



Introduction to US Business Law

28.6.2023

Duration: 120 minutes

- Please check at receipt of the exam the number of question sheets. The examination contains 4 pages and 8 questions.

Notes on marking

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

| | | |
|------------|-----------|------|
| Question 1 | 5 points | 5 % |
| Question 2 | 5 points | 5 % |
| Question 3 | 30 points | 30 % |
| Question 4 | 20 points | 20 % |
| Question 5 | 20 points | 20 % |
| Question 6 | 5 points | 5% |
| Question 7 | 10 points | 10 % |
| Question 8 | 5 points | 5% |

| | | |
|-------|------------|-------|
| Total | 100 points | 100 % |
|-------|------------|-------|

We wish you a lot of success!



Facts:

Banana Inc. (Banana), headquartered in Cupertino, California, is an American hardware and software developer and a technology company that develops and distributes computers, smartphones and consumer electronics, as well as operating systems and application software. The smartphones are designed in the US but produced exclusively by partner companies in China. In addition, Banana operates Internet distribution portals for music, movies, and software. The Bananapp-Store is an app marketplace developed and maintained by Banana, for mobile apps on its bAS operating system. The Bananapp-Store is the only store from which bAS users can obtain apps. In the Bananapp-Store, customers can find apps made by Banana itself as well as apps made by third-party developers. Aside from Golo Play, Banana's Bananapp-Store is where the majority of apps are downloaded from across the world; in the U.S., more than half of all mobile devices run on bAS. All these innovations and business models have generated for Banana great fame, with its logo in form of a banana having cult status, and a lot of revenues. At the same time Banana has faced some reproaches for its business practices. In the last years, third-party app developers complained about the strict rules they must abide by in order to be listed in the Bananapp-Store, which is virtually the only way third-party developers can access the huge worldwide market of bAS device services. This is the genius of Banana, as it exercises its control of the bAS operating system to its own advantage by controlling the products and features consumers have access to and forcing third-party developers to sell through the Bananapp-Store. As part of its exercise power, Banana takes a 30% cut for all apps and in-app purchases downloaded from its Bananapp-Store. Banana's exercise of its growing market power is a big deal to third-party app developers and consumers. Its 30% commission negatively impacts third-party developers by limiting the revenue they can generate and places them at a clear competitive disadvantage compared with apps sold directly by Banana. Given the 30% commission fee, third-party developers have no choice but to raise their prices which trickles down to negatively impact consumers by cutting into their purchasing power.



Questions:

1) Why do so many innovative companies whose products are used by people all over the world emerge in the US? Give reasons.

1 point per answer, maximum 5 points

- US Economy is dominant (Dollar, Nobel prizes, companies)
- Competition: Doing business in the US extremely competitive
- Talent pool
- Network effects
- Creativity
- Freedom
- Huge market
- Different mentality
- One language

2) Could the fact that Banana's smartphones, which contribute most to the company's profit, are produced exclusively by partner companies in China, prove to be a risk?

1 point per answer, maximum 5 points

- Political tensions between US and China
- Possible escalation regarding Taiwan - war
- Sanctions
- Too dependent
- Prices might go high
- Shortage

3) Imagine you are the General Counsel (chief in-house lawyer) of the large video game company AlphaGames Inc. (AlphaGames), which develops popular game apps and distributes them together with in-app purchases, which gamers can use to unlock premium features or enhancements in games, for example, on the Bananapp-Store. One day the CEO of the company comes to you and complains: "It bothers me that we still have to pay Banana so much money just because we agreed to pay them a 30% commission on every purchase made through the Bananapp-Store. I read the relevant documents on the deal with Banana and it said that Banana promises to allow the sale of apps and in-app purchases and we promise the 30% commission. And of course I know that many customers have already downloaded our apps from the Bananappstore and made in-app purchases. But maybe we can interpret this deal more in our favor. By the way, I am considering simply telling our tech guys to include a direct pay option to AlphaGames in the next versions of our game apps, which will allow gamers in BAS to opt for a direct pay option that would circumvent Banana's system. What do you think, is there a way we can ignore the deal with Banana? As you know, my wife is an attorney, and when I asked her this question, one of the things she mentioned was "consideration," could that be relevant to us?". As general counsel, explain the legal situation and your concerns to the CEO, specifically addressing the legal basis for the obligation to pay the 30% commission.



