
European Economic Law

3 January 2018

Duration: 120 minutes

- Please check both at receipt as well as at submission of the exam the number of question sheets. The examination contains 4 pages (including this page) and 3 questions.

Notes on grading

When grading the exam each question is weighted separately. Points are distributed to the individual questions as follows:

Part I

Question 1	32 points	50 %
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Part II

Question 2	15 points	23.5%
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Question 3	15 points	23.5%
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	2 additional points	3%
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Total	64 points	100%
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We wish you a lot of success!

Part I: Fundamental Freedoms (50 %)

In Spain, the price of wine is traditionally much lower than in France. The difference has become even bigger due to the financial and economic crisis. As a consequence, the imports of Spanish wine into France have increased considerably so that the French vintners (winegrowers) have difficulties in finding clients for their wine products. They are not happy about the situation and complain about unfair competition since their Spanish competitors can produce at lower cost, in particular because of the lower wages and generally the lower price level for input factors in Spain which is about only the half of labour and other costs in France. While thousands of French vintners demonstrate peacefully, a radical group of them takes matters into their own hands: Several times, they ambush Spanish wine trucks at the Spanish-French border and dump the merchandise on the highway. In addition, they raid big wine distributors in the region and spill Spanish wine over the streets. Local newspapers report that a "wine war" in Southern France is taking place, and that it turns streets into "rivers of red wine". The French authorities condemn the violence, but the French law enforcement authorities do not initiate criminal proceedings.

The Spanish government is concerned about the grave damage caused to Spanish wine exports and claims that France is violating the EU rules on the free movement of goods. The French government responds that the whole responsibility for the regrettable events is with the "wine rebels" in Southern France, and that the French Republic cannot be blamed for the behaviour of private individuals. There should be some understanding for the difficult situation of French vintners faced with the low prices of Spanish wine. Moreover, according to the French government, one of the reasons for the difference in price is the existence of strict grape growing regulations in France which guarantee French wine a higher quality but at the same time increase its price. One could ask the question, the French government adds, if the import of wine which does not abide by the standards of French legislation should not be prohibited altogether. The Spanish government replies that there is no unfair competition: Spain can produce wine cheaper than France since salaries are lower in Spain. According to the Spanish government, France is pursuing protectionist objectives.

Question 1: Is there a violation of the rules on the free movement of goods? Please start from the idea that the EU has taken no harmonization measures with respect to the production of wine. Please integrate in your analysis the *Keck* and the *Cassis* formula, even if these concepts are not relevant for your solution (**32 points including 2 points for good structure and argumentation**).

Note: The question is only about substantive law. Please do not comment on the procedural steps Spain could take.

Part II: EU Competition Law (50 %)

Question 2

Facts:

Loewe SE (“LSE”), having its registered office in Munich (Germany), and SystèmeAudio SaRL (“SAS”), being domiciled in Bordeaux (France), concluded a contract that the latter company should be appointed as “sole representative” of LSE in France, including Corsica. The distribution agreement grants the exclusive right to sell, in this territory, *inter alia* radio receivers, recorders, dictaphones and television sets manufactured by LSE. Depending on the calculation method, SAS holds a market share of 35-50% on the relevant product market for radio receivers.

SAS promises *inter alia* to acquire a minimum percentage of the total amount of the respective products being exported from Germany to the contract territory, to place regular advance orders and to provide appropriate publicity, to set up a repairs workshop with a sufficient stock of spare parts and to carry out a guarantee and after-sales service. Furthermore, it undertakes not to sell articles competing with LSE articles due to their similarity and not to make direct or indirect deliveries for or to other countries from the contract territory. In order to conduct the distribution of the products, SAS was authorized to use the name and emblem of LSE registered in Germany and other Member States. For the duration of the distribution agreement, SAS furthermore registered in France the trademark LINT (Loewe International) which is carried on all appliances manufactured by LSE. In order to protect its market position, SAS also filed actions against other companies seeking to sell LSE products in France. Several competitors justify these “parallel imports” by reference to the high price differences of LSE products in Germany and France which reach, in fact, from 20% up to 45%.

