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Exam European Economic Law (Spring Term 23) – Solution

Part I: The Fundamental Freedoms

I. Free movement of goods or free movement of services?	
1. Goods • No definition in the Treaty • Definition by the European Court of Justice • But: definition is over-inclusive – tangible should be added • Good – tangible asset with monetary value • Not illegal • *Subsumption* • No exception *Subsumption* • Freedom of goods or freedom of services? Arguments pro / contra *Subsumption*	11
2. State measure • Only state measures • No direct horizontal effect *Subsumption*	2

3. Quantitative restriction or **MEQR** in the sense of *Dassonville* & *Keck*?
• Quantitative restriction?
  • Import, export and transit restrictions
  • Quota or total prohibitions
Subsumption
 	
• MEQR?
Dassonville formula
 	
• Cross-border element?
Subsumption
 	
• Keck: Selling arrangement vs. product requirement?
Supsumption
	11

4. Justification a. No EU harmonization measures *Subsumption* b. Justification: Art. 36 TFEU	15

c. *Cassis de Dijon* d. Proportionality Test *Subsumption*	
5. Conclusion	1
6. 4 Extra points (language, structure, etc.)	

Part II: EU Competition Law

Question 1 (≈ 30%) 24 Points **Question 2a (≈ 3%) 2,5 Points** **Question 2b (≈ 10%) 8 Points** **Question 3 (≈ 7%) 5,5 Points** **In addition: 4 extra points for good structure and argumentation or original thoughts.**	**Maximum Score (points)**
Question 1: Do the contractual provisions violate Art. 101 TFEU? You can assume that Art. 101 TFEU is applicable.	**24**
I. Assessment of Article 101 TFEU (+)	**11**
A. Agreement (+) – Types of collusion: agreements, decisions by associations of undertakings or concerted practices – Definition Agreement (GC Case T-41/96, Bayer): "*69. [T]he concept of an agreement […] centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention."* – No defence that: • Never intended to implement the agreement • Forced into agreement • Agreement ineffective/void due to competition law – Types of agreements: • Horizontal: agreements between parties at the same level of the supply chain (e.g. competing manufacturers, distributors, or retailers); • Vertical: agreements between parties at different levels of the supply chain (e.g. between a manufacturer and a distributor, or a distributor and a retailer).	
⇨ Contract in question constitutes an agreement between C and P in the sense of Art. 101 (1) TFEU; C is a supplier of goods (popcorn) and P is a movie exhibitor and also buyer of P's popcorn. They are operating on different levels of the supply chain; the agreement is a vertical agreement.	
B. Restriction of competition (+) – Restriction of competition by object vs. by effect – Restrictions by object: forms of collusion which are by their very nature injurious to the proper functioning of normal competition (Case C-209/07, BIDS, para. 17). In particular "hardcore restrictions", e.g. horizontal price fixing. – Restrictions by effect: Anti-competitive quality of agreement is not evident from its object and a consideration of its effects is required.	