Contract/Agreement/Consideration: 15 points

- The fact that the CEO says "just because we agreed" gives an indication that the agreement/contract relationship and the element "consideration" needs to be discussed.
 - Contract: Agreement (promise) that the law will enforce > Most contracts consists of mutual promises between two or more parties
 - Content of a contract: to create obligation to do or refrain from doing something
 - Legally binding only if either contract is formalized (speciality contracts) or supported by consideration (simple or informal contracts); in exceptional cases: promissory estoppel (fairness)
 - How does an agreement become an enforceable obligation in contract law? UCC distincts between Agreement (parties bargain in fact; not enforceable) and Contract (resulting legal obligation)
 - For an agreement to become a legally binding contract is needed: offer, acceptance and consideration, by a reasonable person, sufficient clear, essential points, able person
 - Offer: No fixed form required, basic test, expressis acceptance or by any reasonable means; informal approach except formality is required by law
 - Acceptance: It must be made by a party to whom the offer is addressed; it must be in the terms of the offer; the offeree must know of the offer at the time he accepts; the acceptance must be communicated to the offeror to be effective
 - Consideration
 - Nature: Complex concept; major difference common law/civil law; mutually bargained-for exchange between the parties; idea of «do ut des»; each side has to receive something in exchange for what they give; an agreement without consideration = illusory, not binding; some states today accept written contracts as consideration; An exchange/or promise to exchange of something of value; consideration separates purely gratuitous promises; consideration = bargain for and given in exchange for performance or performance or a promise of performance by the offeree.; to do something or promise to do something that he does not legally have to do or promise to forbear or forbear from doing something that he has the legal right to do; usually price for goods; mostly relevant for promises; consideration can be anything of value ("peppercorn"); substitutes for consideration: seal /promissory estoppel
 - Elements: A performance or a return promise must be bargained for; a performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise; the performance may consist of an act other than a promise, or a forbearance, or the creation, modification, or destruction of a legal relation
- Subsumption
 - Even if the CEO says "just because we agreed", it can be assumed that a (legal binding) contract has been concluded between two such large companies and not a mere Agreement.
 - Banana promises to allow the sale of apps/in-app purchases and Alphagames promises the 30% commission. So the contract is binding because of mutual executory promises.



- Once someone buys an app Alphagames is bound by its promise to pay the commission

Contract/Interpretation: 8 points

- The fact that the CEO says "maybe we can interpret" gives an indication that the Interpretation of contracts needs to be discussed.
 - When interpreting a contract, assess what the parties intended
 - Factors: Terms of contract, Course of performance, Course of dealing, Trade usage
 - Ambiguity: such terms will be interpreted in favor of the party who had less reason to know of the ambiguity
 - All contracts are assumed to include a term requiring performance in good faith
 - Subsumption: As can be seen from the facts, Banana generally charges a commission of 30%. It can therefore be assumed that this commission is also stipulated in the contract between Banana and AlphaGames and that there is no room for interpretation.

Concerns: 7 points

- The General Counsel needs to point out that the CEO's considered course of action (instructing programmers to include a direct pay option) could constitute a breach of contract.
 - Unjustifiable failure to perform a contractual duty: also only partially
 - Defenses: No valid contract, Lack of capacity (drunk), Mistake (mutual/unilateral), Changed circumstances, Fraud, Duress/intoxication, Public policy
 - Remedies: General damages (money damages), Restitution, Specific performance, Liquidated damages
 - Subsumption: The fact that the CEO now finds that 30% commission is too much does not constitute changed circumstances that could justify a breach of contract.

4) A few weeks after this conversation, the CEO of AlphaGames approaches you again. He says an entrepreneur friend, to whom he was describing his displeasure with Banana's behavior at a party at his mansion in Palo Alto, California, asked him why AlphaGames wasn't trying to fight back against Banana through antitrust. The CEO is always very busy and asks you as the General Counsel of AlphaGames: "Can you please explain to me in a few sentences what the pillars resp. the main legal provisions of US antitrust are? Which of these provisions might be applicable here and why? How are these laws enforced? Can we as a company take antitrust action ourselves, and if so, how do you assess the difficulties? And in which court would a claim have to be filed?"

Legal basis: 4 points

- Sherman Act (1890): Cartels and Monopoly
- Clayton Act (1914): Merger Control, Private Law Suits
- Federal Trade Commission Act (1914)
- Subsumption: Sherman Act Section 2, reason

Enforcement: 6 points



- DOJ
- FTC
- Federal courts
 - Not agencies but federal courts decide
 - Private lawsuits: most important
- Subsumption
 - AlphaGames may take basic antitrust action
 - Federal Court

Difficulties: 10 points

- Relevant Market
 - Definition: Market in which a particular product or service is sold
 - Subsumption: The central point of the case may be the definition of the market for apps, including games. Banana wants the court to believe that consumers have a number of options for acquiring apps. AlphaGames wants the court to believe that the only way for millions of consumers to get apps like its Games is through Banana. AlphaGames is a game developer, and because gaming consoles exist, gamers have a wider set of options for experiencing specific gaming titles. Of course playing games on consoles is a far different experience than playing on a smartphone. But when defining the app market, the court may not make the distinction between console gaming and mobile gaming.
- Ancient laws
 - Ancient antitrust laws and decades of jurisprudence make it hard for plaintiffs to win antitrust cases
 - Especially difficult when it concerns digital markets and very new business models
 - Software developers who challenge Banana's unyielding market power.
 - U.S. courts have set a high bar for plaintiffs by requiring proof that consumers themselves, not just companies, were directly harmed by anticompetitive practices. That may be the main reason we've seen a marked decline in the government bringing antitrust suits in U.S. courts in the past two decades. Given the high legal bar they must clear, government lawyers are not confident they can win. And the court must apply the antitrust laws as they are, and consider precedent cases as they were decided.
 - Waves of enforcement: Interpretation by courts, depending on judges, strict vs. relaxes interpretation
 - Subsumption: Law contains few resources to curb the kind of monopoly power Banana possesses, and it is difficult to find remedies that exist under antitrust law. A lot will depend on the judge. Per se violations less and less, nowadays rule of reasons (need proof)

