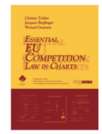
Essential EU Competition Law in Charts - EXERCISES and SUGGESTED SOLUTIONS on the INTERMEDIATE LEVEL

extending the *Exercises and Suggested solutions on the Basic Level* from

Tobler Christa/Beglinger Jacques/Geursen Wessel, Essential EU Competition Law in Charts, HVG-Orac 2011, 75 charts, 144 p., ISBN 978-963-258-118-7.



The *EXERCISES and SUGGESTED SOLUTIONS on the INTERMEDIATE LEVEL* may also be retrieved on the internet from:
http://www.eur-charts.eu/webcompanion/exercises-and-suggested-solutions/esscomp_exercises

EU Competition Law in Charts, exercises:

1. How is the term "undertaking" defined for the purposes of EU competition law?

Suggested solution:

There is no legal definition of the term "undertaking" to be found in the TFEU. Therefore, the term has been defined by the Court of Justice in a series of judgments. The Court has opted for a broad interpretation focusing on the economic activity of the entity in question. Accordingly, an undertaking is "every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed" (e.g. *Höfner* (1991)) and "a unitary organisation of personnel, tangible and intangible elements which pursues a specific economic aim on a long-term basis" (*Shell* (1992)).

2. Identify whether (and if not, why) the following entities fall within the meaning of the term "undertaking" for the purposes of EU competition law in the following situations:

a) A trade union representing workers on shipyards when negotiating the right of paid paternity leave with the management.
b) Metallor, a French steel producer when entering into a distribution agreement with a wholesaler established in Belgium.
c) A National Health System purchasing antibiotics for cost-free treatment of the poor.
d) Football players in exclusive contracts with sportswear companies.
e) A compulsory pension scheme in Italy providing a minimum pension to all public sector employees.

Suggested solution:

a) No, this is a representative organisation pursuing a social policy objective; *Albany* (1999).
b) Yes.

c) No, this is an organisation purchasing goods without subsequently using them for an economic activity; *FENIN* (2006).
d) Yes, undertakings may be legal persons or natural persons; Commission Decision *RAI/Unitel* (1978).
e) This is an organisation with an exclusively social function. Whether or not it is an undertaking depends on whether it is entirely based on the principle of solidarity and non-profit making; *Poucet* (1993).

[Relevant Chart: **C3**][1]

3. ACDC plc is a UK based adapter manufacturer. Blommer BV is a Dutch wholesaler who is convinced that the famously reliable ACDC adapters would be a market hit in the Netherlands. Blommer approaches ACDC and after negotiations a contract is signed. The contractual agreement between ACDC and Blommer provides that a) ACDC will supply its adapters for resale to Blommer in the Netherlands exclusively and b) that Blommer, for a period of three years from the date of the agreement, will not sell products competing with the ACDC adapters. The market share of ACDC in the relevant market is 36% and that of Blommer is 25%.

a) Does this agreement fall within Art. 101(1) TFEU?
b) Assuming that it does, does it benefit from a block exemption?

Suggested solution:

a) For there to be a violation of Art 101(1) TFEU, the following three conditions must be present: (1) there must be one of the three forms of coordinated or collusive conduct between undertakings listed in Art. 101(1) TFEU, (2) the agreement may affect trade between Member States, and (3) the Agreement has as its object or effect the prevention, restriction, or distortion of competition within the internal market.

   (1) *There must be one of the three forms of coordinated or collusive conduct as listed in Art. 101(1) TFEU:* as stated by the Court of Justice in *T-Mobile* (2009), there are three forms of collusion between undertakings which have the same nature and are therefore distinguishable from each other only by their intensity and the forms in which they manifest themselves. An agreement is described in *Bayer* (2004) as "a concurrence of wills between at least two parties, the form in which it is manifested being unimportant as long as it constitutes the faithful expression of the parties' intention". It can be vertical or horizontal; *Consten and Grundig* (1966). Decisions by associations of undertakings are agreements within the framework of collective or representative bodies. A concerted practice has been identified in *Dyestuffs* (1972) as "a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition". ACDC as a producer and Blommer as a wholesaler each clearly fall within the meaning of the term "undertaking". There is an agreement between them. The agreement is vertical, i.e. between undertakings that are not competitors on the same level of production or distribution.