LSE and SAS, in turn, presented different arguments supporting their position: first, exclusive distribution is — they say — the only distribution type allowing to succeed in cross-border trade and increasing production while lowering consumer prices; second, “advance orders” by SAS enable LSE to adapt its production to increased demands; third, SAS carries out market surveys and advertising for LSE and its brand; fourth, consumers obtain prompt and reliable free customer support for which only SAS possesses the necessary information. However, free guarantee services and support for LSE products is also supplied on a regular basis by one of SAS’s main competitors.

Following a decision of the European Commission finding the agreement between LSE and SAS to violate Article 101 TFEU, both companies brought an action for annulment before the ECJ. In the course of the proceedings, it was especially disputed whether the distribution agreement could be subject to an individual exemption under Article 101(3) TFEU.

Question 2: Please assess whether the behavior of LSE and SAS could be justified pursuant to Article 101(3) TFEU? Assume that no Block Exemption Regulation is applicable in the present case. (15 points)

Question 3:

Facts:

EuroPower GmbH (“EPG”; limited liability company), having its registered office in Austria, is the largest European producer of power-actuated fastening (“PAF”) systems for construction trade, including nail guns, nails and cartridge strips. Cartridge strips are separate components inserted into the nail gun to detonate and thereby fasten the nail. They are specifically designed for particular PAF systems and usually protected by intellectual property rights. EPG carries out its main manufacturing operations in Vienna, but it also manufactures in other European countries. Overall, EPG has estimated market shares of approximately 70-80% on the respective markets.

Superfix SE (“SSE”), a *societas europaea* domiciled in Italy, produces *inter alia* nails intended for exclusive use in the nail guns of EPG. SSE filed a complaint to the European Commission: first, EPG allegedly refuses to supply independent dealers of EPG products with cartridge strips unless they also buy a corresponding quantity of EPG nails. At multiple occasions, SSE had sought to obtain supplies of cartridge strips in order to sell cartridge strips together with its own nails for use in EPG nail guns, but neither EPG nor its independent dealers were willing to supply cartridge strips without a matching quantity EPG nails.

Second, EPG had reduced its standard discounts on EPG cartridge strips without nails, granted for the purchase of certain quantities, from 25% to 10% if the respective customer bought nails from the competitor SSE instead of EPG’s nails.

In order to explain its commercial behavior, EPG claims that the nails produced by SSE would be incompatible to EPG nails guns and of inferior quality. EPG submitted various statements made by members of its staff and other persons intending to prove defects in fastenings made with nails produced by SSE. Substandard nails may give rise to breaking and splintering which may be dangerous to operators or lead to unreliable fastenings. Furthermore, EPG refers to its duty of care under product-liability law which would be vastly intensified due to the alleged incompatibility and inferiority of SSE’s nails. The alleged safety problems go back to at least 2015. However, EPL only approached the European Commission two years later with an informal and verbal proposal for a distribution system designed to overcome the alleged safety issues. During the entire period in question, EPG did not take any legal action against SSE nor make a formal complaint to a governmental body.

Question 3: Is the behavior of EPG in compliance with Article 102 TFEU? Please assume that EU competition law is applicable and that there is an effect on trade between the member states. **(15 points)**

Notice: Also in Part II, **2 additional points** can be achieved for good structure and argumentation.

European Economic Law HS 17

Correction Scheme

"Prüfungslaufnummer":

Part 1 – The Fundamental Freedoms

Question 1	Maximal Points	Points obtained
<p>Art. 34 TFEU The free movement of goods rules contain several prohibitions. Here it is not about customs duties (Art. 30 TFEU), but on measures having an equivalent effect like a quantitative restriction on imports (MEQR), Art. 34 TFEU.</p> <p><i>The two points shall be given if the student finds Art. 34 TFEU and if he/she sees that the case is about the restriction of imports (not exports).</i></p>	2	
<p>Goods Art. 34 TFEU only applies to goods.</p> <p>Concept in Art. 28(2), 29 TFEU</p> <p>Definition: "All products which can be valued in money, and which are capable, as such, of forming the subject of commercial transactions"</p> <p>Subsumption: Here it is about wine. Wine is a good in the sense of this definition.</p>	1 1 1	
<p>EU Harmonization Measure Member States are only allowed to take restrictive measures if the subject matter has not been regulated by the EU legislature. According to the Question, Sentence 2, there is no pertinent EU harmonization measure.</p>	1	
<p>Art. 34 TFEU</p> <p>Starting Point: There has to be a state measure. Purely private behaviour is subject to competition law, but not to the fundamental freedoms. Passivity of the state is also state action: State omissions are caught if there is a duty to act.</p> <p>Mentioning of the ECJ case "Commission/France" Mentioning the ECJ case "Schmidberger"</p> <p>Subsumption: Here the French authorities condemn the violence, but the French law enforcement authorities have not initiated criminal proceedings. This is not sufficient in order</p>	2 1 1	

