinion only if a point has not been sufficiently clarified by personal verification or consultation.[34] The expert is appointed by the court in order to factually describe a situation without giving opinion about legal or factual consequences that can result from such situations. The expertise always leads to an opinion which is not binding on the judge.[35] The parties are allowed to call expert witnesses or submit experts' reports. However the court will always give more weight to reports which have been prepared by experts named by it or jointly by the parties, or witnesses heard by the judge. In case those experts' reports are however totally misleading and a party provides a unilateral report it is most likely that the court will order an additional report with a new expert. As said before, the entire conviction of the court is relevant.

In the context of competition law, an expertise may be ordered for example by the court in order to assess the relevant market in a litigation. The parties may also appoint an expert on mutual agreement.

(ii) To what extent, if any, is cross-examination permissible?

Article 408 of the Civil Code of procedure provides for the judge to hear the witnesses separately in the presence of the parties to the litigation. The judge may, however, if the circumstances of the case require, order parties not to be present at the hearing of the witnesses provided that they are immediately informed of the witnesses' declarations. [36]

Pursuant to article 414 of the Civil Code of procedure, the judge conducts the hearing of the witnesses. The parties are not allowed to address queries directly to the witnesses. [37]

Article 415 of the Civil Code of procedure provides that the judge may hear a witness more than once and confront the witnesses and/or the witnesses with the parties.[38]

Cross-examination, in the sense of one party's witness being questioned by the other party, does not occur as questions are always addressed by the judge who discretionary decides whether the question raised by the parties is relevant or not.

(iii) Under which conditions does a statement and/or decision by a national competition authority, a national court, an authority from another EU Member State have evidential value?

A statement or a decision by a national competition authority, a national court, or an authority from another EU Member State 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.

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34 Article 461: "*L'expertise n'a lieu d'être ordonnée que dans le cas où des constatations ou une consultation ne pourraient suffire à éclairer le juge*."

35 Article 446: "*Le juge n'est pas lié par les constatations ou les conclusions du technicien*."

36 Article 408: "*Le juge entend les témoins en leur déposition séparément et dans l'ordre qu'il détermine. Les témoins sont entendus en présence des parties ou celles-ci appelées. Par exception le juge peut, si les circonstances l'exigent, inviter une partie à se retirer sous réserve du droit pour celle-ci d'avoir immédiatement connaissance des déclarations des témoins entendus hors de sa présence.*
Le juge peut, s'il y a risque de dépérissement de la preuve, procéder sans délai à l'audition d'un témoin après avoir, si possible, appelé les parties."

37 Article 414: "*Les parties ne doivent ni interrompre, ni interpeller, ni chercher à influencer les témoins qui déposent, ni s'adresser directement à eux à peine d'exclusion. Le juge pose, s'il l'estime nécessaire, les questions que les parties lui soumettent après l'interrogatoire du témoin.*"

38 Article 415: "*Le juge peut entendre à nouveau les témoins, les confronter entre eux ou avec les parties; le cas échéant il procède à l'audition en présence d'un technicien*."

Trial judges are not bound by the orders of the summary judge. Such order has no authority as the trial judge has solely full degree of jurisdiction for the case to be judged on.

The decision of a natural competition authority will qualify as an element of proof which may however be criticised by the parties involved. The above applies if a party produces documents, for example decisions or judgements rendered in similar cases to the case pending before a Luxembourg court, in order to sustain its arguments. However if a party introduces a compensation action before a Luxembourg court for the occurrence of an antitrust practice the Commission or a national or foreign authority has considered as being or not contrary to Articles 81 and/or 82, a Luxembourg court would unlikely adopt a counter decision.

(c) Proving damage

(i) Are there any specific rules for evidence of damage?

The damage to be indemnified must be personal, certain and direct.[39] It is important to stress that any future damage can also be indemnified, provided that it is proven to be certain (for example: loss of future income). Potential damage is not indemnified.[40] Luxembourg courts also compensate a loss of chance provided the damage is proven.

