

Exam guidelines JUS5310 MA and JUR1310 BA EU Competition Law, autumn 2023

The examination period in EU Competition Law was 24 hours on both MA and BA level autumn 2023, from December 5 at 10:00 AM to December 6 at 10:00 AM Norwegian time. The examination was digital (Inspira) and home-based. The word limit was 3000 words on master's level and 2000 words on bachelor's level.

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 and JUR1310 BA

The exam paper asks four separate main questions (Q3 consists of subquestion A and B). All 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.

Question 1 (Both MA and BA): Discuss whether the agreement on pooling of resources may run counter to TFEU Article 101.

According to Article 101 (1) TFEU: "The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market"

The candidates should be able to identify, interpret and apply the conditions in Article 101 (1) TFEU.

It is clear that Mar-Lines and Coast-Link are separate "undertakings" and that there was an "agreement" to pool their respective fleets of vessels.

With regard to the condition that trade between Member States must be affected, "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. The pooling agreement would clearly satisfy the jurisdictional criteria because of the nature of the services provided (offshore supply services) and the information provided that a share of the market was supplied by various companies from adjacent EU Member States.

Most emphasis should thus be placed on discussing whether the agreement would have an anti-competitive "object or effect".

The candidates should be able to interpret the concept of anti-competitive "object", with reference to the case law of the CJEU. The number of judgments on the general concept of "object" infringements is substantial. The candidates thus have several judgments to choose from. For

example, the CJEU in case C-67/13, *Cartes Bancaires*, held that “the General Court erred in finding (...), that the concept of restriction of competition by ‘object’ must not be interpreted ‘restrictively’. The concept of restriction of competition ‘by object’ can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects” (para 58). The description of the pooling agreement, to optimize both companies' operations and use of vessels, does not have the characteristics of an agreement with anti-competitive “object”.

Consequently, the competitive “effects” of the agreement should be addressed. According to the CJEU, “the consequences of the agreement should (...) be considered and for it to be caught by the prohibition it is then necessary to find that those factors are present which show that competition has in fact been [restricted] to an appreciable extent.” (Case 56/65, *STM*, p. 249) The candidates should discuss how the pooling agreement, for example, could reduce the undertakings' incentives to compete due to the mechanism of hiring vessels and how the inherent information exchange could reduce potential competition from the other party. The exam paper also provides information on market shares relevant to an assessment of whether the undertakings would have market power to restrict competition.

The candidates should also address the exemption rule in Article 101 (3) TFEU. Article 101 (3) TFEU sets out an exemption rule. The candidates should be able to identify the conditions for an exemption and relate the discussion to the benefits of the pooling agreement described in the case.

Question 2 (Both MA and BA): Discuss whether the agreement not to contract with customers of the other company may run counter to TFEU Article 101.

Under this question, the candidates should easily be able to identify this clause as a hard-infringement, as this resembles a customer sharing agreement. By virtue of the clause, customers having contracted with one of the companies are shielded from competition from the other company. There is no obvious cause for the clause other than to restrict competition, so this could be regarded as having an anti-competitive object.

Question 3 A (MA only): Discuss whether the formation of the Joint Venture constitutes a "concentration" pursuant to Article 3 of the EU Merger Regulation (you do not need to discuss turnover thresholds in Article 1 of the EU Merger Regulation).

Article 3 EUMR defines the concept of “concentration”. Pursuant to article 3 (4) “The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b)”. It follows that in order to qualify as a “concentration”, the created joint venture must be jointly controlled and also be operationally autonomous (fully functional). The candidates should be able to identify, interpret and apply these two conditions to the facts of the case.

Question 3 B (MA only): Discuss briefly whether the formation of "Mar-Link" amounts to a Significant Impediment of Effective Competition according to Article 2 of the EU Merger Regulation.

Proceeding on the assumption that Mar-Link constitutes a concentration, the candidates are required to apply the SIEC-standard. The candidates have scarce information about market characteristics and competition between the two parent companies. However, they should at least point to the fact that the parent companies held 45 and 20 % of the general market, so that the combined market share will be 65 % - exceeding the threshold for dominance. The JV will focus its

business on the wind mill segment of the market, but the candidates do not have sufficient information to conclude whether this amounts to a separate relevant market. The candidates may also make use of the factors mentioned in the Commission's horizontal guidelines.

The candidates can also discuss the additional restriction committed to by the parent companies, e.g. that they will not compete with Mar-Link, should be scrutinized under Article 2(4) of the EUMR.

Question 4 (Both MA and BA): Please provide advice to Mrs. Goodfellow on how to proceed with the case.

The question clearly hints at the opportunity to apply for leniency. The candidates are requested to provide guidance, and should briefly describe the procedure. Further, the candidates should distinguish between different potential infringements of EU Competition law. Leniency is only available for cartel infringements. The only potential cartel infringement in the case is the agreement not to compete for customers of the other undertaking. The advice should map the potential infringements where leniency is available, and as well provide some guidance on how to approach the Commission.

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