   (2) *The agreement may affect trade between Member States:* the Court of Justice has adopted a broad interpretation of this requirement. There is an effect on trade between Member States wherever it is "possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence,

[1] All Chart numbers refer to the Charts in Tobler Christa/Beglinger Jacques/Geursen Wessel, Essential EU Competition Law in Charts, HVG-Orac 2011, 75 charts, 144 p., ISBN 978-963-258-118-7, http://www.eur-charts.eu/books/essential-eu-competition-law-in-charts

direct or indirect, actual or potential, on the pattern of trade between Member States"; *Société Technique Minière* (1966)*, Manfredi* (2006). ACDC has agreed to exclusively supply its adapters for resale to Blommer in the Netherlands and Blommer has agreed not to sell products competing with the ACDC adapters. These contractual obligations will have an actual effect on trade between the UK and the Netherlands. Nevertheless, it is relevant only if it is appreciable; *Tepea* (1978). According to the Commission's guidelines on the effect on trade concept (2004)*,* the aggregate market share of the parties on any relevant market affected by the agreement shall not exceed 5% and, in case of vertical agreements, the aggregate Union turnover of the supplier of the products covered by the agreement shall not exceed EUR 40 million. In the present case, both companies' market share exceeds the 5% market share threshold. The turnover of ACDC is not known. A distinction must therefore be made. Where the EUR 40 million turnover threshold is not exceeded, then there is no appreciable effect on trade within the meaning of Art. 101(1) TFEU and the case is, therefore, not covered by Art 101(1) TFEU. Conversely, where the EUR 40 million threshold is exceeded, then it is likely that the agreement will appreciably affect trade between Member States.

(3) *The Agreement has as its object or effect the prevention, restriction, or distortion of competition within the internal market:* Either an anti-competitive object or effect is sufficient. In this case, it is reasonably clear that the exclusivity and non-compete clauses agreed between ACDC and Blommer are intended to restrict competition. Accordingly, the agreement can be classified under the "object" category. As such it may affect trade between Member States by its very nature; there is therefore no need to examine whether the actual effect on competition is appreciable within the meaning of the de minimis rule that is relevant in the context of the "effect" category; *Expedia* (2012) (see updates on the webcompanion, http://www.eur-charts.eu/webcompanion/essential-eu-competition-law-in-charts).

b) An agreement may fall outside Art. 101(1) TFEU because the (cumulative) requisite conditions of this paragraph are not met, or, if they are, because the (cumulative) exclusary conditions in paragraph 3 also apply (i.e. an exemption). There are two types of exemptions, namely individual exemptions (a term that was more common before the introduction of Regulation 1/2003/EC) and block exemptions. The present question concerns the latter. Block exemptions provide for the automatic exemption of categories of agreements that are regarded as normally satisfying the conditions laid down in Art. 101(3) TFEU. Block exemptions apply to the extent that an agreement contains restrictions falling within Art. 101(1) TFEU. Further, block exemptions do not apply to blacklisted conduct (so-called hardcore restrictions). As the present case concerns a vertical agreement, Block Exemption Regulation 330/2010/EC on vertical restraints may be relevant. Art. 2 of the Regulation provides that Art. 101(1) TFEU does not apply to agreements between undertakings operating at different levels of the production/distribution chain relating to the conditions under which the parties may sell or resell certain goods. More specifically, the Regulation covers both exclusive distribution arrangements, such as the one in the present case, and non-compete obligations of a mere three years' duration, neither of which falls under the prohibited hardcore restrictions (Arts. 4(b)(i) and 5(1)(a)). However, Art. 3 states as a condition that the market shares of both the supplier and the buyer may not exceed 30% on their respective relevant markets. While Blommer's 25% market share is under this threshold, ACDC's 36% market share is higher, which renders Regulation 330/2010/EC inapplicable.