Proving a loss of chance requires a two part evaluation: (i) an assessment of what the victim's situation would have been if the chance relied upon had been realised; (ii) an assessment of the chance itself, i.e. the degree of likelihood of the occurrence of the event.[41]

If it is very difficult to prove the existence of damages, it is very likely that a court would not allocate any compensation of damages. If the damage is proven, but it is impossible to assess the quantum of the damage in a very precise manner, the judge will assess the damage *ex aequo et bono*.

(d) Proving causation

(i) Which level of causation must be proven: direct or indirect?

The damage suffered by the plaintiff must be the direct and immediate consequence of the infringement of competition law. Pursuant to general Luxembourg civil law, any claimant must prove that the damage caused to him is the direct consequence of an unlawful conduct, i.e. the violation of a contractual or legal provision or a tort committed by the defendant. By assessing the direct link between the damage and the unlawful conduct, Luxembourg courts apply the theory of the "*causalité adéquate*" (theory of the appropriate causality).[42] According to this theory, the court will assess whether the fault, act or imprudence can be considered as a cause which would have normally let to the alleged damage. Any potential causes which might have contributed to the damage being submitted by the plaintiff to the court are analysed by the court in accordance to this principle.

F. Grounds of justification

(i) Are there grounds of justification?

As grounds of justification the defendant may invoke the individual exemptions as provided for by article 4 of the Law of 17th May, 2004 pursuant to which individual exemptions may be granted if the involved undertakings prove that such

39 *C. Cass*. (n° 15/00), 16th March, 2000, Ravarani, *op. cit*., page 490

40 Court of Appeal (n° 19083), 26th February, 1997, Ravarani, *op. cit*., page 490: "*La Cour d'appel exige des juges que "dans l'appréciation d'un éventuel damage, ils doivent prendre en considération tout élément qui, tout en étant futur, présente un degré de certitude suffisant et est susceptible d'être évalué. Il ne saurait en revanche tenir compte d'un éventuel changement futur de situation qui ne constitue qu'un évènement hypothétique non indemnisable.*"

41 Court of Appeal (n° 16453 et 16454), 17th June, 1998, Ravarani, *op. cit*., page 491

42 Ravarani, *op. cit.*, page 457

agreement, decision or practice improves the production or distribution of goods or promotes technical or economic progress while respecting the consumers' interest. To our knowledge no case similar to Case C 198/01 has been ruled by Luxembourg courts. The Law of 17th May, 2004 does not provide anymore for the exemption if antitrust conduct has been promoted by public authorities as the 1970 Law did.

Other grounds of justification will be *inter alia* that the agreements, decisions and concerted practices fall within the scope of any block exemption regulations or do not fall within the scope of Articles 81 and 82 of the EC Treaty.

In a case opposing a petrol company against an operator of petrol station, the Luxembourg district court has ruled that the agent agreement entered into between the parties did not fall within the scope of Article 81 because the operator bears no financial risk and does not enjoy any economic independence.[43]

Whereas the 1970 Law did not provide for any negative conditions such as defined in Article 81(3), the Law of 17th May, 2004 provides also for these negative conditions.

The Law of 27th November, 1986 on anti-competitive practices[44] which was abrogated by the Law of 30th July, 2002[45] prohibited any form of premium sale ("*vente avec prime*"). However, if the premium is for example a minor service or product linked to the purchase of a service or product and permitted by custom, the offer of such a premium is legal, i.e. the customer receives a minor product or service by buying the "main" product.

(ii) Are the 'passing on' defence and 'indirect purchaser' issues taken into account?

a) To our knowledge, no case law referring to the "passing on" theory has been rendered by Luxembourg courts. Notwithstanding, there are no legal objections to the fact that a Luxembourg court would consider that the alleged damages are mitigated if any overcharging resulting from the breach of competition law were passed on to subsequent purchasers. The burden of proof of the "passing on" defence would be borne by the defendant.

b) Under Luxembourg law, there are three conditions for civil liability (fault, damage and causation), whether liability is contractual or fortuitous. The damage must be certain, real and personal to the plaintiff. Every plaintiff whether direct or indirect purchaser, who can prove a fault / act / negligence / imprudence, a damage and a direct link between the violation of competition law and his damage, can claim for compensation.

   No presumption does exist that higher prices have been passed on to indirect purchasers. Indirect purchases would therefore have to prove that higher prices had been passed on to them.

(iii) Is it relevant that the plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement? Mitigation?

