Prof. Heinemann/Prof. Picht Autumn 2018

European Economic Law

7 January 2019

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 and 4 questions.

Notes on solving the questions

- Only fill out this text block, if you have subject-specific information. All the other information for the students is already mentioned on the cover sheet

Notes on marking

Part I (50%)		
Question 1	**32 points**	**50%**
Part II (50%)		
Question 2	**16 points**	**25%**
Question 3	**6 points**	**9.4%**
Question 4	**10 points**	**15.6%**
	…	**…**
Total	**64 points**	**100 %**

We wish you a lot of success!

Part 1 – *The Fundamental Freedoms* (50 %)

Ms. Fabia Smits is a national of EU Member State M and lives in this state. She suffers from a meniscal tear (knee injury) which is quite painful. The medical treatment of meniscal tears has well advanced in the last decade: Whereas previously the damaged part of the meniscus was removed ("If it is torn, take it out"), the slogan today is "Save the meniscus". For this purpose, new treatments have been developed which comprise augmentation techniques and meniscal reconstruction and can be performed on an outpatient basis (ambulant as opposed to hospitalisation). According to the opinion of her orthopaedist, the specific situation of Fabia Smits is well suited for a reconstructive intervention of the modern type. Ms. Smits decides to undergo this treatment but is told that there is a long waiting list in her country, and that the earliest operation date is only in six months. After some inquiries she learns that the desired medical intervention would be possible in EU Member State A in the following week, albeit at a price which exceeds the cost in her home state by 20 percent. She informs her health insurance H about her plans and undergoes the reconstructive meniscus intervention in private practice in State A. She hands in the invoice of her operation to her health insurance H in her home country.

H refuses to reimburse the costs for the operation and refers to the legislation in EU Member State M: Health care there is organized in form of a social insurance scheme run by the state-owned health insurance H. In principle, only medical care rendered on the territory of M and effected by health care providers registered with H will be reimbursed. Exceptionally, the recourse to foreign doctors and hospitals will be reimbursed if someone travels or stays in another EU Member State and the need for medical care arises unexpectedly. In all other cases, reimbursement for medical treatment requires not only notification but also prior authorization by H which takes a minimum of four weeks (starting from notification) and is at the discretion of H. As Ms. Smits does not fall into these categories, H is sorry to inform her that a reimbursement for her medical expenses is not possible.

Ms. Smits does not agree. She argues that as a national of an EU Member State she can recur to medical treatment anywhere in the EU. Moreover, it would have taken six months to get the operation in question in her own country. As she was suffering pain, such a delay was not acceptable. Besides, in absence of clear conditions, it was not foreseeable how H would have reacted to a request for exceptional authorisation. H replies that Member States are free to organise their social security systems, and that Member State M has preferred a public health insurance system over a private scheme. Even if one applied free movement rules there is, according to H, a justification of the rules in place: Without restrictions, the financial balance of the social health insurance system would be seriously undermined if patients could simply go abroad and make use of expensive medical care there. Ms. Smits responds that "social" security in State M was not able to help her in time. Moreover, according to Smits, the financial balance of the social health insurance is not at risk because her case is only about outpatient treatment so that the financing of hospitals is not affected. Further, not many patients take the trouble to get treatment abroad.

Question 1: Is there a violation of the Treaty rules on the free movement of services?

Please note: The question is only about primary law; please do not take into account any secondary law (regulations, directives) which might be relevant for healthcare. And do not comment on procedural questions.

Part 2 – *EU Competition Law* (50 %)

Facts:

The company P, domiciled in France, produces, inter alia, cosmetics and personal care products. P's brands are distributed through a selective distribution system, mainly through pharmacies on the markets in France and other EU Member States. The company's sales of the corresponding products amounted to EUR 213 million in 2017.

