Course code: JUR1310_1
Word count: 2498
Date: 2 December 2020

Q 1 (MA and BA students): Discuss whether the five manufactorers subscribing to the Spareparts365 and/or Autoinfo infringe Article 101 TFEU

Article 101 regulates cooperation between undertakings primarily at a horizontal level. Its first paragraph prohibits a series of collusive behaviors between undertakings that may have a detrimental effect on the trade between EU member states. The conducts included are decisions by associations of undertaking, agreement between undertakings, and concerted practices. In addition, there is a requirement that the conducts may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the internal market.

In analyzing a measure under Article 101, a threshold issue is whether the entities involved are undertakings. In our case, this is so because the companies are entities "engaged in an economic activity",[1] i.e. the manufacturing and wholesale of automobile spare parts. Moreover, they are independent undertakings engaged in competition with one another.

Further, we must analyze whether the conducts concerned fall under the prohibited types of cooperation. In this case there is no association of undertakings involved and there cannot be said to be an agreement between undertakings, as there is no "concurrence of will" faithfully expressed in any form. We will therefore examine whether the conduct of the manufacturers can be considered to constitute a concerted practice.

To better understand this concept, we can start by saying that the European Court of Justice (ECJ) has said that concerted practices were included in Article 101 to prohibit "a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, *knowingly* substitutes practical cooperation between them for the risks of competition",[2] thus seeking to extend its scope of application beyond mere agreements. Moreover, no actual explicit plan between the undertakings concerned is strictly necessary. Rather, it covers "any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market".[3] Thus, the legal test in establishing the existence of a concerted practice requires there to be a sort of contact between separate undertakings, which *knowingly* reach a mental consensus whereby practical cooperation substitutes competition. In addition, the primary subject matter with regard to concerted practices is usually the exchange of information, as explained by the *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (the Commission guidelines).[4]

In the case at hand, manufacturers have the possibility to register and announce future prices and future price changes in the Spareparts365 database without binding themselves to these offers. The prices can be changed or adjusted at any time. Moreover, all five manufacturers of spare parts have subscribed to Spareparts365, gaining access to this information. Taken together, these elements indicate an indirect contact between undertakings with the aim of exchanging information on intended future pricing in the market. The key issue here is whether this exchange of information

---

[1] Case 41/90 *Höfner and Elsner v Macrotron GmbH* [1991] ECR I-1979, para 21.
[2] Case 48/69, *Imperial Chemical Industries Ltd. v Commission of the European Communities* [1972], para 64 (emphasis added). See also Case 49/92, *Commission of the European Communities v Anic Partecipazioni SpA* [1999] ECR I-04125, para 118.
[3] Case 40/73 *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities* [1975] ECR 01663, para 64.
[4] Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11 p. 1–72.

"reduces strategic uncertainty in the market thereby facilitating collusion". [5] Thus, it is the exchange of strategic information that amounts to a concerted practice – such as intended pricing – "because it reduces the independence of competitors' conduct on the market and diminishes their incentives to compete."[6]

Additionally, there must be a "relationship of cause and effect" between the concerted practice and the undertakings' subsequent conduct on the market,[7] which can be presumed when contact between undertakings has been established.[8] Thus, according to the analysis so far, the manufacturers' conduct of subscribing to Spareparts365 and exchanging information on intended pricing can be said to constitute a concerted practice that is presumed to affect their conduct on the market.

As regards the possibility of affecting trade, the threshold is low and does not require much analysis. The ECJ has established that "[i] 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".[9] In this case, the existence of likelihood is particularly strong since all spare parts manufacturers in the market are involved.

