
European Economic Law

13.01.2014

Duration: 120 minutes

- Please check at the beginning as well as at the end of the test the number of pages. The test includes 2 pages and 4 questions.

Grading:

Question 1	25% of the total
Question 2	25% of the total
Question 3	20% of the total
Question 4	30% of the total
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Total	100%

Good luck!

Question 1 (25%)

A company based in Spain has tendered an offer for a contract to install a new floor (craftsman work) in a public school in Germany. After the Spanish company received the contract, a competitor challenges the tender on the following grounds:

1. In order to be considered for a German public tender, foreign bidders are required to provide a bank guarantee in the amount of 25% of the contract price. The Spanish company has failed to do so.
2. The company's employees do not fulfil the training requirements for carrying out their profession in Germany. Instead of the German 4 year training the Spanish training lasts only for 3 years.

You are invited to prepare the opinion of the Advocate General of the European Court regarding the validity of the above stated provisions.

Question 2 (25%)

Prior to the privatization of the biggest (state-owned) telecommunications provider "Voice" in Belgium the owners altered the Articles of Association of "Voice" and included the following three provisions:

1. The Kingdom of Belgium has the right to appoint two members of the board of directors as long as it holds at least 1 share.
2. No shareholder, irrespective of the number of shares, can exercise more than 20% of the votes.
3. Contrary to the Belgian law in force, providing for a 75% majority for important corporate decisions, the quorum for important decisions is finally set at 80%.

After the privatization of "Voice", the Kingdom of Belgium holds 20% of the shares.

You are invited to prepare the opinion of the Advocate General of the European Court regarding the compliance of the three corporate provisions with the fundamental freedoms of the TFEU.

Question 3 (20%)

In Spain, almost all gas stations are supplied by only a limited set of fuel manufacturers. Most of the supply contracts are long term contracts which oblige the gas station operators to purchase fuel exclusively from one specific manufacturer. There are hardly any gas station operators who purchase fuel under short-term contracts from a range of different manufacturers.

The British company B manufactures fuel and sells it through various Spanish gas station operators. B has a market share of 25% in Spain. Among others, B concluded a supply contract with a ten year term with the gas station operator S. This contract provides that S must purchase all its fuel from B.

Two years after signing the supply contract, the Dutch company D – a competitor of B – offers S a much better deal for the purchase of fuel. S wants to accept this offer and therefore, claims that the contract with B is void as it violates EU competition law. Examine the prospects of S' argument with regard to substantive law.

Question 4 (30%)

German company G manufactures the accounting software „G-Accounting“. In addition, G offers the „G-PDFgen“-module which generates PDF files from „G-Accounting“ data. „G-PDFgen“ can be licensed and paid for independent of the „G-Accounting“ software. In Germany and Austria the market share of „G-Accounting“ in the market for accounting software is between 40% and 45%.

Austrian company A is a software manufacturer that creates PDF files from any kind of file or data. A distributes its software as plug-ins (see below) in Germany, Austria and a number of other European countries. Due to regular user requests, A would like to offer a plug-in for the „G-Accounting“ software which would encompass and extend the functionality of the „G-PDFgen“. In order to develop such a plug-in A needs access to the interface information (see below) of the „G-Accounting“ software.

Upon A's request, G and A negotiated on A's access to the interface information. However, the negotiations were unsuccessful and G denied A the access to the information needed. Now A wants to oblige G to disclose the interface information by way of action on the basis of European competition law. Examine the prospects of A with regard to substantive law.

Please note:

A ***plug-in*** (also called extension or add-on) is a software component that adds a specific feature to an existing software application.

Interface information is needed to achieve interoperability of one computer program (= software) with another. The expression of that information is usually protected by copyright law. A possible decompilation of a computer program (which may be permitted according to Art. 6 Computer-Directive) gives access to some interface information but is often not sufficient to achieve full interoperability.