⇨ The agreement provides for a recommended retail price of 9 EUR per Popcorn standard bag size and a non-compete clause with a duration of five years. The recommendation of a retail price, if no further pressure is exercised so that it has the quality of fixing a direct price, can have effects on the market, such as, for example, establishing a certain minimum price level. The non-compete clause ensures that C will source its goods from P for a guaranteed minimum duration, thus, strengthening P's position in the market. ⇨ Both clauses are restrictions by effect in the sense of Art. 101 (1) TFEU. *Alternatively, students could only acknowledge that there is a restriction of competition by means of the recommended retail price and the non-compete clause, without distinguishing further between restriction by object and effect. In that case, however, further discussion with regard to competition by object or effect was appreciated in the context of the VBER (hardcore provisions).*	
C. Materiality threshold (de minimis) – "*The agreement [must] appear to be capable of having some influence […] on trade between Member States, of being conducive to a partitioning of the market and of hampering the economic interpenetration […]*", Case C-23/67, SA Brasserie de Haecht, p. 415. – The Commission holds the view that agreements between undertakings which may affect trade between Member States and which may have as their effect the prevention, restriction or distortion of competition within the internal market, do not appreciably restrict competition within the meaning of Article 101(1) of the Treaty if the market share held by each of the parties to the agreement does not exceed 15 % on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are not actual or potential competitors on any of those markets (agreements between non-competitors; cf. Commission Notice 2014/C 291/01 ("De Minimis Notice") para 8) – In cases where it is difficult to classify the agreement as either an agreement between competitors or an agreement between non-competitors the 10 % threshold is applicable. – No hardcore restriction – Definition of the market: relevant, geographic – Market share • Vertical agreements: 15% on each market • Good faith • Flexible application	
⇨ Assessment of the relevant markets: C is a wholesale supplier of popcorn. P is a film exhibitor operating large movie theatres.	
⇨ C has a market share of 30% on the market of operating cinemas. P has a market share of 25% on the wholesale market for ready-made popcorn. The market shares of C and P are clearly exceeding 15% each. Because of both market shares, the agreement at issue crosses the de-minimis-threshold for vertical agreements.	

II. Exemption pursuant to Article 101 (3) TFEU	**12.5**
A. Applicability of a block exemption regulation – Pursuant to Art. 101 (3) TFEU, an agreement may be exempted from the prohibition of Art. 101 (1) TFEU by way of a block exemption regulation or an individual exemption. – Exemption pursuant to Art. 2 (1) Commission Regulation (EU) 2022/720 ("Vertical Block Exemption Regulation" [VBER]) can be considered here, because C and P have entered into vertical supply agreement.	
B. Exemption pursuant to Regulation (EU) 2022/720 (VBER) **1. Objective scope (Art. 2 (1) VBER) (+)** – Pursuant to Art. 2 (1) VBER, Art. 101 (1) TFEU shall not apply to vertical agreements. This exemption shall apply to the extent that such agreements contain vertical restraints. "Vertical agreement" means an agreement or concerted practice 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 (cf. Art. 1 (1) (a) VBER).	
⇨ The present agreement between C and P represents a vertical agreement in the sense of Art. 2 (1) (a) VBER, i.e. an agreement where P supplies popcorn to C. ⇨ Vertical restraints are the non-compete clause as well as the recommended retail price of the popcorn. ⇨ The scope of application is opened.	
2. Market share threshold (Art. 3 (1) VBER) (+) – The exemption 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.	
⇨ C and P have a market share of 30% and 25% respectively, therefore they are fulfilling the market share threshold requirement.	
3. No Hardcore restrictions (Art. 4 VBER) (+): Recommended retail price – Art. 4 (a) VBER provides, that the exemption shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.	
⇨ The contractual provision provides for a recommended retail price of 9 EUR per standard bag size of popcorn. A direct or indirect fixing of retail prices does not benefit from an exemption. However, a recommended sales price is generally not a hardcore restriction if either party can deviate from the recommended sales price and is not,	