P's share of the French markets for these products is 20%. In the other Member States where P sells these products, its market share is between 10% and 15%.
The distribution agreements provide that sales must take place exclusively in a physical room and in the presence of a qualified pharmacist. In the event of an infringement, the agreement provides that P can claim from the respective distributor a contractual penalty of EUR 1.5 million.

P's products are tailored to particular skin problems, such as hypersensitive skin, combined with a high risk of allergic reactions. P argues that the physical presence of a qualified pharmacist ensures expert advice, keyed to the respective customer's skin type and minimizing, inter alia, the risk of allergic reactions. Furthermore, the arrangement reduces the risk of "freeriding", i.e. of other sellers benefitting from P's high quality image and know-how without necessarily offering the same level of quality.

The approved distributor V sells P's cosmetics not only in its local shops but also via the Internet. P regards this as a breach of its distribution agreement and requires V to pay a contractual penalty.
V, however, refuses payment and takes the view that the distribution conditions violate European competition law and are, therefore, null and void.

Question 2: Can P require V to pay a contractual penalty or can he claim no penalty because their contractual agreement violates Art. 101 TFEU? Please assume that the agreement lies within the scope of application of EU competition law. **(16 points)**

Question 3: How does the legal situation regarding EU competition law change when P's market shares are 60% in France and between 1% and 3% in the other Member States? **(6 points)**

The Facts of the case change as follows:

P's products belong to the segment of luxury goods and the distribution agreements contain the following clause:

'Image protection for the P prestige-brands requires distribution to be restricted to distribution channels which focus on luxury goods'.

V sells P's products via its own webshop "Lux-Mazone", specializing in luxury goods, but also via the webshop "B-Mazone" (third party) which offers luxury and non-luxury goods.

Question 4: Is it in compliance with EU competition law for P to require V, based on their distribution agreement, to terminate sales via the webshop "B-Mazone"? Which arguments could P present to support its position? **(10 points)**

European Economic Law

Correction Scheme

"Prüfungslaufnummer":

	Maximal Points	Points obtained

Part 1 – The Fundamental Freedoms

Question: Is there a violation of the Treaty rules on the free movement of services?
Remark: The necessary information to solve the case is to be found on the course slides and in *Craig/deBúrca*, p. 824-828.

1. Services The free movement of services rules are to be found in Arts. 56–62 TFEU. Art. 57 TFEU gives the definition of "services": "Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration […]." **a. Services** The definition in Art. 57(1) TFEU is tautological. A service is any independent activity which cannot be qualified as trade in goods. Medical services clearly fulfil this definition. Additional argument in Art. 57(2)(d): "professions" (*freie Berufe*) comprise medical doctors. Here: Smits undergoes surgery "in private practice": Independent physicians are considered "professions".	1 2 2 2	

b. "normally provided for remuneration" Smits has to pay for the medical intervention in Member State A. In this sense, it is about a service against remuneration. Problem: In her home State M, the health system is run by the state in form of a social security system. Member States are – as H rightly states – free to organize their social security systems, and Member State M has preferred a public health insurance system over a privatized scheme. However: Also in State M, doctors are paid for their "services" (as mentioned in the facts). For the fundamental freedoms to apply it is not necessary that the remuneration comes from the recipient of the service. Result: There is a service provided for remuneration. **c. "in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons"** Goods needed for the operation are negligible with respect to the medical service. Moreover, the orthopaedist in charge lives and remains in Member State A. He does not even go into Member State M. Therefore the right of establishment (Art. 49 TFEU) is not relevant. Result: No other fundamental freedoms take precedence over the freedom to provide services. **d. No Treaty exemption** The Treaty contains certain exemptions, for example for agriculture and the armaments industry. There is **no general exemption for social policy** (e.g. health care). The specific aspects of health policy have to be taken into account in the context of justifications (see below 4).	2 2 1	
2. Personal scope of application **Art. 56(1) TFEU: "in respect of nationals of Member States who are established in a Member State"** Here: Smits is a national of EU Member State M and lives in M. She falls into the personal scope of application. Note (not relevant for points): As it is about the passive freedom of provision of services (see below), it is only	2	