<p>to guarantee the possibility of importing goods from other EU Member States into France. We have a relevant state omission here.</p> <p>Do fundamental rights of the French vintners (freedom of speech and of demonstration) lead to a different result (like in Schmidberger)? No, here it is about violent attacks which are not covered by fundamental rights.</p> <p>Quantitative restriction or MEQR</p> <p>Quantitative restriction: There is no restriction with respect to the volume of wine which may be imported into France, hence no quantitative restriction.</p> <p><i>Dassonville</i>-Definition of MEQR: "All trading rules which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions." (an approximative version of this definition is sufficient)</p> <p>Subsumption: The measures of the French vintners directly and actually hamper trade from one EU Member State into another one.</p>	<p>2</p> <p>2</p> <p>1</p> <p>2</p> <p>2</p>	
<p>Keck and Cassis: Exceptions for indistinctly applicable measures</p> <p>Do we have an indistinctly applicable measure here?</p> <p>The action of the French vintners is specifically addressed at Spanish products. However, the perspective is state action, not private action. Is the omission of the French Republic to initiate criminal proceedings directed specifically against goods from Spain, or would the authorities act in the same way if private persons prevented imports from other Member States, for example coming from Italy?</p> <p>The answer is not clear, any result is defensible. The points are awarded for any reflections on this problem.</p> <p>According to the Question, Sentence 3, Keck and Cassis have to be examined in any event, even if the student finds a discrimination (which normally would exclude the application of Keck and Cassis).</p> <p>Keck: Art. 34 TFEU does not apply to "selling arrangements".</p> <p>The destruction of goods is not a selling arrangement.</p> <p>Cassis: Can "mandatory requirements" of public interest justify the import restriction?</p> <p>First Argument of the French Republic: The differences in prices and costs between Spain and France. However: It is the</p>	<p>2</p> <p>1</p> <p>1</p> <p>1</p>	

<p>very sense of the free movement rules to allow market actors to take advantage of price differences and to buy products from anywhere in the internal market. Therefore, measures against price differences cannot be justified by "mandatory requirements".</p> <p>Second Argument of the French Republic: France has higher standards with respect to grape growing. However, it is not clear which public interest shall be advanced by this measure: Consumer protection for example? But even if accepted, this argument could be met by labelling requirements (proportionality).</p> <p>The points will be awarded if relevant reflections on the respective mandatory requirements are made.</p>	<p>2</p> <p>2</p>	
<p>Treaty Exception: Art. 36 TFEU</p> <p>Health protection? It is not apparent how Spanish wine could put health at risk.</p>	<p>2</p>	
<p>Result</p> <p>The omission of the French Republic is a MEQR which cannot be justified, neither by the Cassis formula nor by Art. 36 TFEU.</p>	<p>no points</p>	
<p>Good Structure and Argumentation</p>	<p>2</p>	
<p>Total Score</p>	<p>32</p>	

Part II: EU Competition Law (Prof. Picht)