[Relevant Charts: **C6-C18**]

4. Three medium sized companies established in Greece, A, B and C, are active in producing goods based on olives (such as olive oil, olive pâté etc.) for which Greece is famous. They have a combined market share of approximately 70% in this market in Greece and their annual aggregate turnover is EUR 150 million. The remaining market share is held by two major importers and private label brands of the two major supermarkets. The national sales directors of A, B and C in Greece have regular dinner meetings in Kalamata, referred to as the "Elia Group", where they discuss the state of the economy and of their industry as well as other issues such as packaging and labelling regulations, the public health aspects of certain ingredients, the possibility of increasing prices in the next round of annual negotiations with the distributors, and the desirability of promotional actions in supermarkets. Seen from a substantive angle, is A's conduct as a member of the Elia Group potentially unlawful? For the purposes of this question, you may assume that products based on olives form a single, coherent market.

Suggested solution:
The case concerns the conduct of more than one undertaking (A, B and C meeting in Kalamata), which means that Art. 101 TFEU must be examined. For the basics, see the solution to question 3. The relevant product market in the present case is the market for products based on olive oil whereas the geographic market is the market of one Member State, namely Greece (i.e. the territory for which the discussions in Kalamata are relevant). The undertakings concerned are on the same level of the production (horizontal situation).

(1) Based on the facts of the given case, no form of agreement seems to exist between the undertakings. However, there is an exchange of information, which, in cases where it concerns individualised commercially sensitive information, leads to a rebuttable presumption of a concerted practice; *Anic* (1999). Discussions on raising prices can be considered to be sensitive information. What is of particular note in this case is the fact that the market for olive products appears to be rather oligopolistic (only five companies in total). In such a situation, a lack of price competition might also be the natural way for that market to operate and not the result of collusion. Where there is a concerted practice, the effect on trade between Member States and on competition has to be checked.

(2) Actual or potential effect on trade between Member States can easily be assumed in this case: although the relevant geographic market has been established as one Member State, this does not prevent an effect on trade between Member States since there are imports; *Vereeniging van Cementhandelaren* (1972). The test for actual or potential effect on trade between Member States is broad: a direct or indirect, actual or potential effect is sufficient; *Consten and Grundig* (1966), *Société Technique Minière* (1966). The effect is appreciable since in this case the market share threshold (aggregate market share of the parties in any relevant market of at least 5%) as well as the turnover threshold (aggregate turnover of the undertakings in the products covered by the agreement of at least EUR 40 million) are exceeded.

(3) Regarding the effect on competition, it seems more reasonable in the present case to assume that the concerted practice has the *effect* of restricting competition rather than having the object to do so. Again, the effect must be appreciable, as Art. 101 TFEU does not cover conduct with an insignificant effect on competition (*de minimis* rule, as defined in Commission's guidelines on the effect on trade concept (2004)). The market share threshold of 10% aggregate market share in any of the relevant markets for a horizontal agreement (here: a concerted practice) is exceeded.

Where it is concluded that the conduct of the "Elia Group" indeed falls under Art. 101(1) TFEU, it needs to be examined further whether the case is covered by a block exemption (not applicable in this case), the exemption of Art. 101(3) TFEU (highly unlikely as the four cumulative criteria do not seem to be satisfied) or the derogation of Art. 106(2) TFEU (not relevant in this case). If it does not, it is indeed prohibited and void *ex nunc* on the basis of Art. 101(2) TFEU.

[Relevant Charts: **C6-C10, C22**]

5. The use of industrial and commercial property rights (i.e. of intellectual property) poses various questions under EU competition law. In its early case law on the granting of licences, the Court of Justice distinguished between, on the one hand, open exclusive licences and, on the other, exclusive licences with absolute territorial protection. In the case of the former, the licence relates solely to the contractual relationship between the owner of the right and the licensee, i.e. the owner merely undertakes not to grant other licences in respect of the same territory and to not compete himself with the licensee on that territory. In the case of the latter, the parties to the contract agree, as regards the products and the territory in question, to eliminate all competition from third parties, such as parallel importers or licensees from other territories. The Court held that such absolute territorial protection falls foul of Art. 101(1) TFEU; *Tepea* (1978). Conversely, with respect to open exclusive licences, the Court has stated that, depending on the nature of the product in question, they may not in themselves be incompatible with Art. 101(1) TFEU; *Nungesser* (1982). Reflect on the question of whether or not this approach implies the recognition of a rule of reason within Art. 101(1) TFEU, and whether this makes sense in a situation where Art. 101 TFEU, under para. 3, also provides for derogations.