European Economic Law, HS 2013, Solution Question 1: 25% in total

Violation of TFEU Part 1: Free movement of services	16	
I.) TFEU Basics	1	
- Identify that the bank guarantee was required under a member state act		0.5
- No other EU Directive was passed on the matter		0.5
II.a) Free movement of services	8	
- Subsidiarity		0.5
- Article 57(c) applies to service provided by craftsmen/application to the facts		1.0
- Art. 56/57 includes public procurement		0.5
- No permanent establishment set up in Germany, but established in member State (Spain)/application to the facts		1.5
- Temporary nature (will return to Spain) – Gebhardt case/application to the facts		1.5
- Cross-border element		1.0
- Commercial nature of the service		1.0
- Other freedoms not applicable (goods, workers, capital)		1.0
II.b) The restriction	6	
- Restriction only imposed on “foreign” bidders (no equal application, thus prima facie discriminatory)		1.0
- Least restrictive approach should be taken (van Binsberg); give at least one example that would have achieved the goal by other means		2.0
- Proportional to legitimate objective (public interest)/application to the facts		2.0
- Respect fundamental human rights (Carpenter case)		1.0
III. Conclusion	1	
- Apply proportionality test – Restriction not necessary to achieve an important public interest. Well-argued differing conclusions were also accepted		1.0
Violation of TFEU Part 2: Free movement of services and workers	9	
I.) TFEU Basics		
- Identify that the training requirement was imposed by a member state act	4	1.0
- Applies to all workers in Germany, thus can be an obstacle to market access (Bosman)		1.0
- Mention Dassonville and expansion to other freedoms beside goods		1.0
- Applicable freedoms (only movement of services and workers)		1.0
II.a). Free movement of services & Art. 45	3	
- Mutual recognition Directive 2005/36, concept of mutual trust and recognition		0.5
- Not a regulated profession or university degree required in Spain, no specific EU legislation		0.5
- Temporary Service – no evidence of qualifications necessary if on temporary or occasional basis		1.0
- Art. 45 TFEU – applicable to workers that seek a job in another member state with a qualification obtained in another member state.		1.0
II.b) Justification for the restriction		1.0
- Not justified on grounds of public policy, public security or public health/ apply to the facts	1	
III. Conclusion		1.0
- There is no justification for the imposition of the training requirements. Therefore the law requiring additional training from foreigners is contrary to the EU law.	1	

European Economic Law, HS 2013, Solution Question 2: 25% in total

Violation of Art. 63 TFEU: Free movement of capital	25	
<p>I.) TFEU Basics</p> <ul style="list-style-type: none"> - Identify that the act of altering the articles of association prior to the privatization of Voice was a member state act and that no other EU law is applicable to the scenario - A cross-country dimension is present as shareholders or investors might be from another member country 	3	2.0 1.0
<p>II.) Free movement of capital</p> <ul style="list-style-type: none"> - Identify and explain that the Kingdom of Belgium owns so called "Golden Shares" which enable the holder to exercise special rights. - Explain with reference to the three stated provisions how the Golden Shares impede capital movement under Article 63 TFEU (Comm. vs. Belgium 2002) by diminishing the value of the investment and placing an undue burden on potential shareholders - Address the limitation of influence surrounding the three provisions as well as the limited stock price movement (no participation on the actual underlying value) - No takeover possible - Explain the exceptions in Art. 65 TFEU and their boundaries (justification, proportionate, suitable, necessary) - Apply the exceptions to the provisions. Good arguments in favor of an exception based on public interest were also accepted. 	19	3.0 6.0 3.0 1.0 3.0 3.0
<p>III.) Conclusion</p> <ul style="list-style-type: none"> - Balancing the named factors draw a conclusion on the validity of the three provisions in accordance with Art. 63 TFEU 	3	3.0