relevant that Smits falls into the personal scope of application. The status of the orthopaedist in charge in State A is not relevant here.		
3. State Measure with a cross-border element. **a) State Measure:** There has to be a **state measure**. Purely private behaviour is subject to competition law, but not to the fundamental freedoms. Here: The health insurance H refuses to reimburse the costs for the medical treatment in Member State A. H is state-owned. Therefore, there is a state measure of Member State M. **b) Restriction of cross-border trade in services** **Restriction of trade** Because of the convergence of the fundamental freedoms, the *Dassonville*-definition (developed in the context of the free movement of goods) may be applied: "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) Here: The non-reimbursement hinders the provision of services even considerably! Only few persons will take medial services abroad if they have to pay it out of their own pocket. **Cross-Border Element** Unlike Arts. 34 and 35 TFEU (free movement of goods), Arts. 56 et seq. TFEU do not distinguish between import and export of services. However, it is generally recognized that both forms of restriction are caught by Art. 56 TFEU. Different constellations are to be distinguished, for example the **active freedom to provide services** (service provider goes into the Member State where the service is provided) or the **passive freedom of provision of services** (recipient goes into the Member State where the service is provided). Since *Luisi and Carbone* (1984) it is recognized that also the restriction of the passive freedom of provision of services is caught by Art. 56 TFEU.	2 2 1	

Here: Smits goes into the Member State A where the medical service is provided: This is a case of the **passive freedom of provision of services**. The cross-border element is given.	2	
4. Justifications **a) Absence of EU harmonization measures** According to the case question, secondary law is not to be taken into account. Therefore, harmonization measures and their extent are not to be discussed. **b) Art. 62 with Arts. 51 and 52 TFEU (for all measures, discriminating or not)** Here: Medical care is not official authority (Art. 51 TFEU), nor is it about the "special treatment for foreign nationals on grounds of ... public health" (Art. 52 TFEU). Here it is about the treatment of people living in M, which are all insured by H. The rules for foreign people living in M are the same as for Ms own nationals, so Art. 52 TFEU is not applicable. **c) Three-step test (Cassis type): only for indistinctly applicable measures** - **Indistinctly applicable measure?** Yes, the reimbursement rules apply to everybody. There is no discrimination based on nationality (even if foreigners living abroad are not covered by social insurance of that state). - **Imperative requirements in the general interest** Argument of H: The financial balance of the social health insurance system would be seriously undermined if patients could simply go abroad and make use of expensive medical care there. *Appreciation:* Yes, the financial balance of the social health system can be considered an imperative requirement in the general interest capable of justifying a barrier to the principle of freedom to provide services. **d) Proportionality**: The measure in question must be **suitable** to achieve the objective. Moreover, the measure must not go beyond what is **necessary** in order to achieve the objective.	1 1 1 2	

Appreciation: The interdiction of reimbursement of medical services abroad is perhaps suitable to secure the financial stability of the health care system in M. Also, exceptions are provided for, i.e. the reimbursement of medical costs in case of unexpected needs and the possibility of an exceptional authorization. However, the conditions for prior authorization are not fixed so that there is no foreseeability whatsoever on the outcome of the examination. Moreover, the authorization period of four weeks is too long for emergency cases like here: Smits is suffering pain (one could argue here also with fundamental rights in the field of health). In addition, here it is only about outpatient treatment but not about hospital services, so that an important part of the health system is not affected. In addition, only few patients go abroad for treatment. The extra cost of 20% does not seem exaggerated. Besides, it would be conceivable that H caps reimbursement at the price of the operation in Member State M. This would be a less restrictive measure. It does not seem proportionate to refuse reimbursement for treatment abroad altogether, all the more so as it is here about an urgency case. **Result:** The financial balance of the social health system cannot justify the restriction of the freedom to provide services in this case. *A different result is of course possible if it is based on sound arguments*. **Additional remark:** *Keck* is not relevant here since the case is not about "selling arrangements".	4	

