

## Competition and Market Law, 27.9.2023

### The case (30 p.)

All materials are allowed (an open book exam).

The total length of your answer is limited to 676 words. 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.

Z, B and C belong to the same trade association, the Association of Cola Producers. Z, B and C operate in almost every EU country. In the annual meeting of the Association, one member company (EWY) made the following proposals:

- The rules of the Association should be amended to include the statement 'No member of this Association will sell cola bottles with a lower price than 3 euro / bottle unless the other members unanimously accept the pricing.'
- The rules of the Association should be amended to define the areas on which Z, B, C and EWY are allowed to sell cola drinks.
- The rules of the Association should be amended to include the statement 'The members of this Association and any other cola producers are encouraged to cooperate when it comes lobbying against legal prohibitions of high amounts of sugar in soft drinks'.

When the managing director of Z heard of EWY's proposals, she remarked that Z would not discuss these issues as they may constitute infringements of EU competition law. Because the other meeting participants still wanted to ponder on EWY's ideas, the managing director of Z left the meeting. She requested that the fact that she left would be noted in the minutes of the meeting.

Almost a year later, the European Commission suspects that European cola producers have infringed Art. 101 TFEU, most importantly by price-fixing and market-sharing arrangements. The managing director of Z tells you that the company Z has not had anything to do with the possible rule amendments of the Association or the discussions EWY proposed in the meeting. In fact, at the company Z, they do not open emails that come from the Association, which signifies that the managing director of Z does not know if the rules of the Association were changed after the meeting or not. Z has nonetheless remained a member in the Association.

Please give your reasoned opinion about how these facts are evaluated under EU competition law as regards the position of Z. Z wants to know, among other matters, whether there will be any difference between evaluating the behavior of Z and the other cola producers, and do you think that it is likely that Z will be fined for the competition-infringing behavior.

Additionally, Z has agreed with B that they will inform each other if they change the countries from which they obtain the ingredients for their drinks. They have agreed this on the phone about two months before this date. They both think they should not obtain ingredients from countries that have civil wars going on, and Z and B have discussed this together. Do you think that this phone call and its implications could be a problem under EU competition law? To Z's knowledge, the European Commission is not currently investigating this matter.

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### **Målet (30 p.)**

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

Helhetslängden på ditt svar är begränsat till 676 ord. 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. De 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.

Z, B och C tillhör alla samma branschförening: the Association of Cola Producers ("Föreningen för Colaproducenter"). Z, B och C är verksamma i nästan alla EU-länder. Vid föreningens årsmöte framförde en medlem (företaget EWY) följande förslag:

- Föreningens regler bör ändras så att de inkluderar "Ingen medlem i denna förening får sälja colaflaskor till ett pris lägre än 3 euro/flaska, om inte de övriga medlemmarna enhälligt godkänner prissättningen".
- Föreningens regler bör ändras så att de omfattar de områden där Z, B, C och EWY får sälja coladrycker.
- Föreningens regler bör ändras så att de inkluderar "Medlemmarna i denna förening och alla andra colaproducenter uppmuntras till samarbete när det gäller lobbying mot lagstadgade förbud mot höga sockerhalter i läskedrycker".

När den verkställande direktören för Z hörde om EWY:s förslag kommenterade hon att Z inte avser diskutera dessa frågor, eftersom de kunde utgöra överträdelser mot EU:s konkurrenslagstiftning. Som följd av att de andra deltagarna ville fundera mera på EWY:s

förslag avlägsnade sig Z:s vd från mötet. Hon bad att faktumet att hon avlägsnade sig från mötet skulle antecknas i mötesprotokollet.

Nästan ett år senare misstänker Europeiska kommissionen att europeiska colaproducenter har brutit mot artikel 101 i EUF-fördraget, framför allt genom prisreglering och uppdelning av marknaden. Den verkställande direktören för Z berättar för dig att företaget Z inte har haft något att göra med de eventuella ändringarna i reglerna inom föreningen, eller att de skulle ha varit delaktiga i de diskussioner som EWY föreslog under mötet. I själva verket öppnar företaget Z inte e-postmeddelanden som kommer från föreningen, vilket innebär att den verkställande direktören för Z inte vet om föreningens regler ändrades efter mötet eller inte. Z har likväl förblivit medlem i föreningen.

Vänligen ge ett motiverat yttrande om hur dessa fakta ska bedömas enligt EU:s konkurrenslagstiftning med avseende på Z:s ställning. Z vill bland annat veta om det kommer att vara någon skillnad mellan att utvärdera Z:s och de andra colaproducenternas beteende, och tror du att det är troligt att Z kommer att bötfällas för det konkurrensbegränsande beteendet.