Further, the next part of the analysis of an infringement under Article 101(1) requires an examination of whether the cooperation has as its *object* or *effect* the restriction of competition. In this regard, the common analytical structure requires first to assess whether the cooperation has an anticompetitive objective, and then, if this is not the case, to assess whether the agreement has concrete economic effects.[10]

In this sense, a restriction of competition 'by object' is usually considered to be "injurious to the proper functioning of normal competition" by its very nature.[11] Thus, in a case where exchange of information has occurred, the Commission will have to assess whether such exchange could, by its very nature, restrict competition. In this regard, exchange of information on intended future prices is considered to be particularly likely to lead to a collusive outcome. As explained by the Commission guidelines, "[i]nforming each other about such intentions may allow competitors to arrive at a common higher price level without incurring the risk of losing market share or triggering a price war during the period of adjustment to new prices".[12] Applied to the case at hand, the fact that the manufacturers can revise their announced future prices proves that they are not fully committed to actually selling their products at such prices. Thus, it can be said that the kind of coordination at hand is likely to lead to price fixing – one of the three classical "by object" restrictions – and therefore to constitute a coordinated practice in breach of Article 101(1).

Having established that the manufacturers' conduct is likely to constitute a concerted practice with an anti-competitive object, the next step in assessing whether there has been a breach of Article 101 is to "determine the pro-competitive benefits produced by that [concerted practice] and to assess whether these pro-competitive effects outweigh the anti-competitive effects". [13] This has to be done within the framework laid down by Article 101 paragraph 3. However, it is the Commission's policy

[5] *Ibid* para 61.
[6] *Ibid*.
[7] Case C-199/92 P *Hüls AG v Commission of the European Communities* [1999] ECR I-04287, para 161.
[8] *Ibid* para 162.
[9] Case 56/65 Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.) [1966], p. 249.
[10] Case C-501/06, *GlaxoSmithKline v Commission* [2009] ECR I-09291, para 55.
[11] Case C-8/08, T-*Mobile Netherlands* [2009], para 29.
[12] Commission guidelines, para 73.
[13] *Ibid* para 11.

to consider that restrictions by object are unlikely to fulfill the conditions of Article 101(3). Therefore, I find it unnecessary to examine whether the conduct falls under the exception of Article 101(3).

Q 3 (MA and BA students): Discuss whether the refusal to let Wheeler make entries in Spareparts365 infringes Article 101 and/or 102 TFEU.

In discussing whether the refusal to let Wheeler make entries in Spareparts365 infringes Article 101 and/or 102 TFEU, we must start by pointing out that Article 101 applies to coordination between *several* independen*t* undertakings. Thus, in principle, this requirement is not met, as the decision has been taken by the board of directors of Newco LLC, an independent company now running Spareparts365. However, an argument could be made that, in cases of joint control such as the case at hand, a decision by the subsidiary company could be regarded as an agreement between the parent companies. This is specially the case if the parent companies simultaneously compete in the same market. As will be explained below, this argument is particularly strong in the present case.

If the conduct were rather to be assess under Article 102, several conditions would have to be met, among which the undertaking concerned, Newco LLC, would need to hold a dominant position. In this regard, it could be argued that Newco LLC holds a dominant position which it has abused by refusing Wheeler to make entries in Spareparts 365. However, an undertaking is considered to hold a dominant position when it enjoys a "position of economic strength" that "enables it to prevent effective competition being maintained *on the relevant market*".[14] Thus, in order to establish a position of dominance and thus the application of Article 102, it is first necessary to define the "relevant market" where Newco LLC operates.

In this regard, it is clear from the facts that the market in which Newco LLC operates is a different market from that in which Wheeler operates. Newco LLC operates in the market of information services of cars and motor vehicles, whereas Newco LLC operates in the wholesale of spare parts. Since it is held that Spareparts365 is the *preferred* database for information on spare parts, we assume that there are other companies in direct competition with Newco LLC to provide customers with information on spare parts for cars. Since Newco LLC has not used its market power to restrict competition *in the market of information of spare parts* (the relevant market), article 102 cannot not be applied. I find it therefore not necessary to continue an analysis under Article 102, and will rather focus on Article 101.