Result EU Member State M has violated the Treaty rules on the free movement of services by refusing the reimbursement of costs incurred by an urgent ambulant medical treatment in Member State A.	no points	

Good Structure and Argumentation	2	

Total Score	**32**	

European Economic Law HS 2018

Correction Scheme Part 2 (Competition Law)

Question 2 (16 points / 25%):

V could be obliged to pay a contractual penalty based on the general sales conditions. However, this presupposes the validity of the contractual provision. For this purpose, it must be examined whether the relevant clause infringes Article 101 TFEU.	0.25
Invalidity pursuant to Article 101 TFEU **I. Assessment of Article 101 TFEU** 1. Agreement According to Article 101 (1) TFEU all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, are prohibited. The concept of contract is not defined further in EU law. The established jurisprudence is therefore based on the contractual concept of civil law (cf. Bayer-Case): For the conclusion of an agreement, it is sufficient if several companies express their common will to behave in a certain way on the market. The declaration of will may be expressed explicitly or implicitly, written or informal. Therefore, two elements must be fulfilled for an agreement to be assumed pursuant to Article 101 (1) TFEU. First, there must be a common will of the parties regarding specific market behaviour and, second this common will must actually manifest itself (objective view). There are two types of agreements, namely horizontal and vertical agreements. Agreements or concerted practices between competitors, i.e. enterprises operating at the same level of the production or distribution chain, are considered as horizontal agreements. In contrast, “vertical” means an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods of services. Based on the facts of the present case, P and V concluded a vertical agreement, with a contractual penalty becoming due in the event of breach. The declaration of will has been expressed in a written contract.	1 0.25
2. Restriction by object or by effect: restriction of the freedom of action of pharmacists Agreements referred to in Art. 101 (1) TFEU are prohibited only, if they have as their object or effect the prevention, restriction or distortion of competition within the internal market. The facts are - as the word "or" shows - to be	

understood alternatively. The effects of an agreement on competition are not to be examined if it is established that it has an anti-competitive object. The restriction of competition by object covers those forms of coordination between undertakings which, because of their mode of operation, may be regarded as typically detrimental to the proper functioning of normal competition or to the objective of the internal market. These include hardcore cartels, such as price and quota cartels or tendering agreements. Furthermore, the foreclosure of national markets, the obstruction of parallel trade and vertical minimum or fixed-price agreements are judged by case law to be restrictions of competition which, by their very nature, have the object of restricting competition. The prohibition of Internet sales corresponds to a restriction of the commercial capacity of P's distributors by excluding a tool for selling the products. In addition, the agreement restricts the choice of consumers who wish to buy on the Internet. Finally, it prevents sales to final consumers who are not established in the "physical" territory of the authorised distributor. This restriction inevitably has a restrictive goal. In addition, there is the restriction which already arises from the fact that the manufacturer has opted for a selective distribution system which limits the number of distributors who may distribute the product and prevents them from selling the product to unauthorised distributors. The agreement constitutes, therefore, a restriction of competition by object (differing opinions get points if adequate reasoning).	1.75
3. Materiality threshold (de minimis) Noticeability is an unwritten element of the restriction of competition pursuant to Art. 101 (1) TFEU. This means that the application of Art. 101 TFEU presupposes that the restriction of competition must have a certain minimum effect on third parties in the sense of impairing the alternative courses of action open to them in competition. This is a de minimis rule which prevents Art. 101 TFEU from being applied to small cartels in the broadest sense. The ECJ clarified that an agreement capable of affecting trade between Member States and having an anti-competitive object is by its very nature an appreciable restriction of competition, irrespective of its actual effects. Hence, the agreement at issue crosses the de minimis-threshold. ***Note:*** *Alternatively, the assessment may be continued on the basis of the de minimis notice issued by the Commission. In this case, the existence of a hardcore restriction would have to be analysed.*	1
II. Exemption pursuant to Article 101(3) TFEU 1. Block exemption regulation Pursuant to Article 101 (3) TFEU, categories of agreements may be exempted from the prohibition of Art. 101 (1) TFEU (block exemption regulations). An exemption pursuant to Article 2 (1) Regulation 330/2010 (so-called “vertical” Block Exemption Regulation) can be considered here.	0.5