5) After your responses, the CEO asks you, as General Counsel of Alphagames, if there is any way in the US that AlphaGames can get involved in getting the relevant antitrust laws changed to better cover the conduct of companies like Banana. Explain to him how federal laws are made, how Alphagames could try to influence this process and what would have to be considered in this case and whether it would be sufficient to talk to the President of the United States, the most powerful of the three branches of Government, who is an old school friend of his, to change the laws?

Legislative process: 8 points



- Separation of powers and checks and balances
- Legislative branch
 - Congress
 - House of representatives, senate
 - Art. 1, Section 8 USC
 - Can pass laws over President's veto
- Executive branch
 - President
 - Art. II USC
 - May recommend legislation
 - Can veto congressional legislation
- Judicial branch
 - Supreme court
 - Can declare laws unconstitutional
- Business organizations: 4 points
 - Play a significant role in the legislative process in the US, long history
 - Generally understood as the rise of paid advocacy by special interests seeking favor in lawmaking bodies
 - While lobbying has generally been marked by controversy, there have been numerous court rulings protecting lobbying as free speech.
- Subsumption: 8 points
 - President is not the most powerful institution; cooperation is needed.
 - AlphaGames may attempt to influence the legislative process through lobbying.
 - This costs money
 - but it has a long tradition in the U.S. and
 - since lobbying is largely covered by case law
 - the social reputational risks for AlphaGames are also limited.
 - The timing also seems good, as now Congress is taking a long, hard look at how well 20th-century antitrust laws apply to 21st-century digital marketplaces
 - Congress may decide to retrofit the antitrust laws of all three pertinent antitrust laws—the Clayton Act, the Sherman Act, and the Federal Trade Commission Act.

6) A few weeks later, the CEO of AlphaGames approaches you again as General Counsel with a legal question and says: "Can you imagine, on my smartphone from Banana, the battery got so hot that I easily burned my fingers. I would now like to get one over on Banana and sue them. From my time in law school, I remember that there are different types of product liability claims. Can you please tell me which types do exist and which one would be the best in my case? Explain to him.

5 points

- 3 types
- Defective Design: Not only negligence for production but also design
- Duty to Warn: If product can not reasonable be designed to be safe, then duty to warn
- Duty to Inspect: Manufacturers should make reasonable inspections and tests of products before Distribution
- Subsumption: Defective Design



7) At an annual meeting of General Counsels from around the world in New York, a colleague from Europe approaches you as Alphagames` General Counsel. He is General Counsel of the Zurich-based "Rocket Renewable Energies AG", a company with worldwide business activities and a turnover of 5 billion CHF which is listed at the Zurich Stock Exchange. He asks you: "You know, our company is considering moving to the US. You always hear that Delaware is very attractive for companies, why is that? One of the junior lawyers on my team, who I asked to do some initial research on the ideal legal entity, said an LLC would be best for us, is that true?" Explain to him.

Delaware: 3 points

- Dominant state jurisdiction (50% of all US companies)
- No tax on activities outside the state
- Experienced courts
- More case law than anywhere else
- Computerized registration system
- Lax corporation laws
- Internal affairs doctrine
- Stockholder not liable

Corporation/LLC: 7 points

- Corporation
 - Advantages
 - Perpetual lifetime (not dependend of lifetime owner)
 - No liability for stockholders
 - Board and officers are obliged to do business in best interest of stockholders
 - Disadvantages
 - Double taxation
 - Result: limited liability company
- LLC
 - Similar formation like corporation
 - More recent model
 - General partnership in which the partners enjoy certain types of liability protection
 - Protection varies from state to state; Insurance instead of personal liability
 - Registred with Secretary of State
 - Popular legal form for professional like lawyers; Many big law firms are LLP
 - Can have unlimited term
 - Change in partnership only with consent
- Subsumption: LLC not best option, but Corporation

8) At that meeting, you as general counsel get into a conversation with another colleague who heads the legal department of a major newspaper publisher and asks you for your opinion on the impeachment trail against the former President Donald Trump: "What do you think, how is the impeachment system/instrument today, was it rather strengthened or rather weakened by the proceedings against Trump?" Share what your thoughts are on this.

1 points per answer, maximum 5 points

- Impeachment system is significantly weekend



- Control mechanism of Congress significantly weakened
- Courts more reluctant to get involved
- President more protected
- All depends now on elections
- Precedent for future potential cases
- The two impeachments against Trump have weakened that instrument
 - along party lines
 - Impeachment shall not change election outcome
 - President does not have to cooperate with Congress
 - leaving office destroys jurisdiction
- A next impeachment will be more difficult to be successful as there are precedents now