There is no duty to mitigate the damage on the claimant under Luxembourg law.

It might be relevant that the plaintiff is partly responsible for the infringement or has benefited from the infringement as the damages claimed may be reduced as a result of the passive or active behaviour of the plaintiff. A straightforward answer is not possible in that respect as it depends on the facts. The court has discretionary power to take into consideration the fact of the plaintiff's benefit from the infringement, by assessing his compensation. The relevant factors a court is likely taking into consideration is the qualification of the plaintiff (professional or not), the

43 see point (V), case 3, *Lux.*, *Aral Luxembourg S.A. c/ Koepfler S.àr.l.*, (n° 203/00), 24th March, 2000, not published
44 coordinated version: *Mémorial* A 1992, page 1119
45 *op.cit.*

ignorance of the relevant antitrust law, the good faith or bad faith of the plaintiff, etc.

A principle as laid down by English law relied on in the Courage vs Crehan case is not provided for by Luxembourg law. However Luxembourg courts may apply the principle "*Nemo auditum propriam turpitudinem allegans*". As no case law exists regarding competition law, it may not be necessary that a court would rely on such principle in order to reduce the compensation to be allocated to the plaintiff who is party to a prohibited agreement, provided he has significantly benefited from the agreement.

G. Damages

(a) Calculation of damages

(i) Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?

The damages will be assessed on the basis of the injury suffered by the plaintiff. The profit made by the defendant could serve as evidence for the assessment of the damage suffered by the plaintiff.

In principle Luxembourg courts allocate compensation for moral damages if the reputation or the honour of a person has been affected. Due to the absence of case law in the field of competition law, we cannot provide you with any examples in that field.

In the field of liability of tort for physical injuries caused to persons, one may consider that on an average basis the compensation for injuries varies between 500 Euro and 20,000 Euro depending on the importance of the injuries. The amount allocated as compensation for moral damages amounts to between 500 Euro and 12,500 Euro.[46]

(See also point E (c) and (i) above.)

(ii) Are damages awarded for injury suffered on the national territory or more widely (EC or otherwise)?

If the geographic market is defined as being wider than national, then damages can be claimed for injury suffered within the whole of that relevant geographic market, provided that his prejudice suffered is certain, direct and personal. This means that damages suffered outside the defined geographic market cannot be claimed.

(iii) What economic or other models are used by courts to calculate damage?

- Case law is to our knowledge inexistent in relation to competition law.[47] Furthermore we are not aware of any IP cases ruled on by Luxembourg courts in which damages have been allocated.

  The judges will assess the damage "*ex aequo et bono*" if it is impossible to calculate the damage.

- In the domain of contractual liability, for instance in case of the termination of a purchase deed of real estate property by the purchaser for delay of delivery by the seller, the courts may grant a compensation to this purchaser if he had to buy a new real estate property at a higher price. The loss borne by the purchaser will be assessed by reference to the purchase price of the new real estate property acquired by the purchaser. If such purchase price was higher than the purchase price of the former real estate property, the

46 Georges Ravarani, *"Panorama de jurisprudence en matière d'indemnisation du dommage*", *Pasicrisie,* volume 31, *« Tables »*, page 433 and following

47 please refer to "questions and guidance notes for replying to the questions on economic models"

difference between the two purchase prices may be considered as a loss for the purchaser which has to be compensated.

(iv) Are ex-ante (time of injury) or ex-post (time of trial) estimates used?

The evaluation will be made as of the day of the decision of the court determining the indemnity to be allocated to the plaintiff is rendered.[48] Consequently the estimates used are ex-post.

(v) Are there maximum limits to damages?

The limitation of the damages to be allocated is otherwise directly linked to the proven harm of the plaintiff. There are otherwise no formal limits on the damages that can be claimed.

Are punitive or exemplary damages available?

Luxembourg law, recognising only the reparatory character of the allocation of the damages, does not allow the damages to be of a punitive or exemplary nature. The Luxembourg legal system considers that the State alone is competent to bring actions which are punitive and deterrent unlike damages actions aiming to obtain compensation of the alleged prejudice by the plaintiff.

(vi) Are fines imposed by competition authorities taken into account when settling damages?

