Prof. Kern Alexander / Prof. Peter Georg Picht Fall / 2016

European Economic Law

12 January 2017

Duration: 120 minutes

- Please check both at receipt as well as at submission of the exam the number of question sheets. The examination contains 2 pages and 4 questions.

Notes on solving the questions

- Only fill out this text block, if you have subject-specific information. All the other information for the students is already mentioned on the cover sheet

Notes on marking

- When marking the exam each question is weighted separately. Points are distributed to the individual questions as follows:

Question 1	10 points	25%	
Question 2	10 points	25%	
Question 3	9 points	22.5 %	
Question 4	9 points	22.5 % …	…
…	2 additional points	5%	
Total	40 points	100 %	

We wish you success!

Part I: Fundamental Freedoms (Prof. Alexander)

Question 1

Francophile and Polonia are EU member states. Polonia recently adopted legislation as follows:

Art. 286 of Law no. 297/2014

(1) Any person may acquire under any title or may hold, alone or together with the persons acting in concert with such person, shares issued by an investment company incorporated or based in Polonia, but not more than 5% of the investment company's share capital.

(2) The exercise of the voting rights shall be suspended for the shares held by the shareholders exceeding the limits referred to in paragraph (1).

(3) The persons (investors) referred to in paragraph (1) shall inform, upon reaching the threshold of 5%, within a maximum of three (3) working days the investment firm, the Polonia state regulator, and the local (Polonia) stock market where such shares are traded.

(4) Within three (3) months from the date when the threshold of 5% of the share capital of the investment companies was exceeded, the shareholders in such a situation shall sell the shares in excess of the holding threshold so that they (the shareholders) hold less than 5% of the shares in the investment company.

An investor who is a national of the EU Member State Francophile was considering whether or not to purchase a controlling interest of shares in excess of 5% of an investment company based in the EU state Polonia that would be subject to the above legislative restrictions. The investor contemplates to file an action in the Polonia courts with a view to appealing if necessary to the European Court of Justice (CJEU), arguing that the legislative measures in question violate EU law. In this respect, they would like to know if you believe that they have a reasonable chance of success, especially if the case is appealed to the European Court (CJEU). Please advise them what your opinion is regarding whether the Polonia law represents an infringement of EU law.

Question 2

Under Article 34 of the TFEU *"quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States*". Critically discuss the scope of this provision, in particular, the meaning of the phrase 'quantitative restrictions' and 'measures having equivalent effects' in light of the interpretation given by the ECJ in landmark cases (*Dassonville*, *Cassis* and *Keck*).

Part II: EU Competition Law (Prof. Picht)

Background

"1. In the U.S., a concerted refusal to deal as the result of a conspiracy among competitors could violate Sec. 1 Sherman Act, while unilateral refusal to deal by one dominant company could, in exceptional cases, constitute 'monopolization' and violate Sec. 2 Sherman Act. Five U.S. Supreme Court decisions held so. However, the five cases remained close to the facts and did not provide any clear general guidance or legal standard on how Sec. 2 of the Sherman Act is to be applied with respect to refusals to deal. Lower courts developed certain general doctrines to describe situations where a refusal to deal would fall foul of Sec. 2. The "essential facilities doctrine" is one of the two main doctrines in this respect. […] Although the essential facilities doctrine has been criticized by influential writers such as Areeda, Hovenkamp and Posner, and has not yet been recognized by the Supreme Court, several Federal Circuit Courts do endorse and apply the essential facilities doctrine restrictively." (*Kung-Chung Liu, Rationalising the Regime of Compulsory Patent Licensing by the Essential Facilities Doctrine, IIC 2008, 764-765*)

Question 3: Against the background of the foregoing text excerpt, how would you describe the relevance of the essential facilities doctrine in US American and EU competition law? In order to support your opinion, please write an essay of 1-3 pages including relevant case law from both jurisdictions. **(9 Points)**

Facts

BASF SE, a German chemical company, having a worldwide turnover of more than EUR 70 billion per year, plans to diversify and expand its participation portfolio for specialty chemicals, particularly on the market for 1,4-butanediol (BDO) where it holds a market share of 30-35%. Accordingly, the representatives of BASF enter into negotiations with the Belgian ROYAL Group and submit a "tender offer" in order to purchase the shares of its Belgian subsidies ChemFin S.A. ("CF") and EuroChem S.A. ("EC"). Both undertakings are specialized in the production of BDO and BDO-related chemicals. While "CF" attained a market share of 15-20% on the market for BDO and generates a turnover of EUR 301 million within the European Union, "EC", having a market share of 5-10%, is only a minor player in the market that achieves a turnover of EUR 149 million in Belgium.

