

European Law

Question 1-

Art 102 of the Treaty on the Functioning of the European Union prevents abuse of a dominant position by one or more undertakings in a relevant market or a substantial part of it and it is important to restrict any behavior by an undertaking that may prohibit competition because this may potentially affect consumers and trade between Member States (Cleynenbreugel, 2017, p. 459). Understanding which market an undertaking is operating in is crucial for the purpose of a dominant position because a broad or a narrow approach with regards to a relevant market will have a significant effect on the discovery of a dominant position (Mondaq, 2021). Nevertheless, since a dominant undertaking has an important responsibility to refrain from any conduct that may restrict or distort competition, it is equally as important to them to define what relevant market they are operating in for the sake of abiding by competition rules (Seville, 1993, p. 197). Art 101 of the TFEU has increased its relevance in this area because it involves the assessment of a dominant position to determine if an agreement between two or more undertakings could potentially distort competition according to Davis (2020). Moreover, the European Court defined a dominant position in the case of '*United Brands Co v Commission of the European Communities*' (1978) as:

[...] A position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers, and ultimately of its consumers (Office of Fair Trading, 2004).

Undoubtedly, for Art 102, identifying the market an undertaking is operating in is necessary to establish any dominance in that particular area, in fact, by determining the relevant market, it is possible to calculate the market share of the undertaking which is an essential factor in the assessment of dominance in general as stated in the case of *'Adriatica di Navigazione SpA v Commission of the European Communities'* (2003). The significance for accurately defining what the relevant market is can be highlighted in the case of *'United Brands Co v Commission of the European Communities'* (1978); In this case, difficulties arose when the commission stressed that United Brands was operating in a narrow market for bananas which meant that they had a large position in the market, whereas the United Brands argued that the market was broad and so they only occupied a fraction of the market. Furthermore, defining the relevant market in the context of competition law is important because once it has been specified for the sake of establishing market share, the court can determine whether the Notice on Agreements of Minor Importance (2014) can be granted to the undertaking in question, which means their agreement may not be subject to Art 101 of the TFEU if it is granted as stated by Naftalis and Frankel (2014). In Particular, the commission intervened and provided guidance ("soft law") on how to define the relevant market to determine a dominant position for the enforcement of Art 101 and Art 102; The Commission Notice on the definition of the relevant market [1997] grouped the relevant market into product market, geographical market, and occasionally the relevant temporal market as stated by Chneiweiss (2020).

According to the Commission Notice (1997), the means to establishing whether different goods are in the same product market is by taking into account the product's

interchangeability (Demand and Supply); This is essentially described as the degree to which the services or goods are interchangeable with other products by reasons of prices, intended use, and characteristics (Craig and Burca, 2015, p. 1056). It should be noted that the Commission has modified this past approach to a more useful one called the SSNIP test, which is the primary means to establishing whether different goods make up the same product market according to Mostyn and Graf (2019). Moreover, the SSNIP test measures the goods substitutability (demand) by asking whether a cartel or a hypothetical monopolist can benefit by permanently increasing their price by 5 to 10 percent over the competitors' price, without a significant number of customers switching to another product (Gresoki and Griffith, 2003). However, since the SSNIP test relies solely on hypothetical events, it is deemed insufficient to rule whether two products are demand substitutes as observed in '*Commercial Solvents Corp v Commission of the European Communities*' (1974). As a result, there has been different factors and methods of working out the relevant market used by the Commission such as proof of substitution in the past or where there has been a collapse in the market; Substitution caused by cost and entry barriers; and the outlook of customers and competitors (Craig and Burca, 2019, p. 1061).