The Law of 17th May, 2004 provides that the *Conseil de la Concurrence* may impose fines on undertakings that are in breach of national competition law or Articles 81 and 82 EC.

One could consider that the fines which will be imposed by the new Luxembourg competition authority have at least an indirect consequence on the determination of the damages to be awarded by the courts in case of a competition litigation between parties. Indeed the other party will submit to the judge the decision of the competition authority as means of proof so as to guide the judge on the amounts to be allocated.

(b) Interest

(i) Is interest awarded from the date the infringement occurred of the judgment or the date of a decision by a competition authority?

Interest may be awarded from the date the infringement occurred provided that formal notice has been given to the defendant to stop or to remedy it. Interest may be awarded from the date of injury provided such notice has been given. In principle the courts award interest from the date of the application to the court or the date on which the judgement is issued, except for cases relating to physical sufferance. In such cases the courts allocate interest from the date of occurrence of the accident. Regarding your example, we consider that it is unlikely that a court would allocate interest from the date of occurrence of the infringement as the plaintiff has not yet suffered any damage from that date on.

(ii) What are the criteria to determine the levels of interest?

The rate of interest is fixed by law. The current interest rate as determined by the grand-ducal regulation of 19th January, 2004 amounts to 4.75%.[49] Such interest rate is fixed in accordance to, *inter alia,* the inflation rate.

48 *Lux.*, (n° 40/2000), 2nd February, 2000, Ravarani, *op. cit.*, page 516
49 *Mémorial* A 2004, page 172

(iii) Is compound interest included?

Compound interest is not included unless interest has been due for at least one year and such a possibility has been agreed between parties or is imposed by law. A creditor must bring an action against the debtor for payment of compound interest. [50]

H. Timing

(i) What is the time limit in which to institute proceedings?

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 thirty years. Unlike the Law of 17th May, 2004 which provides for prescription periods in relation to the imposing of sanctions and their execution by the authorities, no specific prescription period is provided for in the law regarding proceedings to be instituted between legal and/or private parties. Consequently the common prescription period of 30 years as laid down by article 2262 of the Civil Code will apply.[51]

(ii) On average, how long do proceedings take?

On average, a case before a first instance court will last 18 months, except before the lower courts ("*tribunaux de justice de paix*"), where cases are normally be judged within 10 months. The proceedings before the Court of Appeal also last approximately 18 months. These periods may be longer where an investigation is ordered by the court.

(iii) Is it possible to accelerate proceedings?

In the context of proceedings before the district court on civil matters or on commercial matters pursuant to the civil procedure and the Court of Appeal, a "*juge de mise en état*" is designated. Article 204 of the Civil Code of procedure provides that the "*juge de mise en état*" fixes the time limits necessary for the instruction of the case on basis of the nature, the urgency and the complexity of the case.[52] The "*juge de la mise en état*" thus determines the procedural organisation of the case, i.e. he determines the dates on which the parties must submit their summons, the date of the hearing etc. If he considers it opportune to accelerate the proceedings, he can impose shorter time limits.

(iv) How many judges sit in actions for damages cases?

One judge sits in the lower courts ("*tribunaux de justice de paix*"). In the district courts and the Court of Appeal, a collegial body of three judges sits. The Supreme Court is composed of 5 judges.

(v) How transparent is the procedure?

a) Pursuant to article 279 of the Civil Code of procedure, any party which invokes a document in support of his arguments shall communicate the document to the other party and to the court.[53]

b) The judge also has the power to order the parties to communicate documents which are not in their possession to each other.[54]

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50 *C. Cass.*, 10th April,1908, *Pasicrisie*, volume 8, page 148

51 Article 2262: "*Toutes les actions, tant réelles que personnelles sont prescrites par 30 ans, sans que celui qui allègue cette prescription soit obligé d'en rapporter un titre, ou qu'on puisse lui opposer l'exception réduite de la mauvaise foi.*"

52 Article 204: "*Le juge de la mise en état fixe, au fur et à mesure, les délais nécessaires à l'instruction de l'affaire, eu égard à la nature, à l'urgence et à la complexité de celle-ci, et après avoir provoqué l'avis des avocats. Il peut accorder des prorogations de délai. Il peut également renvoyer l'affaire à une audience ultérieure en vue de faciliter le règlement du litige.*"

53 Article 279: "*La partie qui fait état d'une pièce s'oblige à la communiquer à toute autre partie à l'instance. La communication est faite, sur récépissé ou par dépôt au greffe. La communication des pièces doit être spontanée. (...).*"

c) Article 185 of the Civil Code of procedure provides that hearings are public, except provided otherwise by law. The court may also order that the hearings may be held "*à huis clos*" if specific circumstances require.[55] Business secrets might be a reason for ordering such a measure. However we are not aware of any such a precedent.