a. Objective scope (vertical agreements, no priority regulations) In order to do so, the scope of the vertical Block Exemption Regulation would have to be opened up. In principle, the vertical Block Exemption Regulation covers all agreements in a vertical relationship. According to Article 1 (1) (a) BER, 'vertical agreement' means an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services. The distribution agreements exist between P and its dealers, and thus between companies operating at different levels of the production and distribution chain. They also concern the conditions under which the dealers have to sell and resell the goods. It is, therefore, a vertical agreement.	1
b. This vertical agreement also contains a vertical restraint within the meaning of Article 1 (1) (b). (For the definition of a restriction of competition see above I. (2)) The scope of application is thus opened up. Priority regulations are not relevant (Article 2 (5) BER).	0.5
c. Market share thresholds, Article 3 (1) BER (up to 30 % market share) According to Article 3 (1) BER, the exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30 % of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30 % of the relevant market on which it purchases the contract goods or services. The thresholds of Article 3 (1) BER are not exceeded since neither P nor its customers have a market share of more than 30 % on the relevant market. The distribution agreement falls under the Vertical BER.	1
d. No violation of Article 4 and 5 BER However, the agreement could violate Article 4 or 5 BER. In the present case, Article 4 (c) BER may be considered, according to which restrictions on active or passive sales to final consumers by members of a selective distribution system operating at the retail level constitute a hardcore restriction and are therefore not exemptible. The prohibition on Internet distribution contained in the distribution agreement restricts the limitation of passive sales to final consumers who wish to purchase via the Internet and are located outside the physical territory of the respective pharmacy belonging to the distribution network. ***Note:*** *The exception in Article 4 (c) does not apply. The prohibition on Internet distribution is not comparable to a prohibition not to conduct business from an unauthorised establishment. The term "authorised establishments" covers only sales outlets where direct sales are made.*	2

Interim conclusion: The agreement is considered a hardcore restriction in the sense of Article 4 (c) BER and, therefore, not exempt from Art. 101 (1) TFEU.	0.25
2. Individual exemption The distribution agreement could be exempted from the prohibition of Article 101 (1) TFEU by an individual exemption pursuant to Article 101 (3) TFEU. The four conditions for an exemption from the prohibition of cartels include both requirements which the agreement must fulfil and limits on restrictions of competition which the agreement must not exceed. • Firstly, the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress; • second, consumers must receive a fair share of the benefits resulting from this improvement; • thirdly, the undertakings concerned must not be subject to restrictions which are not indispensable to the attainment of those objectives; • fourthly, even where there is evidence of improvements, the undertakings concerned must not be afforded the possibility of eliminating competition in respect of a substantial part of the products concerned. A derogation can only be granted if these four conditions are cumulative. ***Note:*** *Candidates could – but were not strictly required to - address the question of whether a hardcore restriction can benefit from an individual exemption at all. However, this has to be affirmed, as otherwise the BER would indirectly acquire the character of a group prohibition regulation which is not known under European law.* a. Improving the production or distribution of goods or promoting technical progress (efficiency gains) An exemption by individual assessment is subject to the condition that the restrictive agreement contributes to the improvement of the production or distribution of goods or to the promotion of technical or economic progress. The obligation in the distribution agreement, that at least one person with a pharmacy diploma issued or recognised must be physically present at all times at the points of sale, is based on the nature of P's products and the need for technical advice. The products are designed for specific skin problems, such as hypersensitive skin, where there is a risk of an allergic reaction. The commitment therefore leads to sales of the respective products that are better tailored to the needs of the customer and generally increases the level of service. This represents a typical qualitative efficiency advantage, as envisaged by para 69 et seq. of the guidelines on the application of Article 81 (3) of the treaty.	0.25 1