To establish dominance in a particular market, the Commission will also consider the geographic market to identify the relevant market as discussed in the case of '*United Brands Co v Commission of the European Communities*' (1978). The geographic market was defined in this case as a location where the ideal conditions of competition applying to the product under consideration are equal for all traders; Furthermore, the scope of the geographic market could be influenced by other factors

such as ease and cost of transportation, geographical restrictions on the use of goods or services, buying habits and consumer preferences (Cleaver, 2016). In the case of *Napier Brown-Sugar* [1988], the relevant geographic market was said to be the UK because Napier had a broad share of the market in the UK, together with the limited amount of sugar that was imported in the UK by the other Member States. In like manner, the commission will consider whether an undertaking that owns an essential facility can breach Art 102 of the TFEU if it uses its power to grant access to its competitor on a less favorable term than those of their services (Lang, 1994, p. 460). This was confirmed in the case of '*Sealink/ B & I - Holyhead*' (1992) where the Commission made clear that Art 102 will be in breach in these circumstances if an undertaking imposes a competitive disadvantage to its competitors without a fair justification.

Nevertheless, market share is the most important factor when determining dominance, hence why the Commission has made several modifications for properly identifying what the relevant market is to calculate the market share of an undertaking as stated by Gottlieb (2019). According to cases such as '*Hilti AG v Commission of the European Communities*' (1994), an undertaking that occupies an outstanding market share (in this case 70 - 80 percent) will more likely be dominant in that particular market under art 102 of the TFEU. In addition, there is also a presumption (rebuttable) of dominance in a situation where an undertaking occupies 50 percent or more of the relevant market as viewed in the case of '*AKZO Chemie BV v Commission of the European Communities*' (1986). Likewise, under Article 101 of the TFEU, dominance will be presumed if the undertakings' market share surpasses the 30 percent market

share threshold; However, this does not make any agreement immediately unlawful, instead, the courts will be required to assess whether the benefits of the agreement compensates for the prohibitive effect on competition (Craig and Burca, 2019, p. 1046). Conversely, under Art 102 of the TFEU, other factors such as the competitiveness and nature of the relevant market must be considered when calculating market share for the sake of establishing dominance (particularly when the market is under 50 percent or less) (Franck and Peitz, 2019).

Finally, since the legal definition of 'market dominance' stems from an undertaking being able to behave to a notable extent independently of its customers, consumers, and competitors, there could be issues in measurements because an undertaking is never fully acting independently of its consumers and customers as they are frequently influenced by the demand curve in a market; It will hardly be manageable to measure behaviors independent of its competitors because naturally, an undertaking in a dominant position may seek to demonstrate its superiority to the point where it can not be exercised further, hence why the Commission has been criticised on their perspective on market power (Craig and Burca, 2019, p. 1062).

Question 2-

To achieve their goal of market integration, the European Economic Community Treaty established provisions enabling the free movement of workers (persons) along with the free movement of goods, free movement of capital, and freedom to establish and provide services (Craig and Burca, 2015, p. 745). Initially, the concept of free movement of persons only applied to workers together with other economically active people, however, to make the free movement of workers more effective, the EU granted rights to workers' families along with other individuals even if they were not directly economically active (Cuyvers, 2017, p. 355). Additionally, the concept of 'workers' was given further expansion to include those in part-time, short-term, or seasonal employment and apprenticeship placements in the other Member States because people such as wives would be dissatisfied if they could not have such benefits (Koikkalainen, 2011). The basic provisions of free movement of workers are set down in Article 45 of the Treaty on the Functioning of the European Union which gives:

- 1) Workers the freedom to move within the EU.
- 2) Abolishes discrimination against workers from different Member States concerning remuneration, employment, and other treatments of work and employment.
- 3) With restrictions justified on motives of public security, public health or public policy: (a) it gives workers the right to welcome offers of employment made, (b) move within the other Member States for employment, (c) to reside in a Member State for employment in line with

the employment rules governing the nationals of that state, (d) and to remain in that area after being employed.

- 4) But, it gives no implementation of rights to employment in the public service

(Cleaver, 2016).