The hearings of the court sitting in commercial matters and more particularly in competition law matters are in principle public.

The lawyer may also request that his documents are terminated to him once the trial is terminated.

I. Costs

(i) Are court fees paid up front?

Court fees are not paid up front, but only once the judgement has been rendered.

(ii) Who bears the legal costs?

In principle, the legal costs are borne by the party which has lost the case unless the court has decided that both parties shall bear part of the legal costs.[56] The legal costs called "*frais et dépens*" do not include the lawyers' fees. The lawyers' fees are borne in principle by their clients. [57]

The division of costs may be shared in case both parties succeed in their claim, for example the plaintiff is partially successful in his claim and the defendant in his counter action There are no circumstances under which the successful party would not be awarded all costs.

(iii) Are contingency fees permissible? Are they generally available for private enforcement of EC competition rules?

Pursuant to article 2.4.5.3 of the "*règlement intérieur de l'Ordre des Avocats du Barreau de Luxembourg*" (rules of procedure of the Luxembourg Bar Association), 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, *inter alia*, an agreement which not only gives right to fees fixed by reference to the services rendered but also additional ones determined by reference to the result obtained on the services rendered, is not considered as constituting a *quota litis*. Such an arrangement would therefore be permitted.

(iv) Can the plaintiff/defendant recover costs? Are there any excluded items?

Article 240 of the Civil Code of procedure provides that the judge may condemn one of the parties to pay to the other one an indemnity for ("*indemnité de procédure*") if he considers that it would be unfair for one of the parties to bear costs which are not included in the "*frais et dépens*".[58] The "*indemnité de procédure*" does not include the legal costs. Usually, the judge imposes an "*indemnité de procédure*" of between 500 and 2,000 ▫ on the unsuccessful party

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54 Article 284: "*Si dans le cours d'une instance, une partie entend faire état d'un acte authentique ou seing privé auquel elle n'a pas été partie ou d'une pièce détenue par un tiers, elle peut demander au juge saisi de l'affaire d'ordonner la délivrance d'une expédition de l'acte ou de la pièce.*"

55 Article 185: "*Les plaidoiries seront publiques, excepté dans les cas où la loi ordonne qu'elles seront secrètes. Pourra cependant le tribunal ordonner qu'elles se feront à huis clos, si la discussion publique devait entraîner un scandale ou des inconvénients graves: mais dans ce cas le tribunal sera tenu d'en délibérer, et de rendre compte de sa délibération au procureur général d'Etat, près la Cour Supérieure de Justice; et si la cause est pendante dans un tribunal d'appel, au grand juge Ministre de la Justice.*"

56 Article 238: "*Toute partie qui succombera sera condamnée aux dépens, sauf au tribunal à laisser la totalité ou une fraction des dépens à la charge d'une autre partie par décision spéciale et motivée*".

57 please refer to point I (iv)

58 Article 240: "*Lorsqu'il paraît inéquitable de laisser à la charge d'une partie les sommes exposées par elle est non comprise dans les dépens, le juge peut condamner l'autre partie à lui payer le montant qu'il détermine.*"

depending on the importance of the case. Such amount shall allow the party which has won the case to recover a part of the lawyer's fees.

(v) What are the different types of litigation costs?

The different types of litigation costs are the following:

a) "*Emoluments*" which are fixed in consideration of the procedural deeds and summaries performed by the lawyer: the "émoluments" are composed of a fixed and a variable amount as determined by the grand-ducal regulation of 21st March, 1974 regarding rights and remuneration allocated to lawyers[59], whereas the lawyer's fees are freely agreed between the lawyer and his client.

b) Disbursements and other legal costs incurred by the legal action i.e. costs normally borne by the unsuccessful party unless otherwise ordered by the court are as follows:

- fiscal stamps and registration fees,
- bailiff expenses[60],
- expert and witness fees[61],
- any payments made on behalf of the parties (travelling expenses, etc.), (We confirm that the experts' fees are included within the legal costs and are payable by the unsuccessful party.).