	At the same time, a reduction in this level of service as a result of free riders is counteracted. This also represents (at least indirectly) an efficiency advantage. free-riding typically occurs in the case of services provided by a dealer before the contract is concluded and the use of which is not invoiced. In such cases, the customer could, for example in the present case, take advantage of intensive advice from a pharmacist and then purchase the product from a cheaper provider without service. The consequence would be that price-oriented providers would benefit from the sales-promoting services of service-oriented providers without these being compensated for their services. This can lead to the service-oriented providers reducing their services, which would generally worsen the level of service (Para 72 of the guidelines). In the present case, the risk of free-riding does not seem to be excluded. For example, the customer could seek expert advice from a pharmacist and then order the recommended product more cheaply via the Internet. In addition, a contrary opinion can be quite represented here: For example, it could be argued that a pharmacist will continue to provide comprehensive advice for all the products he offers, even if free-riders enter the market. However, if the product is no longer sold, because customers now order the product via the Internet, there is a risk that pharmacists will remove the product from their range. As a result, this leads to a complete loss of advice. ***Note:*** *Against the efficiency advantages presented here, it could be argued that securing consulting services or increasing the general level of service can only be seen as a positive effect if the goods in question are those for which additional consulting services are desirable from the consumer's point of view. Processors could argue that due to the mass offer of such care products in other sales outlets (e.g. drugstores, etc.), advice is typically no longer expected from the customer. However, it can be argued that these are care products for special skin problems. The customer therefore needs and expects advice at least initially (e.g. when buying such a product for the first time).* *Against the assumption of a risk from free-riders, students could argue that due to the costs associated with setting up and operating a high level website, Internet retailers do not take advantage of the investments made by point of sale distributors as free riders. However, it can be assumed that the cost of operating a website will in the long term be significantly lower than the cost of expert advice.*	2.25
b.	Appropriate participation of consumers in profits (see "proportionality in the narrow sense") Consumers must also receive a fair share of the efficiency gains generated by the restrictive agreement. "Fair share" means that the passing on of the benefits at least compensates for the actual or likely negative effects caused by the restriction of competition under Article 101 (1) TFEU. The efficiency advantages described above, must therefore, from the consumers' perspective, be weighed against the disadvantages resulting from the distribution agreement. The net effect of the agreement must at least be neutral from the point of view of those consumers directly or indirectly affected by the agreement. In particular, it must be borne in mind, that the obligation of a pharmacist being physically present, leads de facto to a ban on Internet distribution. Internet distribution can, however, bring considerable advantages since it gives the customer the	0.75

	opportunity to order the products from home without having to move to another location. It also gives dealers the opportunity to sell the products outside their immediate field of activity. These disadvantages outweigh the efficiency gains mentioned above, because the exclusion of an entire form of distribution (Internet distribution) is more important than a partial increase in the quality of advice. It should be borne in mind that even if Internet sales are approved, it can be assumed that customers will be able to make use of advisory services both in pharmacies and with doctors. Advice is therefore not completely excluded. ***Note:*** *Another result of the consideration is acceptable, if well-reasoned.* c. Indispensability of the restrictions imposed on the undertakings concerned for the attainment of the objective (see "necessity") Furthermore, the restrictions would have to be indispensable to achieve the efficiencies. This implies a two-fold test. First, the restrictive agreement must be reasonably necessary in order to achieve the efficiencies. Secondly, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies. The first test requires that there are no other economically practicable and less restrictive means of achieving the efficiencies. It is particularly relevant to examine whether the parties could have achieved the efficiencies by means of a less restrictive type of agreement and, if so, when they would likely be able to obtain the efficiencies. This could include detailed customer information (in the form of texts, images, interactive elements, etc.) that a website could provide. However, this is not comparable to the direct advice provided by a pharmacist, which is specifically tailored to the individual customer. A contractual solution is conceivable as well: P could oblige pharmacies by means of a service contract to provide the desired advisory services and directly remunerate them for this through discounts or the like. This would guarantee an appropriate level of service. Since this means is to be judged less drastic but of comparable efficiency, the de facto Internet distribution ban contained in the distribution conditions is not to be regarded as indispensable. In the course of the second test, the indispensability of each restriction of competition flowing from the agreement must be assessed. A restriction is indispensable if its absence would eliminate or significantly reduce the efficiencies that follow from the agreement or make it significantly less likely that they will materialise. Restrictions that are black listed in block exemption regulations or identified as hardcore restrictions in Commission Guidelines are regularly not considered as indispensable. ***Note:*** *A different view might be acceptable.* d. Failure to eliminate competition in respect of a substantial part of the products concerned. Lastly, the agreement must not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the	1