Question 2	Maximal Points	Points obtained
Individual Exemption (Article 101(3) TFEU)		
<p>As indicated at the end of question 3, no Block Exemption Regulation applies in the present case. It must be assessed whether the agreement in question could be subject to an individual exemption pursuant to Article 101(3) TFEU.</p> <p>There are four cumulative conditions that need to be analyzed in more detail:</p> <ul style="list-style-type: none"> (1) Efficiency gains (2) Fair share for consumers (3) Indispensability of the restriction (4) No elimination of competition in respect of a substantial part of the products in question 	<p>1</p> <p>1</p>	
<p>(1) Efficiency gains</p> <p>According to Article 101(3) TFEU, the prohibition of Article 101(1) TFEU can be declared inapplicable, if the respective agreement contributes to improving production or distribution of goods or to promoting technical or economic progress.</p> <p>It is widely recognized that the system of exclusive distribution can contribute to improve the production and distribution of goods. This might also hold true with respect to guarantee and support services for customers as well as for the advance orders carried out by the sole distributor. However, account should only be taken of appreciable objective advantages generating value to the European Union as a whole and being of such character as to compensate for the disadvantages caused in the field of competition. Subjective benefits the parties to the agreement might obtain from it in their production or distribution activities are not relevant. In the present case, it can be assumed that the parties' agreement is in general capable of contributing to the improvement of production and distribution of goods. First, as argued by SAS and LSE, efficiency gains of exclusive distribution can particularly occur in cross-border trade, because language, legal and technical difficulties can be overcome more easily. In addition, exclusive distribution may lead to savings in logistic costs due to economies of scale in transportation and distribution. Second, as indicated by the parties, it is possible to improve the process of production planning by means of the systems of "advance orders" enabling the distributor to guarantee the continuous and demand-oriented supply of the consumers. Third, efficiencies by exclusive distribution could be assumed, because the distributor SAS is required to contribute protecting and building up LSE's brand image. In contrast, it remains unclear to which extent objective efficiency gains could be derived from the conduction of market surveys, e.g. with respect to the technological conditions of the French market. Lastly, in the case of complex products, such as radio receivers, efficiencies could result from the fact that the supplier is able to concentrate its education and training activities on the sole distributor being able to</p>	<p>1</p> <p>1</p> <p>1</p>	

provide high quality support to the customers.		
<p><u>(2) Fair share for consumers</u></p> <p>In a second step, it has to be assessed whether there is a fair share for consumers of the resulting benefit according to Article 101(3) TFEU. This implies that the pass-on benefits at least compensate the consumers for any actual or likely negative impact caused to them by the restriction of competition.</p> <p>In the field of trade, benefits in the aforementioned sense can comprise the improvement in distribution as well as other advantages of rationalization, but in any case consumers have to obtain a “fair share” through prices and other conditions of sale. As claimed by the competitors of SAS, there are substantial price differences between Germany and France with respect to products manufactured by LSE. Even though the possibility that consumers do not “fairly” participate in the benefits resulting from this situation is reduced if parallel imports to France are conducted, it still exists. And, most importantly, the probability of a fair share for consumers would almost be eliminated by a fully functioning system of absolute territorial protection deploying SAS as exclusive distributor and widely excluding competition for SAS on the respective market. It is therefore not the agreement in question which generates advantages to consumers but — on the contrary — only the undercutting of said agreement. This is, however, not what the Art. 101(3) requirement aims at. As a consequence of the agreement (if not undercut), all other wholesalers and retailers would only be able to acquire LSE products from SAS for higher prices. For sure, the concept of “fair share” does not only encompass quantitative benefits, but also qualitative efficiencies, such as the improvement of service. Specialized distributors may be able to provide for services that are tailored to the customer’s needs. In the present case it is, however, not to be expected that the free customer support guaranteed by SAS would compensate the negative impact resulting from the exclusive distribution scheme. Accordingly, the exclusive distribution agreement between LSE and SAS does not provide a “fair share” for consumers of the alleged benefits.</p>	<p>1</p> <p>1</p> <p>1</p>	
<p><u>(3) Indispensability of the restriction</u></p> <p>In a third step, it has to be analyzed whether the restriction imposed on the undertakings concerned is not indispensable to the attainment of named objectives according to Article 101(3)(a) TFEU. In this respect, the restrictive agreement itself as well as the individual restriction flowing from the agreement may not only be favorable, but must be reasonably necessary for the attainment of the efficiencies.</p> <p>The admission of parallel imports could complicate advance planning for the sole representative with respect to the quantities which he considers he will be able to sell, but such risk is inherent to any commercial activity and does not justify specific protection.</p> <p>Furthermore, it can be argued that guarantee and after-sale services for LSE products cannot be granted without absolute territorial protection. On the one hand, the proper provision of these services</p>	<p>1</p> <p>1</p>	