The fees mentioned here above are all included in the *frais et dépens*.

c) Lawyer's fees.

(vi) Are there national rules for taxation?

Please refer to point II) v) a) and b). In addition rules governing litigation over costs are determined in a decree of 16th February, 1807 as amended on the liquidation of the costs.[62]

(vii) Is any form of legal aid insurance available?

The grand-ducal regulation of 18th September, 1995 on legal aid provides that persons with low income will be granted legal aid. The State bears the costs of this. [63] Legal aid insurance is available irrespective of the relevant branch of law. It is granted *inter alia* to nationals and to EU citizens. However a business man (*commerçant*) or a self employed person is, in principle, not entitled to legal aid insurance if the litigation relates to his business. Legal aid insurance to these persons is only exceptionally granted for duly serious reasons.

Persons with low income are *inter alia* the following:

- single person: 999,35 Euro (amount equal to the minimum income),
- couple: : 1499,05 Euro.

Nothing prevents a person to enter into a private insurance contract covering legal costs. In this respect the regime will be defined in the insurance contract to be entered into between the insurance company and its client.

(viii) What are the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law?

It is difficult to give a clear cut answer to this, as the costs depend on several variables such as the complexity of the case, whether investigations have been ordered, experts committed, etc..

59 *Mémorial* A 1974, page 401
60 Grand-ducal regulation of 24th January, 1991, *Mémorial* A 1991, page 107
61 Grand-ducal regulation of 23rd December, 1972, *Mémorial* A 1972, page 2117
62 *Recueil Lois spéciales*, volume 6, "*Tarif des frais et dépens*", page 21
63 *Mémorial* A 1995, page 1916

J. General

(i) Are some of the answers to the previous questions specific to the private enforcement of competition rules? If so, in what way do they differ from the general private enforcement rules?

From a procedural perspective, no difference exists between the general private enforcement rules and the rules for private enforcement of competition law. From a substantive point of view, the issues raised will obviously be more complex and require a level of analysis not present in other damages cases.

(ii) EC competition rules are regarded as being of public policy. Does that influence any answers given?

No

(iii) Are there any differences according to whether the defendant is a public authority or natural or legal person?

No. However, it is very unlikely that in proceedings for enforcement of competition law before civil courts, the defendant would be a public authority. A public authority is only likely to be party to proceedings before the administrative courts where a person would challenge the decision issued by that authority. However the administrative court cannot allocate compensation, but only annul or, if so provided for by law, amend the administrative decision.

If public authorities are operating a business they may be sued for breach of competition rules before Luxembourg "civil" courts.

There is also no difference according to whether the defendant is a natural or a legal person except as provided for under point E (iii).

However, it should be noted that no criminal proceedings can be brought against legal persons. Criminal proceedings can only be started against company directors and shareholders. The concept of criminal liability of a legal person is alien to Luxembourg law.

(iv) Is there any interaction between leniency programmes and actions for claims for damages under competition rules?

No leniency programs are provided for under Luxembourg law. The fact that a company has benefited from leniency under EC law will not have any influence on a subsequent damages action against the same firm.

(v) Are there differences from region to region <u>within</u> the Member State as regards damages actions for breach of national or EC competition rules?

No

(vi) Please mention any other major issues relevant to the private enforcement of EC competition law in your jurisdiction

Pursuant to Luxembourg private international law governing the claims of non contractual obligations, despite the principle of the *"lex loci delicti"*, actions for liability in tort are rather governed by the law of the country with which it is most closely linked.[64] This may not be the place of the occurrence of the tort. For example, if the tort is committed in France, but the victim and the author have the Luxembourg nationality, a Luxembourg court will rule the case on basis of Luxembourg law.