As a consequence of the general economic crisis in Europe, which also affected the chemical industry, "CF" and "EC" were placed under pre-bankruptcy regime by the Belgian Court of Commerce, which supervises the management of both undertakings during the proceedings. While other competitors appeared to be not interested in acquiring "CF" and "EC", BASF, notwithstanding the financial problems, confirmed its tender offer.

In the present case, the general field of application of EU competition law is undisputed between the parties. However, the envisaged transaction raises various legal issues regarding EU merger control. You are asked to give your opinion on the following question:

Question 4: Is the envisaged transaction between BASF SE and the ROYAL Group within the ambit of and in compliance with the EU Merger Regulation 139/2004? Problems concerning the relevant market and procedural aspects can be disregarded. **(9 Points)**

Notice: **2 additional points** can be achieved for good structure and argumentation.

European Economic Law (EEL) Professor Kern Alexander/Professor Peter G Picht

Model Answers

Question 1-Professor Kern Alexander (10 points)

Introduction (required reasoning):

The Polonia legislation raises questions regarding whether its restrictions on investment and limitations on ownership in an investment company unlawfully infringe the provisions of the European Union Treaty (TFEU) **on free movement of capital** and **the right of establishment**. This essay will analyse each of the provisions of Polonia's investment law to determine its lawfulness under the EU Treaty. In doing so, it will briefly review the applicable EU Treaty provisions on free movement of capital and right to establishment and consider how the Court of Justice of the European Union (CJEU) has considered similar legislative restrictions in previous cases. The essay will then apply the applicable treaty provisions and the CJEU jurisprudence to the case in question (**1 point**)

Free movement of capital:

State what Treaty provisions are engaged by the law in question and why they are relevant to the present case :

The applicable provisions of the EU Treaty regarding the free movement of capital are articles 63-65.

Article 63 (1) TFEU states in relevant part: Within the framework of the provisions set out in this chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited (**0.5 point**).

Article 65 (1) ((b) TFEU provides the main exceptions to article 63 TFEU as follows:

> 1. The provisions of Article 63 TFEU shall be without prejudice to the right of Member States:
>
> (b) To take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are *justified* on grounds of public policy or public security. […] (**0.5 point**)

Additional points can be granted at the examiner's discretion.

Relevant case law to be reviewed <u>(no mere description):</u>

In the Case C-439/97 Sandoz GmbH v. Finanzlandesdirektion für Wien (1999) ECR I-7041, the ECJ held that taxation by a Member State of loan agreements entered into by residents, regardless of the place where the agreements were entered into, could constitute an unlawful restriction on the movement of capital, unless it could be justified under article 65 (ex Article 58 TEC). In other seminal cases C-98/01 (Commission v. UK) and C-436/00 (Commission v. Spain) with similar fact patterns to the case at hand, the ECJ considered whether the 'golden shares' held by the state in privatized companies along with limits on the amount of voting shares that a private investor could hold in these companies complied with the free movement of capital provisions of the Treaty. (**<u>1 point)</u>**

Applying these provisions to Polonia's legislation as follows:

(1) Any person may acquire under any title or may hold, alone or together with the persons acting in concert with such person, shares issued by an investment company incorporated or based in Polonia, but not more than 5% of the investment company's share capital.

(2) The exercise of the voting rights shall be suspended for the shares held by the shareholders exceeding the limits referred to in paragraph (1).

(3) The persons (investors) referred to in paragraph (1) shall inform, upon reaching the threshold of 5%, within a maximum of three (3) working days the investment firm, the Polonia state regulator, and the local (Polonia) stock market where such shares are traded.

(4) Within three (3) months from the date when the threshold of 5% of the share capital of the investment companies was exceeded, the shareholders in such a situation shall sell the shares in excess of the holding threshold so that they (the shareholders) hold less than 5% of the shares in the investment company.