<p>for all LSE machines contributes to the reputation of the LSE brand. On the other hand, it could be detrimental for the customers if SAS is compelled to refuse these services for parallel imported products for which competitors do not carry out the same adequate services. However, taking into consideration the objectives related to the indispensability criterion the fears regarding the reputation of LSE do not appear severe enough in order to justify such a comprehensive restriction of competition. As indicated in the facts of the case, one of the main competitors of SAS also supplies free guarantee services and support for LSE products and nothing in the facts indicates that there might be any harm for the reputation of the LSE brand. Moreover, LSE is not prevented from informing its customers by adequate means about the nature of the service and any other advantages offered by the official distribution network for LSE products.</p> <p>Lastly, it could be reasoned that SAS would not be willing to bear the costs of market observations on behalf of LSE without absolute territorial protection. However, since the respective observations are rather beneficial for SAS than for the consumers, because it is enabled to adapt the LSE products to the needs of the French market, the argument proofs to be unfounded.</p> <p>To conclude, the absolute territorial protection implemented by the distribution agreement between LSE and SAS is not indispensable for the attainment of the named objectives.</p>	<p>1</p> <p>1</p>	
<p><u>(4) No elimination of competition in respect of a substantial part of the products in question</u></p> <p>In a last step, it must be assured that there is no elimination of competition in respect of a substantial part of the products in question according to Article 101(3)(b) TFEU. Whether competition is eliminated depends on the reduction in competition being caused by the respective agreement.</p> <p>Since the exclusive distribution agreement tries to implement a system of absolute territorial protection seeking to hinder the market entrance of potential competitors for SAS on the French market for radio receivers, on which SAS already has a market share of 35-50%, it could be argued that there is a high potential for an elimination of competition. However, whether cooperation allows the parties involved to eliminate competition in respect of a substantial part of the products in question, cannot solely be assessed on the basis that the respective agreement terminates competition between those parties representing a substantial part of the market. Instead, a realistic analysis of all possible sources of competition must be conducted, including the bargaining power of the opposite market side, the market structure and the degree of market concentration as well as the degree of potential competition by third parties including market entry barriers. In the present case, “several” competitors already entered the market and even started to sell the same LSE products, but it is not evident that they are able to put SAS under competitive pressure. Furthermore, there is no indication that the opposite market side disposes of bargaining power or that new market entries could be expected in the short-term.</p>	<p>1</p> <p>1</p> <p>1</p>	

	15	
	Total	Total

Question 3	Maximal Points	Points Obtained
<p>As indicated, it can be assumed that EU competition law is applicable (<i>ratione personae/materiae/loci</i>), and that there is an effect on trade between Member States. Thus, three different elements have to be analyzed in accordance with Article 102 TFEU:</p> <p>(1) Dominant position within the internal market (2) Abuse (3) No objective justification of the conduct</p>	1	
<p><u>(1) Dominant position</u> Whether EPG possesses a dominant position is determined by means of a two-step procedure. First, the relevant market must be defined. Second, the market power of EPG on the respective market must be analyzed.</p> <p><u>(a) Definition of the relevant market</u></p> <p><u>(i) Product market</u> The relevant product market comprises all products which are regarded as substitutable by the consumer, by reason of the products' characteristics, price and intended use. Of particular relevance is the demand substitutability being measured through the SSNIP test.</p> <p>There could possibly exist an all-embracing market for complete PAF system solutions, comprising nail guns as well as matching cartridge strips and nails. However, separate markets for nail guns and cartridge strips seem more convincing. Once a consumer invested in the reusable component (nail gun), if there was a small but significant price increase for the single-use components (cartridge strips and nails), he would most likely demand alternative sources for consumables that still fit the reusable nail gun. Thus, there are separate markets for nail guns and consumables (cartridge strips and nails).</p> <p>For the reusable nail guns, the market can be assumed to include all PAF systems, since equally well-functioning nail guns from different producers must be seen as interchangeable from a potential customer's point of view.</p> <p>For the consumables however, the market could be defined as either comprising cartridge strips and nails for (all) PAF systems in general, or as consisting of multiple PAF system-specific markets for each brand of nail guns. Due to the distinctive technical specifications of nail guns from different producers,</p>	<p>0.5</p> <p>0.5</p> <p>0.5</p>	