directly, or indirectly, forced to implement the recommended price as a result of pressure or incentives offered by either party. ⇨ Based on the facts, the RRP for a standard sized popcorn bag is indexed for inflation. That means that the price moves upwards in parallel to the inflation index. Since each inflation-related adjustment of the RRP is directly communicated to the cash registers in Cinestar's cinemas, it restricts, in principle, the ability for Cinestar to set the price independently and would amount to a hardcore restriction in the sense of Art. 4 (a) VBER. Since Cinestar's staff can, however, set a resale price in the cash registers that deviates from the adjusted RRP, it is of importance whether Popcorn Paradies is asserting pressure or using incentives in such a way that Popcorn Paradies effectively is setting the retail price. ⇨ Since it cannot be inferred from the facts that P is using pressure or offering incentives to not deviate from the communicated RRP, it can be well reasoned that no external factors are present that would force C to implement the recommended retail price of 9 EUR. Therefore, C is free to deviate from the indexed price and to set a lower or higher price than the communicated price by P. ⇨ The recommended retail price of 9 EUR per standard size bag of popcorn does not qualify as a hardcore restriction pursuant to Art. 4 (a) VBER. *Remark: Other findings were accepted, if based on a good reasoning. In particular, students were rather free how to consider the direct transfer into the cash registers, as long as they sufficiently discussed this aspect.*	
4. No excluded restrictions (Art. 5 VBER) (+): Non-compete clause – The exemption does not apply to non-compete obligations contained in vertical agreements if they have an indefinite duration or exceed 5 years. – According to Art. 1 (1) (f) VBER a "non-compete obligation" means any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80% of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market.	
⇨ The present agreement obliges C to only source popcorn from P for the next five years which constitutes a non-compete obligation in the sense of Art. 1 (1) (f) and would, in principle, qualify as a restriction that does not benefit from the VBER. Since the duration of said is limited to 5 years, the provision is still admissible and the exemption applies.	
4. Period of validity (+) – The Regulation entered into force on 1 June 2022 and expires on 31 May 2034.	

Note: Assessing validity of VBER was not required.	
5. Interim Result ⇨ The preconditions for the applicability of the VBER are met; there are no hardcore restrictions in the sense of Art. 4 VBER and no excluded restrictions according to Art. 5 VBER. Therefore, pursuant to Art. 2 (1) VBER, Art. 101 (1) TFEU is not applicable to the present vertical agreement. The agreement and its vertical restraints (recommended retail price and non-compete obligation), therefore, benefit from the "safe harbour" -effect of the block exemption.	
C. Individual exemption ⇨ No need to assess an individual exemption pursuant Art. 101 (3) TFEU in this case. *Note: The well-argumented discussion of the individual exemption may be accepted as well when no block exemption regulation was examined. Furthermore, the treatment of the individual exemption could be adapted to the finding of a hardcore restriction.*	
D. Interim Result The requirements of the VBER are fulfilled; the agreement between C and P (recommended retail price and non-compete obligation) is exempted pursuant to Art. 2 (1) VBER.	
III. Result The contractual provisions do not violate Art. 101 (1) TFEU as they are exempted pursuant to Art. 2 (1) VBER.	**0.5**
Question 2a: (≈ 3%): Comment on Y's statement that Art. 102 TFEU only protects consumers.	**2.5**
Various answers/argumentations possible, including: – Who is Art. 102 TFEU designed to protect: consumers, competitors, both? – Possible cases where interests of consumers and competitors clash: behaviour by dominant undertaking can injure competitor but not consumer (cf. Case C-7/97 Bronner) – Classification of behaviours: Art. 102 TFEU can apply both to exploitative and exclusionary abuses (Wish and Bailey, n 40 207–212); exploitative abuses usually harmful to consumer; exclusionary abuse usually harmful to competitors; instances possible where conduct by dominant firm may be both exploitative and exclusionary. – Some commentators argue that Art. 102 TFEU should be restricted to exploitative behaviour harmful to consumers and that a real link between harm and market power of the dominant undertaking is necessary. – Art. 102 TFEU covers both exploitation and anti-competitive behaviour (cf. Case 6/72, Continental Can para 26). ⇨ Y's statement that Art. 102 TFEU only protects consumers, is, considering established case law and legal doctrine, incorrect. Art. 102 TFEU both protects consumers and competitors from abusive behaviour of dominant undertakings.	