64 Court of Appeal, 16th June, 1970, *Pasicrisie,* volume 21, page 347, Fernand Schockweiler, *Les conflits de lois et les conflits de jurisdictions en droit international privé luxembourgeois,* page 150, 2nd edition, Paul Bauler

(vii) Please provide statistics about the number of cases based upon the violation of EC competition rules in which the issue of damages was decided upon

Such statistics are not available.

III. Facilitating private enforcement of Articles 81 and 82 EC

(i) Which of the above elements of claims for damages (under sections II) provide scope for facilitating the private enforcement of Articles 81 and 82 EC? How could that be achieved?

We consider that the present system might already be sufficient for the private enforcement of Articles 81 and 82. The condition of causation as provided for by Luxembourg law is a guarantee in order to avoid an abundance of unjustified claims.

The obstacles to the private enforcement of Articles 81 and 82 are not legal ones. The principle reason for the lack of actions for damages for breach of EC competition law is that economic undertakings as well as consumers or consumers' associations are generally unaware of the scope of competition law.

The future independent competition authority may remedy that situation by issuing of "guidelines" and promoting competition law.

It should be noted that claims in relation to Articles 81 and 82 EC are very time consuming both in terms of instruction and drafting and as a result economic actors are very reluctant to initiate such proceedings and try rather to solve the problem they are faced with outside court.

(ii) Are alternative means of dispute resolution available and if so, to what extent are they successful?

Alternative means of dispute resolutions of competition law matters would be arbitration[65] and/or the mediation.

Mediation proceedings are not regulated by any law. However, there exists a mediation centre in Luxembourg and another which is in cooperation with the Luxembourg Bar Association. Although these centres do not deal with competition law matters (but rather with family law and common contractual and liability in tort cases)., nothing precludes them from doing so.

Arbitration may be an effective way of resolving competition disputes as the parties may choose arbitrators specialised in competition law.

Furthermore, arbitration and mediation permit to resolve the disputes faster and on a more friendly basis.

The parties always have the option to conclude a settlement agreement, even during the course of the trial. As such settlements are always confidential, we cannot provide you with any information in that respect.

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65 Articles 1224-1251 of the Civil Code of procedure

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V. National case law summaries

Case 1: [66]

Several perfume manufacturers summoned the supermarket Auchan before the summary judges for requesting an injunction to be issued on behalf of Auchan to stop the offering and selling of their perfumes in the supermarket without their authorisation as those products are offered in a closed selective distribution channel. They considered that the sale of their perfumes by Auchan without their permission constituted an unfair competition practice. Indeed, Auchan having purchased the products from a member of the closed selective distribution channel of the perfume manufacturers was arguing that it had ignored that the seller was a member of such a distribution channel. The summary judge has by order issued on 24th December, 1996 admitted the claim and ordered Auchan to stop any sale of these products subject to an indemnity to be paid in case of non-respect of such injunction ("*astreinte*"). This order is interesting in relation to the burden of proof. The court of appeal, confirming the order of the summary judge has ruled that:

The mere fact for a person to distribute brand products distributed through a selective distribution channel, without being an approved member thereof, is not, *per se*, in the absence of any other elements, an unfair trade practice.

However any third party commits an unfair trade act if it is fully aware that, by purchasing products from a member of the distribution channel, the latter violates the selective distribution agreement by selling the products to it.

Given the existence of a closed distribution network, any third party which distributes the products which are distributed through that network, is assumed having purchased those products from a member of the network and to be an accessory to the member, author of the breach of the distribution contract. The third party shall then prove that its supply was lawful i.e. that he has purchased these goods without being in collusion with the breach of the contract committed by the member of the selective distribution channel.

Case 2: [67]

A petrol station offered several free services to his customers in relation to the purchase of petrol such as the free washing of the windows of the car and the free check of the pressure of the tires. The petrol station also offered a free carwash for each tenth purchase of petrol.

A competitor of the petrol station was challenging such practices before the summary judge arguing that such practices would equal to the practice of premium sales which was prohibited under the former law on anti-trust practices and requested the summary judge to take an injunction on behalf of the petrol station for stopping these services.

