European Economic Law HS 2019

Correction Scheme Part 2 (Competition Law)

Question 1 (24 points)	Maximum Score
Question 1.1 (6 points) **Is EU competition law applicable to the "framework supply contract"?**	
In order for EU competition law to apply, the following requirements need to be fulfilled a) Applicability ratione personae b) Applicability ratione materiae / loci c) Effect on trade between Member States	**1 point**
(a) <u>Ratione personae</u> –Undertaking in the sense of Art. 101 and 102 TFEU: • Case C-41/90, Höfner: "21. [T]he concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed […]." • Cases C-180/98 et al., Pavlov: "75. [A]ny activity consisting in offering goods or services on a given market is an economic activity […]." • Non-economic activities are, in particular, activities provided on the basis of solidarity, the exercise of public powers or procurement pursuant to a non-economic activity. Individual, private and public undertakings as well as liberal professions are included. The "single economic entity doctrine" states, inter alia, that groups of companies are, in principle, treated as one undertaking. <u>Subsumption:</u> B is a shopkeeper and S a supplier of products. S and B are both entities engaged in an economic activity/ offering goods on a given market. Therefore, the agreement was made between two undertakings and the requirement	**1 point**

rationae personae is fulfilled. B-Ex is, in principle, treated as a single economic entity together with its mother company.	
(b) Ratione materiae/ loci -Materiae: • Since special regimes (agriculture, transport etc.) are not applicable (S and B are selling resp. buying small and large products), this requirement is fulfilled. -Loci: • Explanation of economic entity doctrine (Case C-48/69, Dyestuffs), implementation doctrine (Cases C-89/85 et al., Wood Pulp I) and effects doctrine. • EU has been applying implementation doctrine, but no definitive limitation to one doctrine. Subsumption: B is located in Italy and S is located in France. Pertinent acts have been carried out in EU countries. Effects have been generated on EU market. In consequence, EU competition law applies under all doctrines.	**2 points**
(c) Effect on trade between Member States *“Guidelines on the effect on trade concept” (OJ C 101, 27 April 2004, p. 81)* *(students were not expected to cite or fully repeat the below passages, only to explain their core concept of effect on trade between Member States)* 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	**1.5 points**

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.

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. The impairment of domestic trade does not have to have actually occurred; rather, the mere suitability of the measure for this purpose is sufficient.

IV. Limitation of applicability by the criterion of appreciability

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. <u>Subsumption:</u> This agreement has effect on trade between member states, i.a. because undertakings are situated in different Member States and their market shares exceed 5%.	
(d) <u>Subsumption</u> EU competition law is applicable.	**0.5**
Question 1.2 (14 points) **If so, does the "framework supply contract" violate EU competition law?**	
While neither of the involved undertakings is dominant and Art. 102 TFEU, hence, not pertinent in this case, the "framework supply contract" could violate Art. 101 TFEU.	**0.5**
I. Article 101(1) TFEU 1. Addressees of the prohibition of cartels: Companies 2. 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.	**2 points**

The concept of contract is not defined in primary EU law. According to established jurisprudence 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. <u>Subsumption</u>: Based on the facts of the present case, S and B concluded an agreement. Their “framework supply contract” is based on consent and intended to legally bind the undertakings. Its conclusion manifests the parties’ common wills.	
3. Restriction by object or by effect 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. <u>Subsumption</u>: B must buy 82% of all PL and PS products it purchases from S, and there are parallel obligations regarding shipment. The "framework supply contract" runs for 3 and 8 years respectively. The agreement constitutes, therefore, a restriction of competition by object *(differing opinions receive points if adequately reasoned).*	
II. Materiality/de minimis-threshold	"De minimis" is an unwritten element of the restriction of competition pursuant to Art. 101 (1) TFEU. It requires 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. 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. 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: a) if the aggregate market share held by the parties to the agreement does not exceed 10 % on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of those markets (agreements between competitors) (2); or b) 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	**1 point**

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). 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. <u>Subsumption:</u> S holds a 35% market share on the market for PL wholesale sellers and a 26% market share on the market for PS wholesale sellers. The market shares of S are clearly exceeding 15%. Because of its nature and the involved market shares, the agreement at issue crosses the de minimis-threshold. ***<u>Note</u>**: If students assess de minimis at some other point in their Art. 101 TFEU-discussion they can receive equal points.*	
III. 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 BER) can be considered here, inter alia because B is obliged to concentrate its orders for the products on one supplier (S) and the agreement is therefore in part a vertical single branding agreement. a) Applicability i. Objective scope (vertical agreements, no priority regulations) 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	**10.5 points**

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.

Subsumption: The "framework supply contract" is a vertical agreement as B and S operate on different levels of the production and distribution chain.

ii. 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))

iii. Priority regulations are not relevant (Article 2 (5) BER).

iv. Market share thresholds, Article 3 (1) BER

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.