Provision (1) prohibiting more than 5% of an investment company's shares (as shown by UK and Spanish cases) engages the right of free movement of capital. It can only be permissible if shown to be a proportionate measure, ie., to achieve a valid regulatory objective. Based on the Spain and UK cases, the restriction probably lacks proportionality; but another argument could be shown that there is a strong state interest in restricting private investment in investment companies for regulatory reasons in order to prevent concentrations of ownership in investment firms. But this argument would have to overcome the fundamental EU law right of free movement of capital. This would be a difficult to make and the better argument is that the free movement of capital right is engaged and the prohibition lacks proportionality and not justified on general good grounds (**<u>0.5 points</u>**).

Provision (2) stating that the exercise of voting rights of a foreign investor shall be terminated in excess of 5% of shares in a local investment firm falls under the same analysis as provision 1. It engages the right to free movement of capital but it cannot be justified on general good or propotionality grounds (**<u>0.5 points</u>**).

Provision (3) requires that the investor inform the Polonia regulator that it reached the 5% threshold within 3 days of obtaining 5% of voting shares in an investment company. This

also engages right to free movement of capital, but would probably be a permissible measure because article 65 (1) (b) and the ECJ has held that a system of prior administrative approval is consonant with the principle of proportionality if:

- it is based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned; and
- all persons affected by a restrictive measure of that type have a legal remedy available to them.

Polonia would therefore have the competence to require investors who reach 5% voting shares in investment companies to notify the regulator for informational purposes that might contribute to the collection of data etc., and as long as investors would have a legal remedy to challenge the requirement (which there is no suggestion that they do not). (**0.5 points**).

Provision (4) the state requirement for the investor to sell its shares in excess of 5% voting rights would also engage the free movement of capital right and the measure would be subjected to the proportionality test. Arguments can be made on both sides, but the requirement to sell coud be seen as an infringement on the right to free movement of capital because the measures lacks proportionality and no clear public policy or general good reason why to allow this restriction (**0.5 points**).

Additional points can be granted at the examiner's discretion.

Right of establishment:

The applicable provisions of the Treaty regarding the right to establishment are found in Chapter 2 entitled 'Right of Establishment', articles 49 – 52/54

Article 49 TFEU states in relevant part:

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. (**0.5 point**)

The definition of "establishment" is the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period. The three features of establishment that trigger the provision are that the activity is non-temporary, economic in nature, and it is cross border. (**0.5 point**)

Article 52 (1) provides that a firm's right of establishment "shall not prejudice the applicability of provisions laid down by law, regulation or administrative action (...) on the grounds of public policy public security or public health" in which a host state imposes a "....restriction on the freedom of establishment". (**0.5 point**)

Article 54 defines a "company" or other business entity or legal person as entitled to the right of establishment if the firm is formed in accordance with the law of its member state and constituted under civil or commercial law including cooperatives and other legal persons governed by private or public law. To qualify for the right of establishment the firm or person in question would have to have their registered office, central administration or principal place of business within an EU or EEA Member States. (**0.5 point**)

Additional points can be granted at the examiner's discretion

Right of the establishment in relation to the case at issue:

Provision (1) of the law would engage the right of establishment as it would hinder the ability of a foreign investor from one EU state to invest and to buy up the voting rights of a Polonia investment company. Restrictions on share ownership can constitute a restriction on the right of establishment and can be imposed for a legitimate regulatory objective but the measure in question must meet the criteria of the ECJ Gebhard test as follows: 1) applied in a non-discriminatory manner; 2) justified by imperative requirements in the general interest; 3) suitable for securing the attainment of the objective which they pursue; 4) and do not go beyond what is necessary in order to attain it (**0.5 point**).

Provision 2 would also attract the Gebhard test, and arguments could be made pro and con but better argument is that it engages right of establishment and that the measure is not proportionate nor justified on general good grounds (**0.5 point**).

Provision 3 is just a reporting requirement to give more information to the regulator and so would probably meet the proportionality test (**0.5 point**).

