

Exam guidelines JUS5310 MA and JUR1310 BA EU Competition Law, autumn 2022

The examination period in EU Competition Law was 24 hours on both MA and BA level autumn 2022, from December 6 at 9:00 AM to December 7 at 9:00 AM Norwegian time. The examination was digital (Inspira) and home-based. The word limit was maximum 2000 words on MA level and 1500 words on BA level. However, the word limit can be exceeded by up to maximum 10% at both levels.

As an open book exam, all available sources could be used. The general rules on cheating and plagiarism nevertheless apply. Grades are awarded on a scale from A to F, where A is the best grade and F is a fail. Further information on the grading scale and marking criteria are found on the course website.

Teaching in this course has combined both live and pre-recorded lectures with case-based exercises and discussion. The seminars have been joint for MA and BA students, although two seminars have covered topics only described in the achievement requirements on MA level. Further information on the achievement requirements is available on the course website.

There exam papers for MA and BA students were separate, but similar. Below are some non-exhaustive guidelines for the assessment of the candidates' answers to the exam questions.

JUS5310 MA

The exam paper asks two separate questions (Q1 and Q2). Both questions should be answered. The grading should be based on the overall performance of the candidate. In principle, a passing grade may be awarded even in the event that a candidate's answer to one of the questions qualifies as a fail.

Q 1: Discuss whether a concentration between H-Post and Continental Post "would significantly impede effective competition (...) in particular as a result of the creation or strengthening of a dominant position" in the relevant market in Hispania and/or the relevant market in Germanica, ref. Article 2.3 of the EU Merger Regulation (139/2004).

Article 2 (3) of the EU Merger Regulation (EUMR) sets out the substantive standard for the Commission's intervention against anti-competitive concentrations. Pursuant to the wording of the provision "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 incompatible with the common market."

The candidates should interpret the required standard of competitive harm and be able to distinguish between alternative and more specific criteria for intervention. The wording explains that a significant impediment to effective competition (SIEC) in particular result from the creation or strengthening of a dominant position. The concept of market dominance is thus central to the meaning of SIEC. Paragraph 26 of the preamble of the EUMR also explain that a SIEC "generally results from the creation or strengthening of a dominant position". A dominant market position may be held by a single undertaking following a concentration (single dominance). A dominant position may also be held by several undertakings that are linked in such a way that they adopt a common market behaviour (collective dominance). Under certain circumstances, the notion of SIEC can also "be interpreted as extending, beyond the concept of dominance, [but] only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned.", ref. paragraph 25 of the preamble.

The candidates' concrete analyses should distinguish between the likely effects of the concentration in the respective markets in Hispania and Germanica.

In the relevant Hispanic market, H-Post held a market share of 50 %, G-Post's market share was 30 % and Continental Post had a market share of 20 %. A concentration between H-Post and Continental Post would create a new combined undertaking with a total market share of 70 %.

The most relevant of the alternative grounds for intervention in the Hispanic market is the risk that the concentration would create or strengthen a single dominant market position and thus result in a SIEC. The candidates should be able to account for the meaning of the notion of dominance by reference to the case law of the CJEU («a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers», e.g. case 27/76 United Brands and case T-87/05 EDP.)

High combined market shares (70 %), entry barriers (large investments in sophisticated logistics software as well as in large fleets of vehicles for parcel delivery) and barriers to expansion (if they were to substantially increase their capacity to collect and deliver even more parcels, significant investments in additional terminals and vehicles would be necessary), strongly indicate that the concentration would create or strengthen a single dominant market position and thus result in a SIEC.

In the relevant Germanic market, H-post's market share was 30 %, G-Post had 50 % and Continental Post 20 %. A concentration between H-Post and Continental Post would create a new combined undertaking with a total market share of 50 %.

The most relevant of the alternative grounds for intervention in the Hispanic market is the risk that the concentration would create or strengthen a collective dominant market position (together with G-Post) and thus result in a SIEC. The concept of collective dominance refers "to a situation in which effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, in particular because of correlative factors which exist between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and also of consumers.", ref. joined cases C-68/94 og C-30/95 Kali & Salz.

The remaining undertakings' high and symmetric market shares (50/50) and the entry barriers for potential competitors are factors that must be present for a concentration to create or strengthen a collective dominant position. However, there is also lack of market transparency (H-Post, G- Post and Continental Post respectively did not know the prices charged by the two other undertakings for their parcel delivery services.) and substantial barriers to expansion (if they were to substantially increase their capacity to collect and deliver even more parcels, significant investments in additional terminals and vehicles would be necessary). These facts strongly suggest that it is not possible to know or monitor whether the other undertaking is adhering to a common market policy and that there is not an effective threat of retaliation for deviation from a common market policy.

Accordingly, the conditions for a finding of a collective dominant market position appear unsatisfied.

Some students will potentially consider whether criteria for SIEC without dominance may be fulfilled. Students that are able to meaningfully discuss the vague guidance provided by paragraph 25 and 26 of the preamble of the EUMR, and perhaps refer to the appealed judgment in case T-399/16 CK Telecons, should be credited.

Q 2: Provided HC-Post holds a single dominant position in the relevant Hispanic market after the merger; discuss whether HC-Post's planned pricing practices infringe Article 102 TFEU.

Article 102 TFEU states that "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States."

The candidates should be able to identify, interpret and apply the conditions in Article 102 TFEU.

The application of the concept of "undertaking" and the notion of "dominant position" does not warrant elaborate discussions. A dominant position in a market covering an entire Member States is sufficient to be "a substantial part of" the internal market, ref. case 127/73 BRT.