The summary judge has ruled that the offering of such premiums does not infringe the law:

66 *Auchan Luxembourg-Textiles S.A.-Parfums Christian Dior S.A. et consorts*, Court of Appeal, 22nd October, 1997, *Pasicrisie,* volume 30, page 273; the judgment has been confirmed by the Supreme Court, 29th October, 1998, *Pasicrisie*, volume 31, page 7

67 *Réf. com.*, 11th October, 1985, *S.àr.l. Huss-Jungblut / S.àr.l. Copal, Pasicrisie,* volume 28, *Sommaire de jurisprudence*, page 98

The relevant question is, in this case, to assess whether the free of charge service is an incidental service allowed by trade customs or not and whether it is closely related to the sold good. Regarding the first branch of the exception, one shall notice that the fact for an operator of a petrol station to wash free of charge the vehicle's windows when the customer is purchasing petrol, has always been considered as a trade custom for any diligent operator of petrol stations.

Although this service has fallen a little bit into disuse, one shall not consider that this free of charge service rendered in connection with the purchase of petrol as being a prohibited premium.

The same applies to routine controls such as the oil check or the check of the tires' pressure of the vehicle.

In this case, the car washing, given the custom described here above, is not a premium, whereas it is only offered after a volume of ten purchases of petrol.

This service anyway represents a mere incidental service, as in order to benefit from it, the customer will have to purchase petrol for an amount of approximatively 12,000 francs.

For instance, the service rendered represents only 0.75% of the purchase value. This circumstance allows, even one takes into consideration the low profit margin of the petrol stations, to consider the free of charge service as an incidental service.

The car washing is closely linked to the purchase of petrol as these two services are performed by the same operator and are linked to the car maintenance.

Therefore the trade practice of the defendant does not qualify as a premium sale.

Case 3: [68]

The agreement between a petrol company and the agent (petrol station) provided for an option for renewal of the contract for another 5 years period to the benefit of the petrol company. The agent was arguing that such clause does not comply with EC competition law and that the contract would be null and void on the basis of Article 81. The request was rejected.

Indeed, the court ruled that:

In order for Article 85 to be applicable, the contract shall be entered into between two undertakings i.e. two economic entities vested with a real autonomy to determine their own market policy.

The contracts entered into with agents, by which they undertake either to negotiate on behalf and in the name of the principal or to enter into agreements in the name and on behalf of the principal within a determined part of the territory, are not prohibited by Article 85.

The Commission, which is not bound by the qualification given by the parties to their contract, considers that, in order to distinguish an agent from an independent operator, the agent shall not, by its own functions, assume any risk incurred by the deal when negotiating.

It considers that this condition is not met and that an economic actor qualifies as an independent operator, especially if the contracting party, being or without being requested to do so, maintains an important stock, assumes at his owns expenses important free of charge services to its customers, and may determine or determines the price or the terms and conditions of the transaction (*cf. Droit commercial européen Goldman, Lyon-Caen, Vogel, Dalloz 1994 n° 481 and following)*.

The defendant vainly argues that given the circumstances, all the risks related to the operating of the business shall be borne by the *société à responsabilité limitée Koepfler* by means of guarantees which have to be provided in favour of *Aral S.A.*, whereas the exclusive purpose of these guarantees is to ensure the transfer of the sales' receipts by the *société à responsabilité limitée Koepfler* to *Aral S.A.*.

68 *Lux.*, *Aral Luxembourg S.A. c/ Koepfler S.àr.l.*, (n° 203/00), 24th March, 2000, not published

The plaintiff also vainly argues that it shall provide, on his own expenses, important and free services to its customers as at the beginning of the contract, the fact of hiring employees to serve petrol to the customers does not constitute an important service but is a condition of the operating of the petrol station, given that self-service was not commonly developed at that time.

By comparison, one can indicate that in the judgement rendered by the *Landgericht Hamburg*, in the case opposing the petrol company Esso to one of its retailers, the court considered that, regarding the requirement of the criterium of important services provided to the customers: "such criterium is fulfilled by the providing by the petrol station of equipment such as check engine equipment, supply of water, air pressure equipment, oil disposal service, vacuum service as well as any other equipment".

The *société à responsabilité limitée Koepfler*, which is an element of the distribution system of the principal Aral, does not constitute an autonomous entity in its relationships with Aral, so that it cannot enter into any agreement amongst undertakings with it; Article 85 of the Treaty is not applicable to it.