UiO : Faculty of Law
University of Oslo

Course: JUS5310

Candidate number: 643468

Number of words: 2694

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Question 1

In order for article 101(1) of the Treaty on the Functioning of the European Union (TFEU) to be found infringed a list of certain conditions must be satisfied. Firstly, according to the wording of the article, a former cooperation between two or more independent undertakings must have taken place. Concerted practice is one of the forms that the cooperation may take.

According to the statement of the European Court of Justice (ECJ) in the joined cases 40/73 etc., Suiker Unie, "*each economic operator must determine independently the policy which he intends to adopt on the common market*" (para 173). The notion of a concerted practice is defined by the ECJ in case 48/69, ICI, where it states that: "*concerted practice is a form of coordination between undertakings which, without having reached the stage of where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition*" (para 64).

In order for a concerted practice to be established a series of legal requirements must be fulfilled. First and foremost, direct or indirect contact between separate competing undertakings is considered a fundamental element. According to the quotation derived from the joined cases 40/73 etc., Suiker Unie, "*the requirement of independence […] strictly precludes any direct or indirect contact between 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*" (para 174). The aforementioned quote indicates that the notion of concerted practice primarily applies to information exchange between competing undertakings. So, in case that competing undertakings reveal to each other their intended future conduct on the market and a causal influence is observed, that practice may qualify as contact within the meaning of concerted practice.

The causation between the contact and the subsequent conduct adopted by the concerned undertakings is another legal requirement (*See Anic, case C-49/92, para 118*). In general, a contact between separate undertakings, typically in the form of exchange of information regarding their future market behavior, creates a rebuttable presumption of a subsequent conduct and a causal effect (*See Huls, case C-199/92, para 162)*.

In the given exercise, all five manufacturers of spare parts subscribed to the database in question and, as a result, they gained access to all the information announced in Spareparts365 by their competitors. A continuous interaction and an indirect contact with one another concerning in particular future prices and future price changes is evident. It seems that the strategic uncertainty to the operation of the relevant market will be highly reduced due to the exchange of information between the manufacturers via the use of the Spareparts365 database (*See Guidelines on Horizontal Cooperation Agreements*). That may constitute a presumption of concerted practice, which is explicitly prohibited under article 101(1) TFEU. The fact that the future prices registered in Spareparts365 are not binding offers and can be changed or adopted anytime is a strong indication of how the five manufacturers will interact and collude in an anticompetitive manner.

Moreover, the particular cooperation seems to be a restriction of competition by effect, as article 101(1) requires. The subscription of the manufacturers to the Spareparts365 may affect competition both inter partes and on the relevant market. Given that all manufacturers are active on the same relevant market, which is the spare parts production, they are actual competitors and, thus, such a cooperation may provoke a reduction of competition between them. Additionally, the concerted practice has the potential to reduce competition on the relevant market, since the prices of the spare parts offered in the market are likely to be altered in accordance to the future conduct announced by the competing undertakings. Lastly, the cooperation is found to have the potential of affecting trade between Member States, given that it covers the whole territory of a Member State, Drivinia.

In regard to the liability held by Autoinfo under article 101(1) TFEU, one could claim that the company operated as a third-party facilitator or organizer of the concerted practice in question. In line to the judgements in case T-99/04, AC Treuhand I (para 122), and case C-194/14, AC Treuhand II (para 35), even if a party is not active on the same relevant market in which the participants of a concerted practice operate, it can be held liable for facilitating the operation of an anticompetitive agreement or concerted practice on the market. In our case, Autoinfro is the undertaking offering the Spareparts365 service, which constitutes the essential means of communication between the manufacturers of spare parts active on the market. Hence, Autoinfo is considered the facilitator of the concerted practice carried out by the manufacturers and so it does violate article 101(1) TFEU.

It should be noted that since the four cumulative conditions articulated in article 101(3) TFEU are not satisfied in our case, the exemption rule does not apply and, therefore, the five manufacturers subscribing to the Spareparts365 and Autoinfo infringe Article 101 TFEU.

Question 2

The notion of a concentration is articulated in article 3 of the EU Merger Regulation (EUMR) and constitutes a legal requirement for the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings to be applicable. According to the explanation that the General Court has given on the case T-411/07, Aer Lingus, "*concentrations have the following characteristics in common: where before the operation there were two distinct undertakings for a given economic activity, there will only be one after it*". Basically, a concentration is a consolidation of previously independent undertakings so that after the mutual consent of the two independent undertakings has taken place there will only be one undertaking.