Provision 4 requires the shareholder's interest in excess of 5% of voting rights of the investment company's shares to sell those interests. This general requirement without more would probably fail the proportionality test and not be justified on general good grounds. (**0.5 point**)

Additional points may be granted at the examiner's discretion

Relevant case law to be reviewed:

In considering the proportionality principle, you can cite the Caixa bank case as an example of restrictions on right of establishment. In interpreting the above provisions regarding the right of establishment, the ECJ has struck down as legally invalid any member state regulations or measures that may infringe on the right of establishment if such measures are determined to lack proportionality. For a state to show that their measures which restrict a fundamental Treaty right are proportional, they must demonstrate that the restriction in question is *necessary* to achieve a legitimate regulatory objective (**0.5 points**).

Additional points may be granted at the examiner's discretion

Conclusions

Polonia legislation 286 (1), (2) & (4) would be struck down as an infringement of the right to free movement of capital and right of establishment as the measures do not comply with the proportionality principle. 286 (3) would comply with both statistical and regulatory reporting to a member state on the grounds that they are expressly permitted and the restrictions in question are proportional (**0.5 points**).

Question 2-Professor Kern Alexander (10 points)

Introduction:

You may briefly illustrate the importance of the free movement of goods in the internal market and review the main Treaty Provision governing this, such as:

- Article 34 TFEU, which relates to intra-EU imports and prohibits 'quantitative restrictions and all measures having equivalent effect' between Member States;
- Article 34 TFEU, which relates to intra-EU imports and prohibits 'quantitative restrictions and all measures having equivalent effect' between Member States;
- Article 36 TFEU, which provides for derogations to the internal market freedoms of Articles 34 and 35 TFEU that are justified on certain specific grounds. **(0.5 point)**

Analysis of Article 34 TFEU:

Article 34 is directly effective and applies to obstacles in trade 'among Member States'. A cross-border element is therefore a prerequisite for evaluating a case under this provision. (**0.5 point**)

Article 34 is also applicable in non-harmonised areas and in areas which are not covered by more specific provisions in the Treaty (e.g. taxation). (**0.5 point**)

Purely national measures, affecting only domestic goods, fall outside the scope of Articles 34–36 TFEU. (**0.5 point**)

Article 34 TFEU is often characterised as a defense right which can be invoked against national measures creating unjustified obstacles to cross-border trade. Accordingly, infringements of Article 34 TFEU seem to presuppose activity on the part of a State. (**0.5 point**)

Article 34 prohibits national rules applying only to imports (distinctly applicable measures) and those applying equally to domestic goods and imports (indistinctly applicable measures). This means : measures that discriminate directly between domestic and foreign products and those that even though are equally applied to both domestic and foreign products, have the effect of favouring the former as against the latter. (**0.5 point**)

'Distinctly applicable measures' are measures that do not apply equally to domestic and imported goods... such measures discriminate against imports because they make importation more difficult and costly relative to the domestic product (e.g. demanding higher safety checks on imported goods) 'Indistinctly applicable measures' are those measures which appear on their face to be equally applicable to domestic and imported goods, but the effect of the measures disadvantages imported goods by requiring them to satisfy the state's domestic set of rules for similar products. These measures cover the marketing of products in the widest sense (e.g. butter packaging) (**0.5 point**)

However, the difference between distinctly and indistinctly applicable measures is that indistinctly applicable measures can be justified if they are necessary to satisfy mandatory requirements. For example environmental protection, promotion of national culture, etc. Overall, it is important to distinguish between them because the defenses available for each

category differ. Distinctly applicable measures, as is the case with QRs can only be justified, if at all under Art 36. Indistinctly applicable measures are treated more leniently and may be justified under |Art 36, or by reference to mandatory requirements. (**0.5 point**)

To demonstrate some deeper understanding, you may also mention at this point that Article 34 TFEU reflects the obligation to respect the principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of Community products to national markets. Hence, as you may explain, obstacles to free movement of goods which are the consequence of domestic rules that lay down requirements to be met by such goods in principle are liable to constitute measures having an equivalent effect even if those rules apply to all products alike. (**0.5 point**)

Additional points can be granted at the examiner's discretion.

Article 34 (QR and MEQR under relevant case-law):

A 'quantitative restriction' was defined by the ECJ as a measure which amounts to "a total or partial restraint of, according to the circumstances, imports, exports or goods in transit". The ECJ has defined MEQRs on imports very widely: "All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade" (Dassonville). Overall, under the "Dassonville formula", it is stressed that that the most important element determining whether a national measure is caught under Article 34 TFEU is its effect ('… capable of hindering, directly or indirectly, actually or potentially …') (**0.5 point**)

Dassonville served as the legal basis for the decision in Cassis de Dijon. In Cassis de Dijon, the Court introduced two key principles.