Further developments arrived later in the Maastricht Treaty (TEU) with the introduction of EU citizenship in Art 20 of the TFEU, which entails that any person with a Member State's nationality is automatically an EU citizen (Cuyvers, 2017, p. 355). Moreover, Art 20 of the TFEU gives EU citizens the right to move and reside freely in other Member States; Importantly, the Treaties of the European Union developed EU citizenship rights once more through Art 21 of the TFEU which holds the principal right that states the following: EU citizens have the right to move and reside freely in the Other Member States and is susceptible to the limitations from the Treaty and secondary legislation (such as Directive 2004/38 and Regulation 492/2011) (Cygan and Szyszczak, 2006, p. 977). Furthermore, Directive 2004/38 regulates the rule on residence for EU citizens and it provides that no conditions other than a presentation of a passport or ID card, should be imposed on an EU citizen and their family members for the right of entry and residence in another Member State for three months (Ochel, 2010, p. 314). Moreover, longer stay (more than 3 months) is available to EU workers under Art 7 of the Directive, who are: (a) Working of self-employed in the host Union state; (b) owns sufficient resources for themselves and family members to avoid becoming a burden on the social assistance regime of the host Member State in the course of their residence including extensive sickness insurance; (c) registered at a public or private establishment which is

funded by the host Member State for the principal intention of pursuing a course of study, which includes vocational training; (d) are family members traveling with or following an EU citizen that meets the conditions mentioned above (Rossi, 2015, p. 14). As for 'sufficient resources', Art 8(4) requires Member States to take into account the personal situation of the EU citizens and they are forbidden to set a fixed amount that will satisfy the meaning of 'sufficient resources'; Nonetheless, according to the commission's advice, EU citizens have 'sufficient resources' where the level of their resources is greater than the 'threshold under which a minimum subsistence benefit is granted in the host Member State' (Mantu and Minderhoud, 2019, p.316). In terms of expulsion, Art 27 of Directive 2004/38 expresses that irrespective of nationality, Member States can refuse entry of Union citizens on grounds of public policy, public security, or public health (Dzehtsiarou and Coffey, 2019, p. 444).

Since Mary is an Irish citizen, she is automatically considered an EU citizen under Art 20 of the TFEU, which also gives her the right to move freely and reside in another Member State; Mary can relocate to the Netherlands for a period longer than three months because she is enrolling for vocational training in a Dutch University to become a psychotherapist and also she has sufficient resources for herself, which satisfies the regulations set down in Art 7 of Directive 2004/38. According to the case of '*Grzelczyk v CPAS*' (2001), Mary can apply for a subsistence allowance if her savings run out during her studies and her Irish nationality will not prevent her from benefiting from this right as that will be a breach of Art 18 of the TFEU. Likewise, Art 18 of the TFEU will also allow Mary to pay tuition fees in installments as the Netherlands students because the court stated in '*Grzelczyk v CPAS*' (2001) that Union citizens who find

themselves in the same circumstances as nationals of Member State should enjoy the same treatment in law regardless of their nationality.

Nadine is a Union citizen under the provisions of Art 20 of the TFEU, therefore, she also has the right to move to and reside freely in another Member State. Although, she is not a worker, Art 3 of Directive 2004/38 demands that Member States enable the admission of a family member who requires personal care from the EU citizen due to serious health issues, and also they must facilitate admission for the partner with whom the Union citizen has a durable relationship with, duly attested (Craig and Burca, 2015, p.778); Moreover, Nadine's health issue is immaterial because it is not a disease with epidemical potential, nor is it an infectious or contagious parasitic disease that requires protection provisions to nationals of the host Member State according to Art 29(1) of Directive 2004/38.

As for Oscar, who is also an EU citizen, Art 27 of Directive 2004/38 makes clear that past criminal convictions are not in themselves reasons for refusing access to an EU citizen; It also states that the individual's conduct must be an actual and sufficient threat affecting one of the fundamental interest of society. Oscar's conduct could be considered a sufficient threat (arsonist), but since he is 17 years old, Art 28 of Directive 2004/38 protects him against expulsion because it provides that a minor should not be subject to such action unless it is in their best interest as stated by the Convent on the Rights of the Child of 20 November 1989; Since Oscar is getting treatment as an outpatient, expulsion will not be in his best interest and so as result, he can move to the Netherlands with Mary.

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