	products concerned. Whether competition is being eliminated depends on the degree of competition existing prior to the agreement and on the impact of the restrictive agreement on competition, i.e. the reduction of competition that the agreement brings about. In the present case, the de facto prohibition of Internet distribution could allow the elimination of competition in respect of a substantial part of the products concerned. This is supported by the fact that a complete distribution channel is eliminated, which significantly restricts additional competition. However, the small market share of P and the strong inter-brand competition are arguments against the assumption of a possible elimination of competition.	1
Result: The clause contained in the distribution agreement violates Art. 101 (1) TFEU, is not exempted in any way and is, hence, null and void pursuant to Article 101 (2) TFEU. P therefore has no claim against V for payment of a contractual penalty.		0.25

Question 3 (6 points / 9.4%):

It is questionable whether, in view of the high market shares in France on the one hand and the low market shares in the other Member States on the other, there is a sufficient restriction of competition in the European single market.	0.25
Interstate clause The application of Article 101 (1) TFEU presupposes that the restriction of competition in question is capable of affecting trade between Member States. This is intended to distinguish the scope of application of the Union's competition rules from that of national competition law.	0.5
I. The terminology "trade“ The concept of 'trade' must be interpreted broadly. Basically, it refers to all commercial transactions to the extent that they fall within the scope of application of the TFEU. II. Effect on trade The concept of the suitability of an anticompetitive action to affect trade between member states is interpreted broadly as well. According to the settled case law of the European Court of Justice, it is sufficient for the action in question to be capable, by virtue of the circumstances as a whole, of directly or indirectly affecting trade between Member States in a manner which may be detrimental to the realisation of the objectives of a unified single market, by contributing to the establishment of barriers to trade within the internal market and making it more difficult for the markets to penetrate each other as intended by the Treaty. The indirect and third-party effects of the measure must also be taken into account. In addition, the individual agreement which is to be assessed in each case may not be examined on its own merits in terms of its ability to affect trade between the member states. But it must also be asked whether it is not part of a more comprehensive treaty system which, at least in its entirety, is designed to affect trade flows between member states according to the criteria mentioned above (bundle theory). III. Benchmark The benchmark is the hypothetical situation absent the measure in question and, hence, without the impact on competition it may bring about. It is used to measure whether the behaviour can result in a noticeable change in trade between member states. It does not matter whether the behaviour promotes or hinders trade since it is merely the objective of the Treaty to create an internal market without restricting competition. The impairment of domestic trade does not have to have actually occurred; rather, the mere suitability of the measure for this purpose is sufficient. The same applies to the purpose of an agreement, which is to restrict competition within the Community.	0.5 0.5 0.5