- ✓ The "Rule of reason": Member States may maintain or impose trade barriers where "necessary" to satisfy "mandatory requirements".
- ✓ The "Rule of mutual recognition": a rebuttable presumption that goods lawfully sold in one Member State should be available in all others (**0.5 point**)

In *Cassis*, the Court reaffirmed the application of Article 34 also to indistinctly applicable measures that have the effect of a quantitative restriction to imports since, as the Court emphasised, obstacles to free movement could result from "disparities" between the different national laws of each member state. (**0.5 point**) .These disparities could result in placing a disadvantage on products that had to comply with different standards in the country of production and the country of export (**0.5 point**). Therefore, measures of this sort that lay down product requirements relating to goods' production or designing stage (dual burden rules) would be considered to fall under the ambit of Article 34 (**0.5 point**).
On the other hand, measures relevant to the marketing of the products (equal burden rules) would not be covered by Article 34, albeit under the condition that they can be justified under one of the mandatory requirements envisaged in the same decision (i.e. public health, fairness of commercial transactions, defense of the consumer) (**0.5 point**). In consequence, and following the Court's ruling in Dassonville and subsequently in *Cassis de Dijon*, there is no need for any discriminatory element in order for a national measure to be caught under Article 34 TFEU (**0.5 point**).

This wide interpretation of Article 34 and equal burden rules given in the *Cassis de Dijon* case, is what the *Keck* decision aimed to rectify. This was mostly due to the fact that after *Cassis de Dijon*, several other cases that tried to use its "formula" ended up with discrepancies after its application and thus, concerns were raised as to the breadth of the test and its subsequent possible abuse by traders to promote their own commercial freedom (**0.5 point**).

In Keck & Mithouard, the Court held that "certain selling arrangements" did not, as a matter of law, "hinder trade between Member States".

- ✓ Selling arrangements are exempt from Article 34 TFEU.
- ✓ Selling arrangements" must:

    - apply to all relevant traders

- have the same effect, in law and in fact, on the marketing of domestic and imported goods (**0.5 point**).

If these two cumulative conditions of the Keck-formula are met, then, as the ECJ said in Keck, "the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products." You must clarify that the driving force behind the concept of selling arrangement is the market access test. The market access test ultimately focuses on whether the contested measure does or does not have the object or effect of treating products coming from other Member States less favourably. (**0.5 point**)

Additional points may be granted at the examiner's discretion

Conclusions:

Although the exact scope of Article 34 TFEU is somehow clarified, it may be argued that the Court continue to interpret Article 34 too widely in terms of its prohibitive effect. This approach may fail to ensure that Member States are protected in their competence to regulate their own markets and set their own policies (**0.5 point**)

Part II: EU Competition Law (Professor Peter G Picht)

Question 3	Maximum Score	Achieved Score
Essential facilities doctrine		
General introduction The origins of the essential facilities doctrine can be found in US American antitrust law. In general, the term essential facility refers to a piece of infrastructure or a crucial raw materials, for instance ports, public transport, network structures or even intellectual property rights, which are necessary for an undertaking in order to conduct business and without which it is not able to offer its services to consumers. The doctrine aims at overcoming so-called market failures, i.e. if the competitive forces play insufficiently in certain markets. In the past, such problems could particularly be observed in the context of natural monopolies and the former state monopolies. From the viewpoint of competition law, the essential facilities doctrine constitutes a particular manifestation of refusal to supply under Article 102 TFEU that can be distinguished from other abusive practices, such as general forms of refusal to supply, monopoly leveraging or discrimination.	**1 Point** **0.5 Point**	
US American competition law As stated in the text, the essential facilities doctrine is a quite disputed issue in US American competition law. Doubts and concerns have not only been formulated by several academic researchers, but can also be observed in jurisprudence. While US District Courts as well as Appellate Courts appeared to be more open towards the application of the doctrine, the Supreme Court adhered to a more restrictive approach. In this respect, three cases are especially worth-mentioning. At the beginning of the Supreme Court's case law stands the judgment *United States v Terminal Railroad Association of St. Louis*. By refusing to grant access to the railway station to other competitors the dominant undertaking violated Sec. 2 Sherman Act because the access to the station was deemed "essential". Subsequently, the Court neither confirmed nor refused the essential facilities doctrine in *Aspen Skiing Co v Aspen Highlands Skiing Corp.*, albeit the Circuit court explicitly referred to the theory in its assessment. However, finally, the Supreme Court rejected the essential facilities doctrine in *Verizon v Trinko*, stating that Verizon was under no antitrust duty to grant other competitors access to its system.	**1 Point** **1.5 Point**	
EU competition law Irrespective of the controversy in the US, the essential facilities doctrine became a legal transplant that was not only transferred to various European jurisdictions, such as Germany or Switzerland, but it also found entrance to EU competition law. At the beginning of the 1990s, the ECJ and the EU Commission discussed the essential facilities doctrine for the first time in the context of three cases concerning infrastructure facilities. While the Court held in the *Port of Genova*-judgments that the refusal of the	**0.5 Point** **1 Point**	