Pursuant to the definition provided in article 3 of the EUMR, there are three categories of operations that may qualify as a concentration: mergers of undertakings, acquisitions of control by undertakings of previously independent undertakings and creation of full function joint ventures. If there is no concentration with an EU dimension, then the EUMR does not apply.

According to the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01), "*the fact that a joint venture may be a full-function undertaking and therefore economically autonomous from an operational viewpoint does not mean that it enjoys autonomy as regards the adoption of its strategic decisions. It is therefore sufficient for the criterion of full-functionality if the joint venture is autonomous in operational respect*" (para 93).

In this particular case, two separate undertakings, namely Widgets and Gadgets, have established the new full function joint venture, Newco LLC. Regardless of the high percentages of shares and voting rights that both Widgets and Gadgets own, this new legal entity is formed to operate autonomously a business on the market and generally hold all the functions of an autonomous economic entity, as article 3.4 EUMR requires. Newco LLC seems fully functional as it maintains its own market presence and holds sufficient independence from its controlling undertakings. It hasn't just taken

over a specific function of the parent companies' business activities and has a management dedicated to its day-to-day operations (See Commission's jurisdictional notice, para 95).

Further, the sale and purchase agreement signed by Newco LLC and Autoinfo needs to be examined. The acquisition and transference of the Spareparts365 database may qualify as an acquisition of control over assets of another undertaking. Based on articles 3.1(b) and 3.2. EUMR, the concept of control entails the possibility of exercising decisive influence on a previously separate undertaking. In other words, as stated in the case T-282/02, Cementbouw v Commission, the notion of control refers to "*the possibility to determine the strategic commercial behavior of an undertaking*". This possibility of exercising decisive influence might be a result of acquisition of assets.

According to the Jurisdictional Notice of the EU Commission, in order for an acquisition of assets to be considered an acquisition of control of a part of an undertaking, "*assets must qualify as business with a market presence, to which turnover can be clearly attributed*" (para 24). In our case, it is evident that the so-called Spareparts365 database and its accompanying subscriptions qualify as a factual business that does create a turnover on the market.

It is, also, mentioned that none of Autoinfo's employees or management were transferred to Newco LLC, but were to be seconded from the parent companies. Pursuant to paragraph 94 of the Jurisdictional Notice of the EU Commission, "*the personnel of the joint venture do not necessarily need to be employed by the joint venture itself. The secondment of personnel by the parent companies may also be sufficient if this is done either only for a start-up period or if the joint venture deals with the parent companies in the same way as with third parties. The latter case requires that the joint venture […] the joint venture is also free to recruit its own employees or to obtain staff via third parties*". This indicates that the secondment of employees and management from the parent companies to Newco LLC is in accordance to the law and does not influence Newco's functional independence.

Question 3

According to article 102 TFEU, certain conditions must be met in order for the prohibition against abuse of dominance to apply. First of all, article 102 applies only to undertakings, meaning "*every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed*" (*see case 41/90, Hofner*

and Elsner v Macrotron, ECJ, para 21). All types of companies are included. In our case, Newco LLC satisfies this functional approach that the ECJ has adopted and its activity consists of producing spare parts and offering the Sparepart365's services.

Secondly, the undertaking must hold a dominant position on the relevant market. In this context, it is a necessary precondition that the relevant market is defined (*see case T-61/99, Adriatica di Navigazione v Commission, General Court, para 27*). The concept of a relevant market has a product dimension and a geographical dimension. In our case, the relevant product market in which Newco LLC seems to operate is the production of spare parts as well as the offer of market-intelligence and analytics in the car and motor vehicle sector. The relevant geographical market is located in Drivinia, a Member State of the European Union.

Moving on to the examination of dominance, one should bear in mind the definition provided by the ECJ in the United Brands v Commision case 27/76, where it is clarified that a dominant position "*is a position of economic strength which enables the dominant undertaking to prevent effective competition on the relevant market […]".* As it is stated in the exercise, Spareparts365 had become the mostly preferred database for information on spare parts and, thus, it would be impossible for Wheeler to enter the relevant market without access to the particular database. This implies that Newco LLC "may have an appreciable influence on the conditions under which that competition will develop" (*see case 85/76, Hoffman LaRoche v Commission, ECJ*) and so the company does hold a dominant market position.