Suggested solution:
According to a definition given by the OECD, the rule of reason can be described as "a legal approach by competition authorities or the courts where an attempt is made to evaluate the pro-competitive features of a restrictive business practice against its anticompetitive effects in order to decide whether or not the practice should be prohibited" (http://stats.oecd.org/glossary/detail.asp?ID=3305). Different from Art. 102 TFEU, Art. 101 TFEU does provide for derogations. For that reason, the General Court held that there is no place for a rule of reason within Art. 101(1) TFEU; *Métropole Télévision* (2001). Nevertheless, the *Nungesser* approach in fact implies the existence of such a rule of reason, since it exempts certain licence agreements on the level of Art. 101(1), rather than on the level of Art. 101(3) TFEU. Today, a case like *Nungesser* might fall under the Technology Transfer Block Exemption Regulation 772/2004/EC, which, in terms of the structure of Art. 101 TFEU, belongs to the level of Art. 101(3) TFEI.

[Relevant Charts: **C11, C21, C27**]

6. Ralph Rice is a UK producer of turbine-powered jet engines, which it supplies to its contractors in the UK, Italy, the Netherlands and Switzerland. Because of the high transportation cost of its products, Ralph Rice has not extended its sales operations beyond these states. Ralph Rice has only a 9% share of the EU market for turbine-powered jet engines. However, it supplies 83% of the turbine-powered jet airplane engines sold in the UK, Italy and the Netherlands. Ralph Rice's share of the wider market of air-breathing jet engines (which consists of turbine-powered jet engines and ram-powered jet engines) in the UK, Italy and the Netherlands, is 8%. When compared to turbine-powered jet engines, ram-powered jet have no moving parts, do not have any carbon-fibre parts, are less efficient (i.e. require more gas) but are significantly cheaper. Using its extensive financial resources generated from healthy profits over the past five years, Ralph Rice has developed a very efficient distribution system. The company's strong market position has also enabled it to offer discounts to some of its UK customers, which are negotiated separately with individual contractors and based on the size of the orders placed. Recently, one of Ralph Rice's competitors, MotorSky SA, also discovered that Ralph Rice is offering very substantial discounts to MotorSky's existing customers if they agree to become, over the next 12 months, customers of Ralph Rice. MotorSky questions the compatibility of the above discount arrangements with Art. 102 TFEU. You are asked to advise MotorSky on this matter.

Suggested solution:

This case concerns the conduct of one single undertaking (Ralph Rice). Accordingly, Art. 102 TFEU must be examined. Art. 102 TFEU prohibits the abuse of a dominant position within the internal market by an undertaking (or two or more undertakings forming an economic entity for these purposes) insofar as it may affect trade between Member States. Therefore, a violation of Art. 102 TFEU requires (1) that Ralph Rice is in a dominant position, (2) that it has abused that position, and (3) that the abuse is capable of affecting trade between Member States.

(1) *The existence of dominance* is determined by the undertaking's economic power and its ability to behave independently of its customers and competitors in the relevant market. The relevant market is defined in terms of (a) products, (b) geography and (c) time.

a) With regard to the relevant *product market*, MotorSky should argue for a narrow market, namely that of turbine-powered jet engines where Ralph Rice's market share in the UK, Italy and the Netherlands rises to 83%. Ralph Rice would in contrast likely argue that the relevant product market is that of air-breathing jet engines where its market share is only 8%, which means that it is unlikely to be in a dominant position. At this point, cross-elasticity of demand (demand substitutability) and cross-elasticity of supply (supply substitutability) have to be taken into account. Demand substitutability concerns consumers' behaviour, in essence the question being whether the consumer would substitute turbine-powered jet engines with ram-powered jet engines on the basis of their respective characteristics, use and price. The SSNIP (Small but Significant Non-transitory Increase in Price) test on pricing as well as *United Brands* (1983) and *Hilti* (1991, 1994) judgments are important in that regard. Conversely, supply substitutability concerns the behaviour of other producers. The advice in this case would have to focus on whether air-breathing engine producers could cheaply and easily switch from making turbine-powered jet engines to making ram-powered jet engines. Based on the information provided, there appears to be low cross-elasticity of both demand and supply between turbine-powered jet engines and ram-powered jet engines due to the products characteristics.