Remark: A broad range of arguments was possible and accepted here. The focus was on an overall convincing discussion, not on individual arguments. Furthermore, students were not expected to cite specific cases or sources.	
Question 2b (≈ 10%) How would you assess the compliance of Y's behaviour with Art. 102 TFEU? You can assume that Art. 102 TFEU is applicable. *Remark: Students did not need to discuss the applicability of Art. 102 TFEU or the dominant position of Y on the relevant market.*	**8**
A. Abuse – Firms can, in principle, decide on their terms and transaction partners according to their liking. However, dominant undertakings are bound by stricter rules, namely in particular Art. 102 TFEU in EU competition law. Under this provision, it needs to be analysed whether behaviour of dominant undertakings remains within the boundaries of competition on the merits. – Refusal by the dominant firm to supply existing customers is deemed abusive unless there is some objective justification (Case 77/77 *Benzine en Petroleum* ECR 1513). Abusive behaviour can also be present if the refusal to supply is based on a desire by the dominant firm to integrate vertically into the finished-product market (Case 6 and 7/73 ECR 223). Consequently, a dominant firm cannot, without objective justification, refuse to meet the orders of long-standing customer who abide by regular commercial practice (Case 27/76 *United Brands*). It is not quite clear whether the rules on refusal to supply also apply to new customers (c.f. Craid/De Búrca, EU Law, p. 1106; Subiotto / O'Donoghue, Defining the Scope of the Duty of Dominant Firms to Deal with Existing Customers under Article 82 EC, p. 687 et seq.). The case law and the commission tend to condemn such refusals as well if there is no objective justification (Craid/De Búrca, EU Law, p. 1106). ⇨ Because of its dominant position in the market, Y has a special responsibility not to allow its conduct to impair genuine and undistorted competition on the common market (Case 322/81 Michelin; Case T-228/97 *Irish* Sugar; Case T-65/98 *Van den Bergh* Foods). It follows that Y cannot simply adopt a course of conduct which might be unobjectionable if taken by a non-dominant undertaking (Case 322/81 Michelin; Case T-51/89 *Tetra Pak v* Commission ECR II-309). By leveraging its dominant position in the respective market, Y might want to indirectly force X to continue the existing supply contract. Y's action could be seen as a punishment for the termination of an existing supply contract. Admittedly, since the facts mention competitor(s) of Y, it can be assumed that Y is not the only supplier of chips. However, it might be unclear for X whether these other suppliers will be able to fulfil X's needs for chips in the future. Y is not simply refusing to supply X. However, due to the thread of a rather unusual price increase of 25% if X returns to Y, X might reconsider changing to another competitor of Y. Punishment for switching suppliers, a rather	

normal behaviour in the business world, does not constitute competition on the merits. The threat of an unusual price increase in case that X wants to return to Y therefore constitutes an abusive behaviour. *Remark: A broad range of arguments was possible and accepted here. The focus was on an overall convincing discussion, not on individual arguments.*	
B. Objective Justification There are no indications in the facts that the behaviour of Y can be justified.	
C. Result This behaviour can be qualified as an abuse by some form of refusal to supply (cf. Cases 6 and 7/73) and a violation of Art. 102 TFEU.	
Question 3: (≈ 7%) Explain the main concepts and approaches regarding the geographical applicability of EU competition law.	**5.5**
Concerns the scope of application of EU competition law (ratione loci). *Remark: This openly worded question allowed for a broad range of wordings and arguments. It was, however, key to include the following doctrines.*	
– **Economic entity doctrine (Case C-48/69, Dyestuffs)** • Looks at an EU location of an involved company. If, for instance, subsidiary companies are located in the EU, EU competition law is applicable to non-EU parents.	
– **Implementation doctrine (Case C-89/85 et al., *Wood Pulp I*)** • EU competition law is applicable if at least part of a restrictive agreement is implemented in the EU.	
– **Effects doctrine (Case C-413/14 P, Intel)** • The effects doctrine states, that EU competition law applies to undertakings if the effects of the agreements or practices are felt (have an effect) within the EU. Originally the effects doctrine has been established in the context of US antitrust law. • To limit the, potentially very broad, reach of EU competition law under the effects doctrine, the CJEU introduced a qualified effects test in the Intel decision. According to the "qualified effects"-test, it is at least sufficient for the application of EU competition law if the effect of a practice is immediate, substantial, and foreseeable.	