involved shipping companies to grant other competitors access to a port violated Article 102 TFEU, it refused to consider locomotives and train drivers as essential facility in the *European Night Services*-judgment. In the well-known *Bronner*-judgment, the ECJ specified the scope of the doctrine and developed three cumulative conditions for its application. Mediaprint's refusal to grant Bronner access to its delivery scheme was considered as violation of Article 102 TFEU, if: (1) the refusal was likely to eliminate all competition on the downstream market; (2) there was no objective justification; and (3) the facility was indispensable, i.e. no actual or potential substitute could be found. Subsequently, the doctrine's scope of application appeared to be gradually shifting from "tangible" to "intangible" essential facilties. Apart from the *Magill*-case, which has been decided before *Bronner*, two ECJ judgments are especially noteworthy. In the first case, *IMS/Health*, the Court affirmed and specified the requirements for the application of the essential facilities doctrine in relation to intellectual property rights. In contrast to its previous judgments, it particularly required, that the undertaking requesting a licence intends to offer a new product / service that is not offered by the IPR owner and for which there is potential consumer demand. In the second case, *Microsoft v Commission*, the ECJ reaffirmed its findings on essential facilities in relation to information (protected by intellectual property). However, the new product-requirement referred to in *Magill* and *IMS/Health* was further developed to a new technological development.	**1 Point** **0.5 Point** **0.5 Point** **0.5 Point**	
Summary The attitude towards the essential facilities doctrine in EU competition law and US American antitrust law significantly differs. In contrast to the European Union, where the application of the doctrine in the course of Article 102 TFEU is generally undisputed and where the conditions for its application have been clarified by the ECJ, the US Supreme Court does not recognize the essential facilities doctrine in its judgments. A possible explanation for this difference could be seen in the deviating approaches of both jurisdictions in relation to the behavior of market dominant undertakings. While EU competition law only prohibits the abuse of a dominant position, US American antitrust law sanctions the monopolization itself or even the attempt to monopolize. However, in contrast to the US American courts, which recognize various justifications for refusals to supply, the ECJ and the EU Commission are more reluctant to accept such justifications.	**0.5 Point** **0.5 Point**	

	9 Points	
	Total	**Total**

Question 4	Maximum Score	Achieved Score
EU Merger Regulation 139/2004		
(I) Concentration In order to establish a "concentration" in the sense of the EUMR, different elements have to be examined. (a) Lasting change in structure In a first step, it needs to be analyzed whether the envisaged transaction leads to a change of control on a lasting basis under to Article 3(1) EUMR. According to the facts of the present case, BASF plans the acquisition of direct control of the two subsidies "CF" and "EC" by means of a "share deal" pursuant to Article 3(1)(b) EUMR. (b) Control In a second step, it has to be considered whether "persons or undertakings" (Article 3(3) EUMR) acquired control conferring "the possibility of exercising decisive influence on an undertaking" according to Article 3(2) EUMR. Due to the fact that BASF seeks to obtain ownership in the subsidies "CF" and "EC" by means of acquiring the companies' shares, it is able to exercise decisive influence in the sense of Article 3(2)(a) EUMR. (c) Joint venture The transaction between BASF and the ROYAL Group does not qualify as joint venture in the sense of Article 2(4) and Article 3(4) EUMR respectively. (d) Exceptions (Art. 3(5) EUMR) Since none of the exceptions of Article 3 (5) EUMR applies in the present case, a concentration under the EUMR can be confirmed.	**1.5 Point** **1.5 Point** **0.5 Point** **0.5 Point**	
(II) Community dimension Notwithstanding the fact, that the planned transaction between BASF and the ROYAL Group, aiming at the transfer of the shares of "CF" and "EC", can be subsumed under Article 3 EUMR, the European Commission's competence is limited to concentrations having community dimension according to Article 1(2) or Article 1(3) EUMR. (a) First set of criteria (Article 1(2) EUMR) The first criterion according to Article 1(2)(a) EUMR is fulfilled, because the combined aggregate worldwide turnover of all undertakings (BASF, "CF" and "EC") is EUR 70'450 million and therefore above the threshold of EUR 5'000 million. Moreover, the second criterion pursuant to Article 1(2)(b) EUMR is given, since the aggregate Community-wide turnover of each of at least two undertakings concerned (BASF as well as "CF") is more	**0.5 Point**	