<p>cartridge strips for one brand of nail guns are regularly not interchangeable by the customer with those of another brand. Additionally, due to intellectual property rights on EPG cartridge strips, significant competitive pressure within the nearer future will not occur through supply-side substitutability. Lastly, SSE is in need of cartridge strips specifically designed for a particular type of EPG's nail guns for which SSE offers suitable nails. Thus, there are brand-specific markets of cartridge strips for each brand of nail guns.</p>		
<p>Finally, there could be either a comprehensive market for cartridge strips of one producer together with corresponding nails or separate markets for cartridges and matching nails from other producers. Nails are produced in numerous specifications by various producers and often comply with standardized qualities and sizes (e.g. DIN EN 10230-1). Thus, when there is a small but significant price increase on nails by the PAF system producer, consumers would be likely to switch to alternative nail sources complying with the same standard for the existing nail gun. As a result, there are separate markets for cartridge strips and matching nails.</p>	0.5	
<p>To conclude, there are separate markets for nail guns, cartridge strips and matching nails.</p>	0.5	
<p><u>(ii) Geographical market</u> The relevant geographical market comprises the area in which the undertakings concerned are involved in the supply and demand of products and services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because the conditions of competition are appreciable different.</p>	0.5	
<p>Since there are no indications of artificial barriers hindering the export of the respective products, they can be transported throughout the whole European Union without excessive transport costs. Accordingly, the relevant geographic market is the Community as a whole.</p>	0.5	
<p><u>(iii) Temporal market</u> There are no indications in the facts of a specific temporal market concerning a specific time period that needs to be considered.</p>	0.5	
<p><u>(b) Market power</u> The dominant position referred to in Article 102 TFEU relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave independently to an appreciable extent. In order to determine the market power of EPG on the relevant market, the two elements of actual and potential competition have to be examined.</p>		
<p><u>(i) Actual competition</u> According to the case law of the ECJ very large market shares are in themselves evidence of a dominant position. In the</p>		

<p>present case, it is established that EPG has an absolute market share of between 70% and 80% in the relevant markets being a clear indication for the existence of a dominant position in the markets for nail guns, cartridge strips and for nails. <i>Against this background, the relative market share indicating the difference to the market share of competitors cannot be considered as significant, because the competitors only have small market shares.</i></p>	<p>0.5</p>	
<p><u>(ii) Potential competition</u> The element of potential competition concerns the question if there are concrete indications that new competitors have a realistic opportunity and not only theoretical chances to enter the relevant market. Relevant factors to measure potential competition are <i>inter alia</i> unused production capacities, the possibility to adapt production processes and the substitutability of the product in question. Potential competition also strongly depends on barriers to entry, such as administrative obstacles or privileges granted by law, e.g. intellectual property rights.</p>	<p>0.5</p>	
<p>In the present case, there is at least one potential competitor (SSE) that seeks to enter the relevant market for cartridge strips and already entered the market for nails designed for EPG nail guns. Taking into account the facts of the case, it is not sufficiently clear if EPG has unused production capacities, but it appears that SSE was able to adapt its production processes for EPG nails guns and that nails produced by EPG and SSE are substitutable.</p>	<p>0.5</p>	
<p><u>(c) Conclusion</u> On the basis of these considerations, EPG holds a dominant position in the relevant markets.</p>	<p>0.5</p>	
<p><u>(2) Abuse</u> As a general rule, Article 102 TFEU prohibits any abuse of a dominant position by one or more undertakings. The concept of abuse has been defined by the ECJ in <i>Hofmann-La Roche</i> as: (1) relating to the behavior of an undertaking in a dominant position; (2) which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse; (3) to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators; (4) has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of the competition. In this respect, a further distinction is made between exploitative and exclusionary abuse. The general clause is further specified by the non-exhaustive catalogue of Article 102 TFEU defining particular forms of abuse. In general, EPG adhered to a selective commercial strategy towards its competitors and their customers seeking to prevent or limit the market entry of independent producers of EPG compatible consumables. Accordingly, different practices must be distinguished.</p> <p><u>(a) Tying of cartridge strips and nails (Article 102(d) TFEU)</u></p>	<p>1</p> <p>1</p>	

