European Economic Law

Correction Scheme

"Prüfungslaufnummer":

	Maximal Points	Points obtained

Part 1 – The Fundamental Freedoms

Question: Does France violate the fundamental freedoms?
Remark: The case is inspired by the ECJ decisions in Joined Cases C-724/18 and C-727/18 of 22 September 2020. However, instead of dealing with the services directive, the exam focuses on the freedom to provide services.

1. Free movement to provide services The first problem regards the correct choice of the fundamental freedom that is relevant to the case. The activity in question is renting out furnished apartments. It is therefore reasonable to start with the freedom to provide services (to be found in Arts. 56 – 62 TFEU). It is not wrong, though, to start with other fundamental freedoms, as long as the freedom to provide services is examined in the end. **a. Services** 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 […]." The definition in Art. 57(1) TFEU is tautological. A service is any independent activity which cannot be qualified as trade in goods. Renting out furnished apartments clearly fulfil this definition.	2 2	

b. "normally provided for remuneration" The clients have to pay rent for the apartments. So, it is about a service against remuneration. **c. "in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons"** In the apartments, a selection of red wines is offered. Wine is a "good" in the sense of Arts. 34 ff. However, the wine is completely accessory to the rental of the apartment ("sign of courtesy"). For this reason, only the freedom to provide services, and not the free movement of goods is applicable. Moreover, *MIP* has its seat in France. It does not go into other Member States. 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. For the renting out of apartments, there is no such exemption.	2 2 2 2	
2. Personal scope of application **Art. 56(1) TFEU: "in respect of nationals of Member States who are established in a Member State"** Here: *MIP* is a French company formed in accordance with French law. According to Arts. 62, 54, it is a "national of a Member State". **"other than that of the person for whom the services are intended"** For clients from France and from third countries outside the EU, this condition is not fulfilled. However, clients come also from other Member States of the European Union. With respect to them, the personal scope of application is given.	2 2	
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 French Construction and Housing Code (CHC) provides that, in the big cities, prior authorisation by the mayor of the municipality is required for the short-term letting of furnished accommodation. This is a state measure.	2	
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 authorization requirement (subject to an offset requirement) hinders the provision of services even considerably.	2	
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. Here: The clients come to Paris where the service is provided: This is a case of the **passive freedom of provision of services**. The cross-border element is given.	2 2	
4. Justifications		

a) Absence of EU harmonization measures According to the notes, there is no EU harmonization measures in the field of short-term letting of furnished apartments.	1	
b) Art. 62 with Arts. 51 and 52 TFEU (for all measures, discriminating or not) Here: The rental of apartments is not official authority (Art. 51 TFEU), nor is it about public security or public health (Art. 52 TFEU).	2	
However, it is conceivable to affirm "public policy" (Art. 52 TFEU). The term is interpreted narrowly, though. In the case law, there is not always a clear distinction between "public policy" and the "imperative reasons" of the three-step test. It is therefore correct if the student deals with the questions mentioned in the context of the "imperative reasons" below in the context of "public policy". The full number of points shall be available no matter at which of these two places the arguments are put forward.		
c) Three-step test (Cassis type): only for indistinctly applicable measures - **Indistinctly applicable measure?** Yes, the authorization requirement applies to everybody	1	
- **Imperative requirements in the general interest** Argument of France: Fight against housing shortage in the big cities and to guarantee social diversity *Appreciation:* With companies like Airbnb and others, the short-term letting of apartments has become popular. While this innovative approach is to be welcomed, there are also problems. More and more, apartments in the cities are converted from residential use to such short-term letting. This reduces the supply of affordable housing and disturbs social diversity. Both aspects can be considered an imperative requirement in the general interest capable of justifying a barrier to the principle of freedom to provide services.	4	
- **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. *Appreciation:* The authorization requirement subject to an offset condition is suitable to maintain the number of apartments used for residential purposes. Is it also necessary, or is there a less restrictive measure? The measure taken by France seems necessary. First, the measure is limited to large cities in which the housing problems mainly occur. Moreover, French legislation does not provide for a complete ban of short-term letting of furnished apartments, but establishes an authorisation system: The authorisation can be obtained if residential housing is created elsewhere in the city. Therefore, France has set up a system that is as low-intervention as possible. *Remark*: Of course, a different appreciation is possible. The full number of points is available to the extent that reasonable arguments are given for the other result. **Result:** The fight against housing shortage in the big cities and the aim of guaranteeing social diversity justifies the restriction of the freedom to provide services in this case. **Additional remark:** *Keck* is not relevant here since the case is not about "selling arrangements".	2 4	

