

## Competition and Market Law, 23.11.2022

### The Case (30 p.)

All materials are allowed (an open book exam).

The total length of your answer is limited to 4680 characters (without counting spaces). Please note that keeping your answer within the allowed length is your responsibility. The system will not automatically prevent you from writing a longer answer. The evaluators will not read the part of your answer that exceeds the upper limit. Please note that you will have to plan your text well so that you can write a coherent and concise answer.

The company Pero produces certain kinds of construction chemicals. Pero has a 52% market share in the market of selling these chemicals to end-users in the Nordic countries and in Estonia.

The trade association InChe is an association of the producers of industrial chemicals. In the association, the members network and, among other things, plan lobbying regarding improving legislation proposals that touch the entire field of business. Pero is a member of InChe. Additionally, four other major companies that are active in the production of construction chemicals in the Nordic countries and in Estonia belong to the same association. In addition to these companies, two other major companies operating in the same field exist: these two do not belong to the association but they operate in the same countries.

Pero and the association InChe want to establish a joint venture. The joint venture would have, as InChe reports, both commercial and 'ideological' goals. You are an external lawyer contracted by InChe, and you are asked to assess the legal implications of the joint venture project and any plans associated with it. Please respond to the questions and explanations presented to you by InChe, basing your answer on EU competition law:

- The joint venture C-Environ would research efficient ways to minimize the environmental impact that results from the production and warehousing of three chemicals. An individual company operating in the field of chemicals could not easily invest as much time and resources in this kind of research, but C-Environ will be able to do it.
- The results of this research and development work would be distributed without limitations to Pero and to the other member companies of InChe. They could freely utilise the information they receive from the joint venture in their own business.
- If the results of the research and development work were such that it is possible to commercialize them, for example by selling the results to external operators, C-

Environ could provide the results to outsiders, for payment, if the shareholders of C-Environ consider this appropriate.

- One goal of the joint venture project would be that C-Environ would be outside the scope of applicability of EU competition law.
- One goal of the joint venture project would be to force those market operators that do not belong to InChe to exit the market. The idea would be that this would happen in an indirect way, as Pero and other members of InChe - that benefit from the results of the joint venture - would just be more efficient and could also advertise themselves as environment-friendly companies. The buyers would choose the providers of lower prices, and those suppliers that claim to be environment-friendly, and these would be the companies that benefit from the results of the joint venture.
- One goal would be that the members of InChe could, in the long run, clearly reduce their production and warehousing costs. The association InChe would recommend that the member companies make sure that the lower costs translate into lower prices.
- The joint venture C-Environ would also research the possibilities to reduce the utilization of child labor in those foreign companies that supply raw materials to produce construction chemicals.
- Pero would own 30% of the shares in C-Environ.
- In your opinion, could InChe, C-Environ or both be found to infringe EU competition law?
- If C-Environ were found to infringe EU competition law, would this be on the responsibility of Pero, since Pero is the biggest individual shareholder in the joint venture?

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### **Målet (30 p.)**

Allt material är tillåtet ("open book exam"-tentamen).

Helhetslängden på ditt svar är begränsat till 4680 tecken (utan att räkna med mellanslag). Notera att det är på ditt ansvar att hålla dig inom ramarna för den tillåtna längden. Systemet hindrar dig inte automatiskt från att skriva ett svar som är längre. Den som bedömer läser inte den delen av ditt svar som överskrider den tillåtna längden. Notera att du är tvungen att planera din text väl så att du kan skriva ett sammanhängande och koncist svar.

Företaget Pero producerar en viss sorts byggnadskemikalier. Pero har en marknadsandel på 52% inom marknaden för försäljningen av dessa kemikalier till slutanvändare i de nordiska länderna och i Estland.

Branschorganisationen InChe är en sammanslutning av företag som producerar industriella kemikalier. Inom organisationen nätverkar medlemmarna och bland annat förbereder

lobbyverksamhet för att ta fram regleringsförslag som berör hela branschen. Pero är en medlem av InChe-organisationen. Till organisationen hör även fyra andra större företag som verkar i norden och Estland som producerar byggnadskemikalier. Utöver dessa företag finns två andra större företag som är verksamma inom samma område: dessa två tillhör inte organisationen men de är verksamma i samma länder.