Subsumption: The thresholds of Article 3 (1) BER are exceeded for the markets for PL since S has a market share of 35% and therefore more than 30 %. With regard to PS, however, the Vertical BER is applicable since S has a market share of 26% and therefore less than 30% and since B holds a market share of 14 % on the market for PS wholesale buyers and therefore also less than 30%.

v. No violation of Article 4 and 5 BER

Vertical agreements may, whatever restrictions or obligations they contain, benefit in principle from the block exemption as long as there are no hardcore restraints prohibited by Article 4 or Article 5.

As for PS, it seems helpful to assess the non-compete/ single-branding clause and the exclusive shipping clause separately.

b) Application to the non-compete/single-branding clause for PS

Article 4 BER is not applicable as there are no hardcore restraints prohibited by this Article.

According to Article 5 1(a) BER, the exemption provided for in Article 2 shall not apply to "any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years".

The obligation for B to buy 82% of all PS products it purchases from S falls under Article 5 1(a) BER:

Under the heading of 'single branding' fall agreements which have as their main element the fact that the buyer is obliged or induced to concentrate its orders for a particular type of product with one supplier. That component can be found amongst others in non-compete and quantity-forcing on the buyer. A non-compete arrangement is based on an obligation or incentive scheme which makes the buyer purchase more than 80% (Art. 1(1)(d) BER) of its requirements on a particular market from only one supplier. It does not mean that the buyer can only buy directly from the supplier, but that the buyer will not buy and resell or incorporate competing goods or services. Quantity-forcing on the buyer is a weaker form of non-compete, where incentives or obligations agreed between the supplier and the buyer make the latter concentrate its purchases to a large extent with one supplier. Quantity-forcing may for example take the form of minimum purchase requirements, stocking requirements or non-linear pricing, such as conditional rebate schemes or a two-part tariff (fixed fee plus a price per unit).

<u>Note</u>: *Students do not have to cite the guidelines. They could get the points if they noticed the single-branding element and cited Art. 1(1)(d) BER.*

B is obliged to buy 82% of all PS products. This exceeds the 80% threshold and constitutes, therefore, a non-compete arrangement.

According to Article 5(2) BER, the time limitation of five years shall not apply where the contract goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer. Otherwise, the non-compete obligation must not run for more than 5 years (Art. 5(1)(a) BER).

The non-compete obligation in this case is not running for more than 5 years. Therefore, Article 5 1(a) is not violated and Article 2 applies, exempting the non-compete clause from Art. 101(1).

c) Application to the exclusive shipping clause for PS

For the purpose of the BER, 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, calculated on the basis of the value of its purchases in the preceding calendar year.

Subsumption: The exclusive shipping clause for PS contains, in essence, an obligation to purchase shipping services. It qualifies, therefore, as a non-compete obligation as long as it covers more than 80% of the shipping services purchased by B with regard to PS. Since this is the case for no more than 5 five years (after three years, B is free to purchase PS from other sources and the shipment clause does not cover shipments from these other sources), the shipment clause regarding PS is protected by the BER.

Note: *Alternatively, the assessment may come to the conclusion that the exclusive shipping clause for PS is not a non-compete clause according to Article 5 1(a) as it does not concern a product/service to be re-sold by B. In that case, however, the BER would equally provide a safe harbour.*

2. Individual exemption

The problematic clauses of 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 are:

- Firstly, the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress (Efficiency gains (on balance));
- secondly, consumers must receive a fair share of the benefits resulting from this improvement (fair share for consumers);
- thirdly, the undertakings concerned must not be subject to restrictions which are not indispensable to the attainment of those objectives (indispensability of the restriction);
- 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 (no elimination of competition in respect of a substantial part of the products in question).

An exemption can only be granted if these four conditions are fulfilled cumulatively.

<u>Subsumption:</u>

a) Single branding/non-compete clause for PL

i. Improving the production or distribution of goods or promoting technical progress (efficiency gains)

The obligation to purchase 82% of all PL products from S may be said to support an efficient and reliable structure for their distribution relationship.

ii. 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 framework supply contract. 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 framework supply contract. There is no information given in the text on consumer benefits. Therefore, it can be assumed that this requirement is not fulfilled.

iii. 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. Restrictions which would qualify as hardcore restrictions under the BER are usually not indispensable.

Under the agreed framework supply contract, B must buy 82% of all PL products it purchases from S. One may argue that the imposed restriction is not necessary as the two parties could have agreed on a somewhat lower percentage.

Furthermore, and in particular, the non-compete obligation regarding PL would have violated Article 5(1)(a) BER – if applicable – since it ran for more than five years, namely eight years. Such a (hypothetical) hardcore restriction is highly unlikely to be considered indispensable, countervailing aspects are not described in the case.

The clause is, therefore, not indispensable.

<u>Note</u>: *Different results are acceptable, if well-reasoned.*

iv. 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 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, given substantial market shares, the contract may allow an elimination of competition, but a definitive answer is hard to give (*both results are accepted, elimination and non-elimination*).

b) Shipping clause for PL

i. Improving the production or distribution of goods or promoting technical progress (efficiency gains).

The shipment clause may be said to contribute to the improvement of the distribution of goods.

ii. Appropriate participation of consumers in profits (see "proportionality in the narrow sense")

There is no information given in the text on consumers' benefits. Therefore, it can be assumed that this requirement is not fulfilled.