Dessutom har Z kommit överens med B om att de ska informera varandra om de ändrar på de länder varifrån de får ingredienserna till sina drycker. De har kommit överens om detta per telefon ungefär två månader före detta datum. Båda företagen anser att de inte bör köpa ingredienser från länder i vilka det pågår inbördeskrig. Anser du att detta telefonsamtal och dess innebörd kan vara ett problem utifrån EU:s konkurrenslagstiftning? Såvitt Z känner till undersöker Europeiska kommissionen för närvarande inte detta ärende.

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## **Explanations of grading**

Overall, the exam went very 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 11' 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.

It was important to keep the different parties straight. Some of the students mixed up the parties or mistyped some of the parties' names. If it was understandable what you tried to say your text was interpreted for your benefit.

Some answers did not discuss all the parts of the task. Please remember, in your future exams, to check that you discuss everything you're asked to discuss. The answers were structured differently, and this was fine, the structure utilised here is only one example of a possible structure.

The meeting & the rules of the association:

The applicability of Art 101: 10 points

- You were expected to briefly discuss the applicability of Art 101 TFEU to this case, with reference to legal sources (undertakings, associations of undertakings, decision / agreement, effect on trade between Member States, effect on competition). See also the Guidelines concerning Tutorial 1 on Moodle.

Possible infringements: 5 points

- You were expected to discuss which of the proposed rules are potentially problematic from the standpoint of competition law (price cooperation and market-sharing) and what kinds of infringements they constitute.
- You were expected to state or otherwise make it understood that you did not consider the encouragement considering lobbying an infringement of competition law.

Evaluation from the standpoint of Z in particular: 6 points

You were expected to discuss these matters:

- Z left the problematic meeting and asked that this fact would be written in the minutes of the meeting (we do not know if it was really written there), this is pointing to the innocence of Z and helps if the authorities can get this information
- Relevant information concerning e.g. actual market behaviour by Z is missing from the fact description, Z's actual market behaviour is of relevance (if the behaviour is in accordance with the problematic coordination, then Z is in trouble, difficult to show in that case that the coordination has not affected Z)
- The fact description tells that Z is still member of the association: this is problematic for Z
- Z tells they did not read communication from the association: this is possibly good for Z, but in practice possibly difficult to prove (+ why remain a member if this is true?), if really manages to prove this, would likely help (e.g. Eturas case), some of you also correctly said that this can be an intentional move to avoid liability
- The fact description does not tell that Z would have gone to authorities to expose the competition infringement (= public distancing), this is problematic from the standpoint

of Z (some of you recommended that Z cooperate with the authorities now, that was nicely done, and could reduce the possible fines for Z)

- Sanctioning: association + the undertakings involved can all be fined. (The joint responsibility of all of them is the main rule.) Z can therefore get fined directly as well as 'indirectly' as a member of the association. (- Whether or not Z would actually get fines in this case cannot be conclusively answered.)

The phone call between B and Z and the implications of this phone call (9 points), you were expected to discuss the following matters with reference to legal sources:

- A phone call is a possible way of Article 101 TFEU infringing cooperation. Here the phone call happens in a horizontal relationship (B and Z, please notice here a difference between the exam question facts and Tutorial 1 Case facts where there was similar information exchange in a vertical relationship: horizontal information exchange is more likely to be problematic). The parties have agreed to inform each other if they change the countries from which they obtain the ingredients for their drinks. They both think they should not obtain ingredients from countries that have civil wars going on, and have discussed this
- All the Article 101(1) TFEU criteria for applicability would have to be met for the discussion/implications to be caught under the article
- Effect on trade between Member States? - Potential effect enough, the suppliers do not have to be in the EU for the effects to be felt in the EU area
- Our facts seem to describe cooperation that should be evaluated as to its effects on competition (not a 'by object' restriction). Effects are possible although not certain. Appreciable effect on competition would have to be present for Art. 101(1) to apply.
- The facts constitute information exchange between competitors or potential competitors. Exchanging strategically important information that is typically secret and directly concerning market behaviour is prohibited. Exchange of historical data is usually less problematic, and exchange of information about future behaviour typically problematic. Exchanging public information is not a problem, but our facts may include other than public information (discussing whether information is public or not gives you points, we do not really know based on the facts whether other than public information is involved; however, why would the companies need to notify each other or discuss this if everything was public already as it is?)
- Information exchange between competitors or potential competitors that de facto means making common decisions about sources of supply is harmful and prohibited under Art 101
- Also, an information exchange can in practice signify setting up a collective boycott (as our facts could be interpreted), and collective boycotts are prohibited under Art 101 (- The fact that the Commission does not investigate the phone call or its implications is not decisive in itself. In theory, the Commission could investigate it at a later stage, as could a national competition authority.)
- Could Article 101(3) apply? The benefits that flow to consumers from this arrangement are unknown, although one can speculate about them. Primarily, the benefits would have to be economic, although other values may also be considered. Some of you

discussed whether avoiding suppliers from civil-war countries could be justified as a matter of public policy, you could also get points for discussing this particular idea. (- For minor companies with minor market shares this exchange of information would be acceptable more easily