b) With regard to the relevant *geographic market*, Art. 102 TFEU requires a clearly defined geographic area "within the internal market or in a substantial part of it" in which the products are marketed and where the conditions of competition are sufficiently homogenous for the effect of the economic power of the undertaking to be evaluated. Ralph Rice would likely argue for a broad geographic market, namely the whole of the EU, where its market share is small (9%). MotorSky should seek to establish the narrower geographic market of UK, Italy and the Netherlands where Ralph Rice has a market share of 83%. Cost and feasibility of transportation (*Hilti* (1991, 1994)) or other factors, such as the use of the product or service, should be considered. As indicated, turbine jet engines are expensive to transport, and, thus, Ralph Rice has not sought to penetrate other markets. Three Member States are nevertheless sufficient to be considered a "substantial part of the internal market".

c) The *temporal market* is not always relevant but might be considered e.g. for products where there are limited production times. There is no specific temporal element to be identified in the given case.

In light of the analysis above, the relevant market is likely to be the market for turbine-powered jet engines in the UK, Italy and the Netherlands for the time that Ralph Rice will be offering very substantial discounts to MotorSky's existing customers.

Regarding the undertaking's strength in the relevant market, Ralph Rice has an 83% share of this market, which is probably enough to be conclusive of dominance; see *Hilti* (1991, 1994), *Hoffmann-La Roche* (1979). Other factors such as Ralph Rice's financial resources, commercial advantages, technical advantages, supply-side factors and other barriers making it difficult to enter the market may be relevant when assessing dominance.

(2) Dominance in itself does not amount to a breach of Art. 102 TFEU. There must also be an abuse. Abuse can be exploitative or exclusionary. Ralph Rice has negotiated different discounts with individual building contractors, based on the size of the orders placed and is offering discounts to a competitor's (MotorSky) existing customers; *Hoffman-La Roche* (1979). This appears to constitute an (exclusionary) abuse of its dominant position. However, it has to be examined as to whether the abuse can be objectively justified. Whilst Art. 102 TFEU contains an absolute prohibition, an objective justification may prevent the conduct from being qualified as abusive (remember that abuse is a normative concept); *Michelin* (1983), *European Night Services* (1998) and *Piau* (2005). There is no indication of any objective justification in the case.

(3) Finally, there is the requirement that the abuse may affect trade between Member States. Under Art. 102 TFEU, an actual appreciable effect does not have to be proven. An undertaking that abuses a dominant position *in a substantial part of the internal market* is likely to affect trade between Member States. In the present case, the relevant geographic market has been established as consisting of three Member States, and the discounting arrangements offered by Ralph Rice can be assumed to at least have a potential effect on trade between Member States.

[Relevant Charts: **C28-C32, C4, C5**]

7. Velocità S.p.A. is an Italian company listed on Borsa Italiana (the Milan Stock Exchange) active in the automotive industry. It has production facilities mainly in Apulia, one of the areas with the weakest economies of Southern Italy, where it produces cars and the famous Basta motorbikes. During the first weeks of the financial crisis in 2008, it becomes clear that Velocità is in deep trouble due to two main reasons: the sudden drop in sales and the fact that it invested in Portuguese bonds. The Italian Government, in the interest of the wellbeing of the Italian regional economy, decides to step in immediately. It provides new capital in exchange forthe issuance of new shares. The result is that the Italian State becomes a 12% shareholder of Velocità and is able to appoint a new management to restructure the company. Italy does not notify the rescue operation to the European Commission. Having received a complaint from Poggia S.p.A., a competitor of Velocità, the Commission investigates the case and after nine months concludes that the rescue measure does not constitute state aid within the meaning of Art. 107(1) TFEU. Accordingly, the Commission approves the measure by formal decision. Poggia now requests your legal advice on the following issues:

a) Is the Commission's decision final or can it be challenged before an Italian Court and/or the General Court in Luxembourg?
b) If the decision is final, can the Italian Government nevertheless be forced to order repayment of the aid on the ground that the aid was not notified to the European Commission?
c) Could the Commission also have found that the measure does constitute state aid but, as regional aid, is compatible with the internal market under Art. 107(3) TFEU?