With regard to the condition that trade between Member States must be effected, "It must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States", ref. case 56/65 STM. HC Post's planned pricing practices would clearly satisfy the jurisdictional criteria both due to the nature of the services provided (parcel delivery services from distance selling companies), the geographical scope of their practices (covering an entire Member State and price differentiation between Hispania and Germanica).

Most emphasis should thus be placed on the interpretation and application of the concept of "abuse".

The candidates should be able to present the general concept of abuse, as set out by the CJEU ("an objective concept relating to the behaviour of an undertaking in a dominant position 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 to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition", ref. case 85/76 Hoffman-La Roche). Furthermore, the candidates should distinguish between the pricing practices described in the exam paper.

Firstly, the exam paper describes a retroactive target rebate. In the past, such rebates have been considered abusive almost as such. More recent case law, however, envisage a more effects-based approach taking into account the particularities and market circumstances of each case, ref. case C-413/14 Intel.

Secondly, the exam paper describes a pricing practice whereby HC-Post planned to differentiate the price level between parcels delivered in Hispania and Germanica respectively. The practice can be analysed from different perspectives. The information that different price levels would make HC-Post's operations in Germanica unprofitable in the short run, and that HC-Post considered that it would weaken its competitor G-Post, should be analysed as a potential abuse in the form of predatory pricing, ref. case C-62/86 AKZO. Moreover, the practice of differentiating between price levels depending on delivery in different Member States is by itself a practice that could be harmful to the European single market. While the facts of the case do not closely mirror a particular decision by the European Commission or a judgment by the CJEU, it is clear that practices that impede the objective of creating a single market may qualify as abusive, ref. Whish/Bailey p. 805 etc.

JUR1310 BA

The exam paper asks two separate questions (Q1 and Q2). Both questions should be answered. The grading should be based on the overall performance of the candidate. In principle, a passing grade could be awarded even if a candidate's answer to one of the questions qualifies as a fail.

Q 1: Discuss (i) whether the new company HC-Post would have a dominant market position within the meaning of Article 102 TFEU in the relevant Hispanic market, and (ii) whether HC-Post and G-Post together would have a collective dominant market position within the meaning of Article 102 TFEU in the relevant Germanic market.

Article 102 TFEU states that "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States."

Subquestion (i) and (ii) concern the interpretation and application of the condition "one or more undertakings of a dominant position within the internal market or in a substantial part of it". It is not necessary for the candidates here to consider the concept of an "undertaking", an "abuse" or an effect on "trade between Member States".

The candidates should clarify that Article 102 TFEU can apply to both one undertaking holding a dominant position and to several undertakings holding a dominant position, ref. "one or more undertakings of a dominant position".

Subquestion (i) concerns the notion of single dominance in relation to the Hispanic market. The candidates should be able to account for the meaning of the notion of dominance by reference to the case law of the CJEU («a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers», e.g. case 27/76 United Brands).

HC-Post's high combined market shares (70 %), entry barriers (large investments in sophisticated logistics software as well as in large fleets of vehicles for parcel delivery) and barriers to expansion (if they were to substantially increase their capacity to collect and deliver even more parcels, significant investments in additional terminals and vehicles would be necessary), strongly indicate that the new company HC-Post would have a dominant market position within the meaning of Article 102 TFEU in the relevant Hispanic market.

Subquestion (ii) concerns the notion of collective dominance in relation to the Germanic market. The concept of collective dominance implies that "a dominant position may be held by two or more economic entities legally independent of each other, provided that from an economic point of view they present themselves or act together on a particular market as a collective entity." Moreover, "The existence of a collective dominant position may therefore flow from the nature and terms of an agreement, from the way in which it is implemented and, consequently, from the links or factors which give rise to a connection between undertakings which result from it. Nevertheless, the existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position; such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question.", ref. joined cases C-395/96, *Compagnie Maritime Belge*.

Here, HC-Post's and G-Post's symmetric market shares (50/50) and the entry barriers for potential competitors are factors that must be present for there to be a collective dominant position. However, there is also lack of market transparency (H-Post, G-Post and Continental Post respectively did not know the prices charged by the two other undertakings for their parcel delivery services.) and substantial barriers to expansion (if they were to substantially increase their capacity to collect and deliver even more parcels, significant investments in additional terminals and vehicles would be necessary). These facts strongly suggest that it is not possible to know or monitor whether the other undertaking is adhering to a common market policy and that there is not an effective threat of retaliation for deviation from a common market policy. Accordingly, the conditions for a finding of a collective dominant market position appear unsatisfied.

Q 2: Provided HC-Post holds a single dominant position in the relevant Hispanic market after the merger; discuss whether HC-Post's planned pricing practices are likely to infringe Article 102 TFEU.

The application of the concept of "undertaking" and the notion of "dominant position" does not require further discussions. A dominant position in a market covering an entire Member State is sufficient to be "a substantial part of" the internal market, ref. case 127/73 BRT.

With regard to the condition that trade between Member States must be effected, "It must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States", ref. case 56/65 STM. HC Post's planned pricing practices would clearly satisfy the jurisdictional criteria both due to the nature of the services provided (parcel delivery services from distance selling companies), the geographical scope of their practices (covering an entire Member State and price differentiation between Hispania and Germanica).

Most emphasis should thus be placed on the interpretation and application of the concept of "abuse".

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to the European single market. While the facts of the case do not closely mirror a particular decision by the European Commission or a judgment by the CJEU, it is clear that practices that impede the objective of creating a single market may qualify as abusive, ref. Whish/Bailey p. 805 etc.

Eirik Østerud and Erling Hjelmeng