Pero och branschorganisationen InChe vill grunda ett samriskföretag (joint venture) som enligt InChe har både kommersiella och "ideologiska" mål. Du är en extern jurist som InChe har anställt och blir ombedd att bedöma samriskföretag-projektets rättsliga verkningar samt eventuella planer som kan tillhöra. Med stöd av EU:s konkurrensregler vänligen svara på de frågor och den redogörelse som InChe har presenterat för dig:

- Samriskföretaget C-Environ skulle undersöka effektiva sätt att minimera miljökonsekvenser i samband med produktion och lagring av tre kemikalier. Ett enskilt företag inom kemikaliebranschen skulle inte lika lätt kunna satsa lika mycket tid och resurser på en sådan här undersökning som C-Environ kommer att kunna göra.
- Resultaten av forsknings- och utvecklingsarbetet skulle utan begränsningar delas ut till Pero och de andra medlemsföretagen inom InChe. De skulle inom sin egen affärsverksamhet fritt få dra nytta av den information som samriskföretaget erbjuder.
- Om resultaten av forsknings- och utvecklingsarbetet var sådana att det är möjligt att kommersialisera dem, till exempel genom att sälja resultaten till externa företag, skulle C-Environ kunna tillhandahålla resultaten till utomstående för en avgift, om aktieägarna i C-Environ anser detta vara lämpligt.
- Ett mål med samriskföretag-projektet skulle vara att C-Environ skulle ligga utanför tillämpligheten av EU:s konkurrensregler.
- Ett mål med samriskföretag-projektet skulle vara att driva ut från marknaden de marknadsoperatörer som inte är medlemmar av InChe-organisationen. Tanken skulle vara att detta skulle ske indirekt genom att Pero och InChes övriga medlemsföretag – som drar nytta av resultaten av samriskföretaget – bara skulle bli mer effektiva och samtidigt även marknadsföra sig som miljövänliga företag. Köparna skulle välja leverantörer med lägre priser samt de leverantörer som säger sig vara miljövänliga, och dessa skulle vara de företag som drar nytta av resultaten från samriskföretaget.
- Ett mål skulle vara att InChes medlemmar på lång sikt klart skulle kunna sänka sina produktions- och lagringskostnader. Organisationen InChe skulle rekommendera att medlemsföretagen ser till att de lägre kostnaderna direkt är synliga i priserna.
- Samriskföretaget C-Environ skulle även undersöka möjligheterna att minska på utnyttjandet av barnarbete inom de utländska företag som förser råvaror för tillverkning av byggnadskemikalier.
- Pero skulle äga 30 % av C-Environs aktier.
- Anser du att InChe, C-Environ eller båda kan anses bryta mot EU:s konkurrensregler?
- Om C-Environ anses bryta mot konkurrensreglerna skulle denna överträdelsen anses vara Peros ansvar, eftersom Pero är den största enskilda aktieägaren i samriskföretaget?

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## **Explanations of grading**

Overall, the exam went well.

Below, it is explained which matters the answer was supposed to discuss. You could get very good points even if you did not mention every matter listed below. For pedagogical reasons, this document also includes alternative answers, and some matters are explained more extensively here than was required from the students. Additionally, mentioning other things could bring you points, as well, if these were sufficiently relevant and correctly described. You did not get 'negative points' even if you said something that was incorrect. If you made a typo ('Art 110' v '101', for example), the answer was interpreted for your benefit, if it was possible to conclude what you tried to say.

Due to the scarce information that the case description provided, some of the assessments under competition law are open, which is why the emphasis is on sound argumentation. The total point count is based on an overall assessment of the answer.

The case raised multiple questions in terms of potential competition law infringements. The fact description was long, and it was important to keep the different parties (the original companies, the association, and the joint venture) straight. Some of the students mixed up the parties. Where it was obvious what you tried to say, your answer was interpreted for your benefit. Note, however, that mixing up the parties in real lawyer work might be a disaster.

The answers were structured differently, and this was fine, the structure utilised here is only one example of a possible structure. A good option, too, was a structure that followed the structure of the fact description / claims.

Max. 30 points.

Applicable law and the criteria for applying it: 8 points.

- The joint venture project gives rise to the question whether Merger Control law applies:
- Article 101 applies to any other agreement between undertakings (or decision by an association of undertakings) except 'full-function' joint ventures. In case of a full-function joint venture, the EU Merger Regulation applies to the establishment of the joint venture. In this case, it is not clear if it is a full-function joint venture that is planned (/ and it would even seem to be a partial-function joint venture).
- Article 101 TFEU criteria for applicability and applying these to the case: (/ discussion on the applicability of 102 could also give you points).
- Based on the facts it seems relatively clear that Art 101 may apply to this case: what is expected is to briefly note, referring to the relevant facts, that the criteria for applicability (undertakings, effect on trade between Member States, object or effect of restricting competition, appreciable effect on competition) are likely met.