than EUR 250 million. Since BASF is located in Germany, it can be assumed that its community-wide turnover forms the major part of its worldwide turnover (alternative solutions by students denying this fact were equally accepted). The fact that "EC" only achieves a turnover of EUR 149 million in Belgium is therefore irrelevant and the concentration has Community-dimension. (b) Second set of criteria (Article 1(3) EUMR) Due to the applicability of the first set of criteria according to Article 1(2) EUMR, it is not necessary to examine the second set of criteria under Article 1(3) EUMR.	**0.5 Point**	
(III) Substantive assessment (a) "SIEC"-test (Article 2(2),(3) EUMR) In order to assess the (in)compatibility of a concentration having Community-dimension with the common market, it has to be established whether there is a "significant impediment to effective competition" (SIEC-test) pursuant to Article 2 EUMR. The creation or strengthening of a dominant position is still deemed as the most important example for "SIEC". In the present case, the acquisition of "CF" (15-20%) and "EC" (5-10%) by BASF (30-35%) would at least amount to a total market share of more than 50% in the BDO market. It can therefore be assumed, in accordance with ECJ case law (e.g. Case C-550/07, *Akzo*), that the operation proposed by BASF is likely to result in the creation of a dominant position by the parties in the market for BDO chemical and could significantly impede effective competition. (b) Failing firm defense Due to the involvement of "CF" and "EC" in the bankruptcy proceedings before the Belgian authorities, BASF could argue that the requirements of the failing company defense are met in the present case. In the opinion of the European Commission, the application of the concept of "rescue merger" is possible, if three cumulative conditions are fulfilled: (i) The acquired undertakings would in the near future be forced out of the market if not taken over by another undertaking Since "CF" and "EC" are heavily indebted, subject to pre-bankruptcy proceedings and under supervision of the Belgian authorities, the danger of bankruptcy of both companies is not unlikely and it cannot be excluded that "CF" and "EC" would be forced out of the market, if they would not be taken over by BASF. Accordingly, the first of the three requirements is fulfilled. (ii) There is no less anti-competitive alternative purchase, and Since in the present case, no other competitor appears to be willing to submit a viable offer for "CF" and "EC", there is no less anti-competitive alternative purchase option. The second requirement is also met. (iii) The assets to be acquired would inevitably exit the market if not taken over by another undertaking	**0.5 Point** **1 Point** **0.5 Point** **0.5 Point**	

Due to the fact that there are also other competitors on the BDO market, which are however not interested in an acquisition, it becomes clear that BASF would not have absorbed the market shares of "CF" and "EC" independent from whether the merger was to take place or not. Accordingly, it is likely that the assets of the failing firms would definitely exit from the market and the third requirement is also given.	**0.5 Point**	
Conclusion Even though the transaction between BASF and the ROYAL Group can be considered as concentration having community dimension in the sense of the EUMR that could significantly impede effective competition, BASF could rely on the failing firm defense in order to justify the acquisition of "EC" and "CF". The concentration is therefore in compliance with European competition law.	**1 Point**	

	9 Points	
	Total	**Total**

Additional points for good structure and argumentation	**2 Points**	

Question 1	**9 Points**	
Question 2	**9 Points**	
Additional Points	**2 Points**	
	20 Points	
	Total	**Total**