European Economic Law, HS 2013, Solution Question 3: 20% in total

Violation of TFEU 101 (+)	19	
I.) TFEU 101 (+)	1.5	
- Aim and purpose		0.5
- Distinction between horizontal and vertical agreements		0.5
- i.c.: Vertical agreement		0.5
II.a) Undertaking (+)	1	
- Functional approach, legal form irrelevant, “economic activity” decisive		0.5
- i.c.: S, B (and D) are private, profit-oriented companies (+)		0.5
II.b) Agreement, decision or concerted practices (+)	1	0.5
- i.c.: Fuel selling/purchasing contract (+)		0.5
II.c) Prevention, restriction or distortion of competition (+)	4	
- Restrictions on the conduct of at least one party with respect to a competitive parameter (e.g. product, price, quality, quantity, customers or geographical activity)		1
- An exclusive purchasing obligation in itself is basically no restriction of competition; debate on the harmfulness of vertical restraints		1
- However, a restrictive effect on competition may arise if due to the interaction with other similar agreements a market distortion occurs (so-called bundle theory, ECJ Delimitis).		1
- i.c.: arguments pro and contra, but rather (+)		1
II.d) Exceptions (-)	1.5	
- Sales representatives privilege (EC Guidelines on Vertical Restraints, Art. 12 ff.)		0.5
- i.c.: S is not integrated into the sales organization of B (-)		0.5
- i.c.: S bears the whole economic risk (-)		0.5
II.e) Appreciable restriction of competition (+)	2	
- De minimis notice		0.5
- Nr. 7.b: 10 % for non-competitors (-)		0.5
- Nr. 8: 5% in the case of cumulative foreclosure effect (-)		0.5
- i.c.: appreciable restriction		0.5
II.f) Effect on trade between Member States (+)	1	
- Commission notice on the effect on trade		0.5
- i.c.: Spain, England and the Netherlands involved (+)		0.5
II.g) Exemption (-)	5	
- Vertical Block Exemption Regulation:		
o VBER 2: vertical agreement (+)		1
o VBER 3: 30% market share threshold (-)		1
o VBER 4: core restriction (-)		1
o VBER 5: prohibited clauses (+): Exclusive purchasing obligation is a non-compete obligation within the meaning of VBER 5 I a		1
- TFEU 101 III: individual exemption (-)		1
III.) Conclusion (+)	2	
- Exclusive purchasing obligation violates EU antitrust law		1
- Legal effect: The respective clause is void (TFEU 101 II)		1
Violation of TFEU 102 (-)	1	
Not applicable due to B’s market share of only 25% in Spain		1

European Economic Law, HS 2013, Solution Question 4: 30% in total

Violation of TFEU 102	30	
I.) TFEU 102 (+)	2	
- Aim and purpose		1
- Special responsibility for undertakings in a dominant position		1
II.a) Undertaking (+)	1	
- Functional approach, legal form irrelevant, "economic activity" decisive		0.5
- i.c.: G and A are private, profit-oriented companies (+)		0.5
II.b) Dominant position in the internal market or in a substantial part of it (+)	11	
- Definition of the relevant market:		
o Commission Notice on the definition of relevant market		0.5
o Relevant product market (demand substitutability, SSNIP-test), relevant geographic market, relevance in time (less important)		2
o i.c.: market for accounting software in Germany and Austria		1
o i.c.: Distinction between primary market (= market for accounting software) and secondary market (= market for generating pdf-files from given data)		1
- Dominant position on primary market:		
o Power to behave to an appreciable extent independent from competitors, customers and consumers		1
o Actual competition (market share and structure): dominance not likely if market share <40%, presumption if market share >50%		2
o Potential competition (barriers to entry and expansion)		1
o Countervailing buying power		0.5
o i.c.: No presumption (market share < 50%), but probably other arguments for dominant position, for example high costs for firms to change their existing accounting software (?/+)		2
II.c) Abuse (+)	14	
- Essential facilities doctrine: In "exceptional circumstances" third parties should be granted access to goods/services even if they are protected by IPRs, i.c. by copyright law		2
- Conditions:		
o Essential facility: Interface information as an essential facility (G has interface information (needed for its own "G-PDFgen"); A needs interface information to enter secondary market)		3
o Facility is necessary for a "new" product on a secondary market (A's plug-in extends functionality of "G-PDFgen")		2
o Elimination of competition		1
o Unjustified refusal		1
- Consequences:		1
o Access to the essential facility		1
o Under reasonable terms		1
o For a reasonable fee		2
- i.c.: G abuses its dominant position by excluding A from the secondary market (+)		
II.d) Effect on trade between Member States (+)	1	
- Commission notice on the effect on trade		0.5
- I.c.: Germany and Austria involved (+)		0.5
III.) Conclusion (+)	1	
- Refusal to license is abusive/not abusive (?/+)		1