In addition, we must distinguish between abusive conduct and legitimate competition by a dominant undertaking. Given that the abuse of dominance (and not the holding of a dominant position) is unlawful, there is a need to inspect whether the refusal to let Wheeler make entries in Spareparts365 constitutes an abusive/anticompetitive conduct. In article 102 TFEU, a non-exhaustive list of various types of potentially abusive conduct is articulated. A refusal to deal is a non-pricing potentially abusive exclusionary practice (article 102 (b) TFEU). A dominant undertaking that refuses to deal may exclude competitors from the market and that may qualify as an exclusionary form of abuse. This strategy applies to undertakings that are vertically integrated, which means that they are present on both an upstream and a downstream market (*see Commercial Solvents v Commission, joined cases 6 and 7-73, para 25, ECJ*). The accused undertaking, namely Newco LLC, seems to have obtained

a dominant position on the upstream level, meaning the offer of the Spareparts365 on the market.

Moreover, a three-step test has been described in case C-7/97, Bronner v Mediaprint, and should, also, be conducted in our case. The refusal concerns Wheeler's access to a database which is considered indispensable for a competing undertaking to do business on the Drivinian spare parts market. Hence, the adoption of such a practice would lead to the elimination of effective competition on the downstream market. Since the Newco's refusal to deal will prevent the Chinese spare part manufacturer from publishing its prices in the relevant database, a barrier to entry in the Drivinian spare parts market will be established. The third level of the test concerns whether the refusal is objectively justified by other procompetitive circumstances. In our case, it is noted that the relevant Drivinian market had faced aggressive competition form the Chinese competitor. A possible justification of the aforementioned refusal to deal could be the protection of the dominant undertaking's commercial interests that have been attacked or challenged by a competitor (*See case 27/76, United Brands v Commission, ECJ*). However, the principle of proportionality of such a justification does not seem to be fulfilled.

Lastly, article 102 TFEU requires that the conduct may affect trade between Member States. Here, the practice in question concerns undertakings from different Member States, and so a refusal to deal may potentially affect trade between Member States (*see case 56/65, STM, ECJ*).

An infringement of article 101 TFEU is not apparent in terms of the refusal to let Wheeler make entries in Spareparts365.

Question 4

Article 11.6 of Regulation No 1/2003 concerns the allocation of cases between the EU Commission and the National Competition Authorities (NCAs). According to it, "*if the Commission initiates proceedings for the adoption of a decision under Chapter III, then it shall relieve the competition authorities of the Member States of their competence to apply Articles 101 and 102 of the Treaty. 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*".

There is a limited number of situations in which article 11(6) is likely to be used by the Commission. A further explanation is provided in the Commission Notice on

cooperation within the Network of Competition Authorities (2004/C 101/03), where the jurisdictional principles for the allocation of cases within the European Competition Network (ECN) are articulated. Even if a NCA has initiated an investigation, the Commission is entitled under certain circumstances to implement an unexpected inspection concerning the same market conduct.

According to paragraph 18 of the Commission Notice, "*where case re-allocation issues arise, they should be resolved swiftly, normally within a period of two months, starting from the date of the first information sent to the network*". The reallocation of the case after this period of time may only occur where the given facts about the case change materially during the course of the proceedings (see *Commission Notice, para 19*). Paragraph 54 of the Commission Notice states that after the two months allocation phase, the Commission can apply Article 11(6) only if certain situations arise. One of these instances is the non-objection of the NCAs concerned.

In line with the above provisions, the Drivinian Competition Authority is entitled to object against the sudden initiation of proceedings held by the EU Commission. Pursuant to paragraphs 55 and 56, the EU Commission needs to explain in a written form the reasons why it intends to apply article 11(6), and the NCA has the possibility of requesting a meeting with the Advisory Committee on the matter before the Commission initiates proceedings.

In our case, the re-allocation phase has expired and a Statement of Objection has already been issued. In addition, none of the known incidents about the case seem to have been altered during the proceedings. Hence, the Drivinian Competition Authority is still competent on the course of the case and has the right to object towards the Commission's initiation of proceedings.

Reference List

Treaties and Legislation

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance)

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings

Treaty on the Functioning of the European Union (TFEU)

Notices and Guidelines

Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01)

Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03)

Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01

Cases

AC-Treuhand v Commission I, T-99/04, 2008

AC-Treuhand v Commission II, C-194/14, 2015

Adriatica di Navigazione v Commission, T-61/99, General Court, 2003

Aer Lingus Group v Commission, T-411/07, General Court, 2010

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Oscar Bronner GmbH&Co. KG v Mediaprint, C-7/97, ECJ, 1998

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United Brands v Commission, C-27/76, ECJ, 1978