

Previous Exams for JUR1310 and JUR5310 - EC Competition Law

Autumn 2010

In 2008, the company Build-and-Go Ltd. (BU-GO) introduced a brand new type of building blocks for children, BU-GO blocks. The blocks could be mounted together with a click-system. The BU-GO blocks grew extremely popular among kids. BU-GO blocks were sold in play sets, many of which had themes from famous movies.

BU-GO's success was (in addition to the particular flexibility of the BU-GO blocks) due to several marketing strategies. Because of its immediate appeal to kids, BU-GO had offered play-corners with product display for free to shopping centers, on the condition that the BU-GO play corners were not used for competing products. Further, it used an aggressive strategy of paying bonuses to retailers for product display in stores ("The better the placement, the better the price"). The BU-GO financial director complained about this, as the sales marginally failed to cover the total costs of producing and marketing the blocks. Moreover, BU-GO offered all children up to the age of 12 free membership in the BU-GO Club. The membership worked so that upon the purchase of 5 BU-GO play sets of a minimum value within one year, the child would receive every second set for free the next year.

In order to ensure the availability of BU-GO blocks, BU-GO introduced a standard clause in its distribution agreements, requiring the distributors to carry the full range of BU-GO products ("full-line forcing"). For each country, it also issued a price list, indicating a price-range (minimum and maximum) for each product. This list was actually adhered to by all dealers.

BU-GO's competitors were unhappy about the success of the company, as they found BU-GO's business methods "unfair" and "aggressive". A complaint was lodged with the European Commission, which initiated proceedings and sent a Statement of Objections ("SO") to BU-GO, alleging both abuse of dominance (exclusive arrangements with regard to placement of play corners, bonuses for product-display, loyalty rebates and predatory pricing) as well as infringements of Article 101 (resale price maintenance, exclusive agreements and full-line forcing/tying). The European Commission also argued that the agreements on preferential product placement within stores were contrary to Article 101.

In its SO, the Commission had defined a separate relevant market for mountable building blocks in plastic, a market in which BU-GO's market share was close to 80%. BU-GO argued that the relevant market should be defined as products requested by children for their leisure time. This approach was referred to as the concept of the "children's wish list". BU-GO stated that the appropriate criterion for the market definition should be the children entertainment character of a product, and cited as examples the facts that sport shoes, CD-ROM or computer games or Hi-fi equipment are perceived by children as perfect substitutes for "traditional" toys. Consequently, BU-GO argued that, in any case, the relevant market comprised baby and toddlers' toys, puppets, cuddly toys, play animals, construction toys, board games, puzzles, assembly kits, outdoor play items, look & listen toys and

hobby articles (the so-called "classic toys") and electronic toys such as computer games and video games. In such a general market for kids' leisure products, BUGO's market share was 7 %.

Further, BU-GO argued that there was no intention of harming competitors, but that the measures were necessary for introducing a new product on the market. As regards Article 101, BU-GO argued that all measures were unilateral acts and that the provision did not apply.

Question 1: Discuss whether BU-GO has a dominant position within the meaning of Article 102 TFEU.

Question 2: Assuming that BU-GO blocks form a distinct relevant market; discuss whether BU-GO has infringed Article 102.

Question 3: Assuming that the market must be defined as toys in general (and consequently that BU-GO's market share is below 10 %), discuss whether the distribution agreements infringe Article 101 TFEU.

Please answer all questions.

Enclosures:

- I. Excerpts from the TFEU
- II. Commission Notice on the definition of the relevant market
- III. Regulation 330/2010