	IV. Limitation of applicability by the criterion of appreciability The only limitation of this comprehensive claim to application of the Treaty's competition rules results from the fact that the restriction of competition in question must be capable of affecting trade between Member States. According to a formula developed by the Court of Justice, appreciability can be denied if the products concerned by a measure restricting competition represent only "an insignificant percentage of the total market for those products in the territory of the common market", so that the effects of the behaviour can be neglected because they are insignificant. The Commission holds the view that, in principle, agreements are not capable of appreciably affecting trade between Member States when the following cumulative conditions are met (Para 52 of the Guidelines on the effect on trade concept in Articles 81 and 82 of the Treaty): a. The aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed 5 %, and b. in the case of vertical agreements, the aggregate annual Community turnover of the supplier in the products covered by the agreement does not exceed 40 million euro. The Commission also holds the view that where an agreement by its very nature is capable of affecting trade between Member States, for example because it concerns imports and exports or covers several Member States, there is a rebuttable presumption that such effects on trade are appreciable when the turnover of the parties in the products covered by the agreement, calculated as indicated in paragraphs 52 and 54 of the Guidelines on the effect on trade concept exceeds EUR 40 million. In the case of agreements that by their very nature are capable of affecting trade between Member States it can also often be presumed that such effects are appreciable when the market share of the parties exceeds the 5 % threshold. However, this presumption does not apply where the agreement covers only part of a Member State.	2
	V. Subsumption A differentiated weighing is expected, taking into account the criteria described above.	1.5 (for an adequate application to the facts of the case)
Result: Both the turnover threshold of EUR 40 million, which has been exceeded, and the high market share in France suggest that the presumption according to para. 54 of the guidelines applies and that the agreement must be subject to an examination pursuant to Art. 101 TFEU.		0.25

Question 4 (10 points / 15.6%):

Preliminary remark: *In this part the sample solution is very open and the number of available points is relatively high. This should give the students the opportunity to discuss the case design independently and creatively.*	
Under Article 101 (1) TFEU, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market are incompatible with that market and are prohibited in principle.	1
The organisation of a selective distribution network is not prohibited by Article 101 (1) TFEU, to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally, that the criteria laid down do not go beyond what is necessary	1.5
A prohibition on the sale of luxury goods via third platforms on the Internet is, hence, permissible provided that it is appropriate to ensure the luxury image of the goods and does not go beyond what is necessary for that purpose.	0.5
The quality of such goods is not just the result of their material characteristics, but also of the allure and prestigious image which bestow on them an aura of luxury. That aura is essential in that it enables consumers to distinguish luxury from similar goods and, therefore, an impairment to that aura of luxury is likely to affect the actual quality of those goods. The establishment of a selective distribution system which seeks to ensure that the goods are displayed in sales outlets in a manner that enhances their value contributes to the reputation of the goods at issue and therefore contributes to sustaining the aura of luxury surrounding them. Second, the prohibition enables the supplier of luxury goods to check that the goods will be sold online in an environment that corresponds to the qualitative conditions that it has agreed with its authorised distributors.	2.5
The prohibition of the use of third-party platforms for the internet sale of the luxury goods at issue must, furthermore, be proportionate in the light of the objective pursued, that is to say, it must be appropriate for preserving the luxury image of those goods and it must not go beyond what is necessary to achieve that objective.	1
The clause here at issue does not contain an absolute prohibition imposed on authorised distributors to sell the contract goods online. Indeed, under that clause, the prohibition applies solely to the internet sale of the contract goods via third-party platforms which operate in a discernible manner towards consumers. Consequently, distributors are permitted to sell the contract goods online both via their own websites, and potentially via unauthorised third-party platforms when the use of such platforms	

is not discernible to the consumer. In particular, given the absence of any contractual relationship between the supplier and the third-party platforms enabling that supplier to require those platforms to comply with the quality criteria which it has imposed on its authorised distributors, the authorisation given to those distributors to use such platforms subject to their compliance with pre-defined quality conditions cannot be regarded as being as effective as the prohibition at issue in the main proceedings.	3
Result: The prohibition does not violate Article 101 (1) TFEU	0.5
If students come to the result that Art. 101 (1) TFEU is violated, they should go on discussing Article 4 (b) and (c) of Regulation No 330/2010.	