In this regard, we have already seen that the types of cooperation covered by Article 101 are decisions by associations of undertaking, agreement between undertakings, and concerted practices. As there is no association of undertakings, the conduct must either be an agreement between undertakings or a concerted practice. Since there are elements pointing to the existence of a *joint intention* to exclude Wheeler from the market of spare parts, the relevant type to analyze would be the existence of an agreement between Widgets and Gadgets.

In this regard, the General Court has established that the concept of agreement "centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention".[15] Thus, it is sufficient that there is a "concurrence of wills on the principle of a restriction of competition".[16] An argument could thus be made that an agreement between Widgets and Gadgets can be inferred from Newco LLC's decision to refuse granting Wheeler access to making entries in the Spareparts365

[14] Case 27/76, *United Brands Company v Commission of the European Communities* [1978] ECR 00207, para 65.
[15] Case T-41/96 *Bayer v Commission* [2000] ECR II-03383, para 69.
[16] Case T-240/07 *Heineken Nederland v Commission* [2011] ECR II-03355 para 45.

database, as this would exclude Wheeler from the Drivinian spare parts market. The existence of an agreement is even more likely since Widget and Newco exert equal control over Newco LLC's decision making.

The Commission has stated that "[a]n exclusive exchange of information can lead to anti-competitive foreclosure on the same market where the exchange takes place", which "can occur when the exchange of commercially sensitive information places *unaffiliated competitors* at a significant competitive disadvantage as compared to the companies affiliated within the exchange system".[17] Thus, the practical effect of excluding Wheeler from making entries to Spareparts365 is to place it in such a disadvantaged position that it would not be able to enter the Drivinian spare parts market.

Further, as was seen above, a second part of the analysis of an infringement under Article 101(1) requires an examination of whether the agreement has as its object or effect the restriction of competition. A restriction of competition "by object" is usually considered to be "injurious to the proper functioning of normal competition" by its very nature.[18] In this case, anti-competitive foreclosure can clearly be considered to be injurious to the proper functioning of normal competition by its very nature. Moreover, Newco LLC's decision of excluding Wheeler from acceding its services cannot have any explanation other than the commercial interests of the parent companies of not engaging in competition with Wheelers, which is also an indication of a restriction by object.[19]

As with the first question, I do not find it necessary to examine the measure at hand under Article 101(3), as it is the Commission's policy that restrictions by object do not fulfill the conditions of Article 101(3).

Q 4 (MA and BA students): Advice the Drivinian Competition Authority on its competence under Article 11.6 of regulation 1/2003.

Article 11.6 of Regulation 1/2003 states that the initiation by the Commission of proceedings for the adoption of a decision under Chapter III of the same Regulation shall relieve the competition authorities of the Member States of their competence to apply Articles 101 and 102. It further states that, if a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority (NCA).

Guidance on how this article shall be applied in practice can be found in the *Notice on cooperation within the network of competition authorities,* paragraphs 50-57,[20] which distinguishes between two different situations: (1) the Commission is the first competition authority to initiate proceedings; and (2) one or more NCAs are the first to initiate proceedings and have notified the Commission and the European Competition Network, as required by Article 11(3) of Regulation 1/2003.

In the latter case, a re-allocation period of two months will start to run, under which the Commission can initiate proceedings, relieving the competition authorities of the Member States of their competence (prior consultations with the authorities concerned). Thus, during this period, the Commission can halt the proceedings and take the case over. However, *after* this period, the Commission can in principle only do so in certain situations indicated in paragraph 54 of the Notice. One of these situations imply that the NCA concerned *does not object*, meaning that, in our case, the Drivinian Competition Authority could object if the Commission intends to apply Article 11(6) *after*

[17] Commission guidelines, para 70 (emphasis added).
[18] Case C-8/08, T-Mobile Netherlands, para 29
[19] See C-307/18 *Generics (UK) and Others* [2020], para 90.
[20] Commission Notice on cooperation within the Network of Competition Authorities OJ [2003] C101/43 p. 43–53.

the re-allocation period is over. For these reasons, the time when the Commission intends to initiate proceedings is the deciding factor as to whether the Drivinian Competition Authority can object.