<u>Note</u>*: Other results are accepted, if well reasoned.*

iii. Indispensability of the restrictions imposed on the undertakings concerned for the attainment of the objective (see "necessity") The same reasoning applies as to the non-compete obligation regarding PL. iv. Failure to eliminate competition in respect of a substantial part of the products concerned. In the present case, the contract may allow an elimination of competition, but a definitive answer is hard to give (*both results are accepted, elimination and non-elimination*).	
Subsumption: The single branding/ non-compete clause and the shipment clause for PS are exempted from Art. 101 TFEU. The non-compete and shipping clauses for PL violate Art. 101(1) (TFEU) and are not exempted in any way. ***Note:*** *Extra points were possible for very strong assessments of ancillary restraints.*	
Question 1.3 **To the extent a violation is present, which are the legal consequences for the "framework supply contract"?**	**2 points**
According to Article 101 (2) TFEU, any agreements or decisions prohibited pursuant to Article 101 (1) shall be automatically void. The invalidity is limited to the extent necessary to give effect to the prohibition under Article 101 (1). Parts of the framework supply contract which do not violate Article 101 and are clearly separable from the infringing parts of the contract remain therefore, in force and effect.	
Question 1.4 **Provided a violation is present, which provisions of which EU-Regulation would S have to consult in order to estimate the fines the EU Commission could impose on it?**	**2 points**

S would have to consult regulation 1/2003, in particular Art. 23 et seq.	
Question 2	
Question 2 (without reference to the above facts) **Explain the statement that "abuse in the sense of Art. 102 TFEU is an objective concept".**	**4 points**
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 **Hofmann-La Roche** as: (1) relating to the behaviour 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 concept of abuse is objective in nature and does not require proof of intention. Nonetheless, the intention of the dominant undertaking may be taken into account in determining abuse. The Commission, as part of its examination of the conduct of a dominant undertaking and for the purposes of identifying any abuse of a dominant position, is obliged to consider all of the relevant facts surrounding that conduct *(Case C-549/10P Tomra Systems and Others v Commission para 18).* It must be observed in that regard that where the Commission undertakes an assessment of the conduct of an undertaking in a dominant position, that assessment being an essential prerequisite of a finding that there is an abuse of such a position, the Commission is necessarily required to assess the business strategy pursued by that undertaking. For that purpose, it is clearly legitimate for the Commission to refer to subjective factors, namely the motives underlying the business strategy in question *(Case C-549/10P Tomra Systems and Others v Commission para 19).* However, the Commission is under no obligation to establish the existence of such intent on the part of the dominant undertaking in order to render Article 102 TFEU applicable *(Case C-549/10P Tomra Systems and Others v Commission para 21).*	

Candidates may mention the following (but it is not required): Even though there is no equivalent to the block exemption as well as the individual exemption pursuant to Article 101(3) TFEU, a prima facie 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 behaviour; (2) legitimate public interest objectives; (3) efficiency considerations. 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.	
Question 3	
Question 3 (without reference to the above facts) **Describe the "merger test" of EU competition law, as implemented in Art. 2(2), (3) of the EU-Merger Regulation.**	**4 points**
The substantive test against which concentrations are assessed is laid down in Article 2(2) of the Merger Regulation and focuses on whether the concentration would significantly impede effective competition in the [internal] market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. *-Article 2(2), (3) of the EU-Merger Regulation:* • *(2) A concentration which would **not significantly impede effective competition** in the common market or in a substantial part of it, in particular as a result of the **creation or strengthening of a dominant position**, shall be declared **<u>compatible</u>** with the common market.* • *(3) A concentration which would **significantly impede effective competition**, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared **<u>incompatible</u>** with the common market.* Prior to the implementation of Regulation 139/2004 in 2004, EU merger control was governed by EEC Regulation 4064/89. Under EEC Regulation 4064/89, a merger or concentration was prohibited if it would "create or strengthen a dominant position as a result of which effective competition would significantly impeded".	

In order to describe the "merger test" of EU competition law, as implemented in Art. 2(2), (3) of the EU-Merger Regulation, the **creation or strengthening of a dominant position** still plays a key role as it is the most relevant of a SIEC. By prohibiting mergers that would lead to a SIEC, the EUMR seeks to prevent mergers that would significantly increase the market power of firms, i.e. their ability to profitably increase prices, reduce output, choice or quality of goods and services, diminish innovation, or otherwise influence the parameters of competition. Market shares and concentration levels provide useful first indications of the market structure and of the competitive importance of the merging parties and their intended merger. There are parallels between this assessment and the assessment of a dominant position under Art. 102 TFEU (*candidates could get additional points by explaining Art. 102-criteria and how they matter for the merger test*). Article 2(2) of the Merger Regulation should be read in conjunction with Recitals 25-9 of the Merger Regulation. The notion of 'significant impediment to effective competition' is clarified in Recital 25 of the Merger Regulation as a notion that extends beyond the concept of dominance, to the anti-competitive effects of a merger resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned. Thus, when assessing the compatibility of a merger, while dominance is still the primary form of competitive harm, it is not the only ground on which the Commission may block a merger.	