Suggested solution:

a) A competitor of a beneficiary of state aid found to be compatible with Art. 107(3) TFEU may want to challenge a Commission decision clearing the aid. Regarding a challenge before a national court, the Court of Justice has stated in *Salt Union* (1996) that it is open for competitors to contest before the national courts the decision of *national* authorities to grant state aid to a competing undertaking. The national court in such cases may refer a question to the Court of Justice for a preliminary ruling under Art. 267 TFEU. With respect to an act of an EU institution (here: the Commission decision), a competitor may attempt to bring an action for annulment to the General Court under Art. 263 TFEU. In this case, Poggia is a non-privileged applicant, as the Commission Decision is not addressed to it but to a Member State. Further, the case does not involve a regulatory act involving implementing measures within the meaning of Art. 263(4) TFEU. In order to have standing, Poggia will, therefore, have to show both direct and individual concern. Companies in a position to establish a substantial effect on their position and active involvement in the state aid procedure are "directly and individually concerned" within the meaning of Art. 263 TFEU; *Cofaz* (1986).

b) Aid cannot be granted before being approved by the Commission. For that purpose, new state aid must be notified to the Commission (Art. 108 TFEU). Non-notified, implemented aid is in principle unlawful and must be recovered. In the present case, the Commission initiated proceedings on foot of a complaint over unlawful aid by a competitor. According to Art. 11 of Regulation 659/99/EC, the Commission may require the Member State to suspend and provisionally recover the unlawful state aid under certain conditions, *until the Commission has taken a decision on the compatibility of the aid with the internal market*. Thereafter, the issue depends on the outcome of the Commission's decision. In the present case the Commission subsequently found the measure in question not to amount to state aid. In such a case, there is no longer a reason for recovery.

c) Only where the aid falls under the General Block Exemption Regulation 800/2008/EC. Where that is not the case, new state aid must be notified to the Commission in order to enjoy exemptions.

[Relevant Charts: **C54 and 55, B18**]

8. In the *Altmark* judgment, the Court of Justice held that financial compensation will not be considered to be state aid if certain conditions are satisfied.

a) What are those conditions?
b) What happens in a case where the compensation paid to a public service provider does not meet the four cumulative criteria set out in *Altmark*?

Suggested solution:

a) In *Altmark* (2003), the German Federal Administrative Court referred a number of preliminary questions to the Court of Justice that had arisen in a dispute concerning, first, the granting and, subsequently, the extending of licences for an operator of scheduled bus transport services that was already receiving public subsidies enabling it to perform these services. The main question was whether subsidies intended to compensate for the costs associated with the operation of urban, suburban or regional scheduled transport services amount to state aid, i.e. to an economic advantage within the meaning of what was then Art. 87(1) EC (today Art. 107(1) TFEU) conferred on their recipient. The Court held that this is not the case where:

- the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;
- the parameters of the basis on which the compensation is calculated have been established beforehand in an objective and transparent manner;
- the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations; and
- where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means so as to be able to meet the necessary public service requirements would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

b) If the four *Altmark* criteria are not met cumulatively, then the compensation paid to the (public) service provider constitutes state aid within the meaning of Art 107(1) TFEU, where all of the other elements of that provision are satisfied. As such, the compensation must be notified to the Commission in accordance with Art. 108(3) TFEU and the provisions of Regulation 669/99/EC. The Commission will then have to assess whether the aid falls under a derogation (including in particular, in the given circumstances, the derogation under Art. 106(2) TFEU).

[Relevant Charts: **C53, C45, C54, C48**]