Result France has not violated the fundamental freedoms.	no points	

Good Structure and Argumentation	4	

Total Score	**42**	

European Economic Law Spring Semester 2022

Part II – *EU Competition Law* (50%)

Question 1 (≈ 32%) 24 Points **Question 2 (≈ 8%) 6 Points** **Question 3a (≈ 5%%) 4 Points** **Question 3b (≈ 5%%) 4 Points** **In addition: 4 extra points for good structure and argumentation**	**Maximum Score (points)**
Question 1: (≈ 32%) **Question 1: Can W demand payment of the contractual penalty from S or does W have no such claim because the respective provisions violate art. 101 TFEU?** *Notes:* – *Assess this question from a competition law perspective only.* – *Assume that art. 101 TFEU is applicable and that a sufficient effect on trade between Member States exists; you don't have to discuss these requirements.*	
Preliminary considerations: S could be obliged to pay a contractual penalty based on the agreement with W. However, this presupposes the validity of the contractual provisions. The contractual provision would be void pursuant to art. 101 (2) TFEU if it is prohibited according to art. 101 (1) TFEU. For this purpose, it must be examined whether the relevant clause infringes art. 101 TFEU.	**1**
I. Assessment of Article 101 TFEU (+)	**8**
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 S and W in the sense of art. 101 (1) TFEU; S and W are both manufacturers of high-end professional pianos, therefore direct competitors that are operating on the same level of the supply chain; the agreement is a horizontal 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	
= In the case at hand: restriction of competition by object in the sense of art. 101 (1) TFEU by directly fixing the selling price and limiting the production capacity.	
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. – EU Commission Notice on agreements of minor importance (de minimis) – No hardcore restriction – Market share o Horizontal agreements: 10% in total o Good faith o Flexible application	
= Assessment of the relevant market: S and W are producing high-end pianos for the professional use	
= S has a market share of 12%, W has a market share of 5–7%; the aggregate market share of S and W is clearly exceeding 10% in total. Because of its nature (restriction by object) and the combined market share, the agreement at issue crosses the de-minimis-threshold.	
II. Exemption pursuant to Article 101 (3) TFEU	**13**
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) Regulation (EU) 1218/2010 (so-called "specialisation" block exemption regulation [BER]) can be considered here, because S and W have entered into an agreement to jointly produce a product. *(Note: the well-argumented discussion of other block exemption regulations may be accepted)*	

B. Exemption pursuant to Regulation (EU) 1218/2010 **1. Objective scope (+)** – Pursuant to art. 2 (1) Regulation (EU) 1218/2010, art. 101 (1) TFEU shall not apply to specialisation agreements in the sense of art. 1 (1) (a) Regulation (EU) 1218/2010. – "Specialisation agreement" means an unilateral specialisation agreement, a reciprocal specialisation agreement or a joint production agreement.	
= Agreement between S and W represents a "joint production agreement" in the sense of art. 2 (1) (d) Regulation (EU) 1218/2010, i.e. an agreement by virtue of which two or more parties agree to produce certain products jointly; also, the parties jointly distribute the new pianos and thus fulfil art. 2 (3) (b); the scope of application is opened.	
2. Market share threshold (+) – Combined market share of the parties must not exceed 20% on any relevant market.	
= S and W have a combined market share under 20% on any relevant market, therefore they are fulfilling the market share threshold requirement.	
3. No Hardcore restrictions (+) – Art. 4 (a) Regulation (EU) 1218/2010: price fixing; exception: fixing of prices charged to immediate customers in the context of joint distribution. – Art. 4 (b) Regulation (EU) 1218/2010: limitation of output or sales; two exceptions. – Art. 4 (c) Regulation (EU) 1218/2010: allocation of markets or customers.	
= Agreement directly fixes prices; however, the prices are charged to immediate customers in the context of joint distribution. According to the exception provided in art. 4 (a) Regulation (EU) 1218/2010, the fixing of prices is allowed if the agreement envisages the joint setting of the sales prices for those products, and only those products, provided that that restriction is necessary for producing jointly, meaning that the parties would not otherwise have an incentive to enter into the production agreement in the first place (cf. also recital 160 Commission guidelines 2011/C 11/01 on the applicability of art. 101 TFEU to horizontal cooperation agreements)	
= Agreement limits production output in the context of the joint production agreement, but falling under exception of art. 4 (b) (i) Regulation (EU) 1218/2010	
= No allocation of markets or customers in the sense of art. 4 (c) Regulation (EU) 1218/2010	
= No hardcore restrictions in the sense of art. 4 Regulation (EU) 1218/2010	