<p>According to Article 102(d) TFEU an abuse may consist in making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.</p>		
<p>EPG carried out a policy of supplying cartridge strips to customers only when such cartridge strips were purchased with the necessary complement of nails. By tying the sale of nails and cartridge strips it becomes very difficult for SSE to sell its own nails. Since EPG makes the sale of cartridge strips conditional upon taking a corresponding complement of nails, an obligation that has no direct connection with the main contract, there is an abuse of a dominant position pursuant to Article 102(d) TFEU. Cartridge strips and nails do not necessarily constitute a single supply, because in a nail gun the nail and the cartridge strip are totally separate and products of different manufacturers can be combined if they are compatible for the same type of nail gun. Furthermore, there is no common practice that nails and cartridge strips are always offered together. Since nail guns are designed to similar standards, there is some interchangeability between different brands of nails in that they can fit more than one brand of nail gun.</p>	1	
<p><u>(b) Discrimination for cartridge strips only-orders (Article 102(c) TFEU)</u></p>		
<p>According to Article 102(c) TFEU an abuse may also consist in applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. In the present case, EPG clearly applied dissimilar conditions to sale contracts for cartridge strips depending on whether the trading partner obtained the respective nails from EPG or its competitor SSE. In case that the customers bought SSE nails instead of EPG nails, EPG reduced its “normal” discounts for its cartridge strips from 25% to 10% in order to block the sale of its competitor’s nails. Furthermore, there is no indication in the facts of the case that the reduction of discounts for cartridge strips was linked to any objective criteria, such as quantity, but it was only based on the fact that the customers were buying nails of the competitor SSE. As a result, EPL sought to significantly influence the free choice of SSE’s customers over the source of their nails and abusively exploited them in violation of Article 102 (c) TFEU.</p>	0.5	
<p>In the context of the present case it should also be considered that rebates granted by a dominant undertaking to customers to reward them for a particular form of purchasing behavior can constitute by themselves a restriction of competition under Article 102 TFEU. This is particularly true for loyalty rebates and group rebates, such as the rebates granted by EPG in the present case, that are either qualified as particular form of customer discrimination according to Article 102 (c) TFEU or that can be considered as general manifestation of exclusionary abuse.</p>	0.5	
<p><u>(d) Conclusion</u></p>		
<p>By engaging in the aforementioned commercial practices EPG abused its dominant position in the relevant market for nails and cartridge strips according to Article 102 (c) and Article 102 (d)</p>	1	

TFEU.		
<p>(3) No objective justification of the conduct</p> <p>Even though there is no equivalent to the block exemption as well as the individual exemption pursuant to Article 101(3) TFEU, a <i>prima facie</i> abusive practice can still be admissible, if it is “objectively justified” under Article 102 TFEU. Three main types of objective justifications can be delimited: (1) legitimate business behavior; (2) legitimate public interest objectives; (3) efficiency considerations.</p> <p>In the present case, the second type relating to legitimate public interest objectives is of particular interest, because EPG primarily relies on safety reasons and consumer protection in order to justify its commercial behavior. It is undisputed that health and safety reasons could serve as valid justifications for abusive practices in the sense of Article 102 TFEU. EPG argues that incompatible and inferior nails of SSE may give raise to breaking and splintering being a potential danger to the operators of EPG nails guns.</p> <p>However, according to ECJ case law, all objective justifications are subject to a strict proportionality requirement determining whether the anti-competitive conduct goes beyond what is necessary and whether there is a less restrictive way to attain the respective objectives. The behavior of EPG cannot be described as being limited to reacting to a concern over the safety and reliability of its PAF systems due to the use of substandard nails. In fact, its practices reflect a commercial interest in stopping the penetration of the market of non-EPG consumables generating the main profits. Pursuing this interest goes in itself beyond what is necessary for following up on the safety concerns potentially at issue. Moreover, EPG did not try to explore other legitimate, effective and less interfering ways of dealing with its safety concerns, but it only submitted an informal and verbal proposal to the European Commission in order to address the alleged safety problems. EPG has also shown a marked reluctance to engage in litigation or request action from the appropriate public authorities which would have allowed these allegations to be properly evaluated. Most importantly, EPL did also not seek to establish direct contact with SSE in order to request a quality improvement.</p> <p>In view of this situation, the arguments raised by EPG cannot be considered as a sufficient objective justification for its abusive practices under Article 102 TFEU. As regards objective justification, the burden of proof always lies on the undertaking accused of abusing its dominant position.</p>	<p>0.5</p> <p>1</p> <p>1</p> <p>0.5</p>	
	15	
	Total	Total
<u>Additional points for good structure and argumentation</u>	2	

Question 2	15 Points	
Question 3	15 Points	
Additional Points	2 Points	
	32 Points	
	Total	Total