- Regarding this, you may also want to see e.g. Tutorial 1 Guidelines.
- Note that there are undertakings (e.g. Pero and C-Environ - the latter could be engaged in an economic activity, as well) + an association of undertakings (the association InChe).
- (+ Association can be considered an undertaking on its own if engaged in an economic activity.)
- The joint venture cannot be kept outside the scope of application of EU competition law if it meets the criteria for applying Arts 101/102; what the parties wish has no relevance (the only way to keep it out would be to make sure that the criteria for applying Arts 101/102 cannot be met by this entity / agreement establishing it).

The characterisation of the possible infringements, their evaluation under Art 101 prohibition, and discussion on the applicability of Art 101(3) exemption: 12 points.

- In the case, a group of undertakings, and an association of undertakings, plan to put into effect different measures, central to these plans is a new joint venture.
- Competition restricting agreements between undertakings and comparable decisions by associations of undertakings are prohibited by Art 101(1). Whether something classifies as an agreement between undertakings or as a decision by an association of undertakings is not relevant in terms of finding infringement.
- Some goals of cooperation such as environmental goals and the reduction of child labor are justifiable and not problematic.
- However, when a group of undertakings plans, in any manner, to force other undertakings to exit a market, that draws closer attention. 'Indirect' forcing through normal competition on the merits (and without coordination) would be fine, but anything that involves e.g. price coordination (note the recommendation by the association) is problematic from the standpoint of Art 101. This is not pure research and development / environmental protection cooperation, or the like, and can therefore be caught by Art 101. Only such cooperation that has no connection to details of competition (pricing, sources of supplies / raw material) could be outside the scope of the prohibition.
- Your opinion was asked about whether the joint venture or the association could be found to have infringed EU competition law.
- The joint venture: it is unclear how independent the joint venture is, but at least as a tool it would be involved in problematic behaviour, if these plans were put into effect. We know very little in terms of what exactly would be the doings of this party. Looks relatively dependent on the original companies. (The undertakings that utilise the joint venture as a tool for cooperation could be found to infringe competition law in any event.)
- The association plans on decisions, particularly the price coordination recommendation, that can be caught by EU competition law (Art 101). The association is therefore at risk of infringing EU competition law.
- Art 101(3) exempts beneficial arrangements that would otherwise be prohibited under 101(1), and this provision could, in general, be applied to e.g. environmental protection cooperation or similar goals. Nonetheless, there should not be competition

restrictions that go farther than is necessary in order to achieve the legitimate goals and here we have e.g. the price recommendation problem. (/ 101(3) cumulative conditions: beneficial cooperation; fair share of the benefit to consumers; no restrictions that go further than necessary; no elimination of competition in a substantial part of a market). It does not seem possible to justify all of the plans under this provision.

- (- It was not required that you study this from the standpoint of a specific Block Exemption, but if you did, you could also get points for that.)
- (/Discussing relevance of Art 102 could also give you points, to a limited extent. Note, however, which parties you are particularly asked about in the end of the fact description. If you focus on Pero's market share and position but overlook the other possible competition law issues (Art 101), you are not able to score very high points. Also, note that there is very little information based on which you could conclude that the other undertakings hold dominance or abuse dominance).

Who is responsible for the possible infringements of the joint venture? ('If C-Environ were found to infringe EU competition law, would this be on the responsibility of Pero, since Pero is the biggest individual shareholder in the joint venture?'): 5 points.

- Essentially, the question here is whether one shareholder of the joint venture could be considered responsible for the infringements of the joint venture because of being the biggest individual shareholder (with 30% shareholding). The information provided in the fact description about the control exercised over the joint venture and about the ownership of the rest of the shares is vague. In any event, it seems unlikely that the joint venture would be a single undertaking with the major shareholder, since the 30% holding is very low for this, and the other facts would seem to suggest that the holder of the 30% does not control the joint venture alone. Different answers that recognised the main points in terms of evaluating this question could give you points.

Addressing the remaining facts and their possible relevance for competition law evaluation: 3 points.

- This could be anywhere in the answer, and you could bring this up in different ways: which practices are not caught by competition law prohibitions at all and/or which facts you consider irrelevant for a competition law analysis.
- Some goals such as environmental goals and the reduction of child labor are justifiable and not problematic.
- Lobbying is problem-free, as well.

Logical, clear, easy-to-follow answer: 2 points.