4. Period of validity (+) – Regulation shall expire on 31 December 2022. *(Note: assessing validity of BER was not required.)*	
= The preconditions for the applicability of the Regulation (EU) 1218/2010 are met; there are no hardcore restrictions in the sense of art. 4 Regulation (EU) 1218/2010; therefore, pursuant to art. 2 (1) Regulation (EU) 1218/2010, art. 101 (1) TFEU is not applicable to the present specialisation agreement in its entirety, the agreement therefore benefits 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.)*	
D. Result = The requirements are fulfilled; the agreement between S and W is exempted pursuant to art. 2 (1) Regulation (EU) 1218/2010.	
III. Result	**2**
= An exemption from art. 101 (1) TFEU applies, the contractual penalty provision is not null and void in the sense of art. 101 (2) TFEU.	
= W can claim, at least from a competition law perspective, the contractual penalty from S.	
Question 2: (≈ 8%) **Assume that S violates art. 101 TFEU by engaging in anticompetitive price agreements with W. Can P be held liable for the administrative fines? If so, under what conditions?**	**6**
– P, as a subsidiary of S, could be held liable for the infringements of its parent company (group liability) based on the concept of the Single Economic Entity (SEE) Doctrine in EU Competition Law	
– SEE Doctrine in EU Competition Law • Principle: several legal entities forming a group of companies are considered as a single undertaking. – Implications of SSE: • Group privilege: agreements within SEE are not caught by art. 101 TFEU. • Group liability: companies in a SEE may be held liable for competition law violations by another group member, regarding both administrative fines (public enforcement) and damages (private enforcement).	
– Requirements for SEE: • Power and exercise of control by group mother over affiliate(s). • 100% ownership of affiliate: presumption of SEE.	
= P is a subsidiary of S, the latter holding 100% of P's shares; = P and S can be viewed as a single economic entity	

– From the affiliate's perspective: activity in the market area of the infringement, i.e. existence of a *specific link* between the economic activity of that subsidiary and the object of the infringement for which the parent company is held liable	
= P is selling the pianos produced by S and W; S is engaging in an anti-competitive price agreement that affects the product market P is active in; therefore, there exists a specific link between the economic activity of S and P	
= Result: P, as an affiliate of S, can be held liable for the infringement of S	
Question 3a: (≈ 5%) **Explain which competition law concept H mainly alleges to in its argumentation and which are the general rationale and requirements of this concept.** *Note: You can assume that G holds a dominant position in the market relevant here.* *(Note: well-argumented discussion of art. 102 TFEU may be accepted.)*	**4**
– Introduction of the term «essential facilities doctrine» – Concept: essential facilities in certain markets, e.g., infrastructure, networks, IPR. – Abusive behaviour in the sense of art. 102 TFEU especially if (e.g. Bronner judgment of the CJEU): (1) Refusal to grant access to the facility is likely to eliminate all competition on the downstream market (2) No objective justification for refusal (3) No actual or potential substitute for the facility in question ("indispensability") (4) In IP cases: prevention of a new or improved product ("new product rule") or other "exceptional circumstances" (e.g. standardization context and SEP licensing refusal)	
Question 3b: (≈ 5%) **Argue whether the application of said competition law concept would result in an obligation for G to grant the license requested by H.**	**4**
– Argumentation required with regard to the above-mentioned preconditions: • Indispensability: Could H develop its own database? • New product rule: H is (arguably) not developing a new product. *(Note: Different lines of argumentation and conclusions were possible and accepted regarding the question whether the reference to the essential facility doctrine can be of success, forcing G to grant a license to H. Good argumentation, and a thorough use of the facts of the case for it, were of the essence.)*	