

LINGUISTIC TRAINING

READING COMPREHENSION (2 h.)

After reading the COTY judgment, answer the following questions:

A. Multiple choice:

1. The ruling was issued in a dispute between Coty, a leading supplier of luxury cosmetics in Germany, and one of its authorized distributors
 - a) [Amazon.de](https://www.amazon.de)
 - b) Coty subsidiary in another Member State
 - c) Pierre Fabre Dermo-Cosmétique
 - d) Parfümerie Akzente

2. Given the diverging interpretations of the applicable EU competition rules, the German court hearing the case decided to stay the proceedings and referred a preliminary question to the Court of Justice of the European Union to clarify:
 - a) Whether a ban using third party platforms in a selective distribution agreement for luxury goods may be compatible with Art. 101(1) TFEU
 - b) Whether a restriction on third party platforms in a selective distribution agreement for luxury goods constitutes a hardcore restriction
 - c) All of the above
 - d) None of the above

3. Which of the following is NOT a Competition Law issue present in the Coty ruling?
 - a) Horizontal agreements
 - b) Luxury goods
 - c) Selective distribution agreements
 - d) Marketplace bans

4. According to the CJEU, because distributors were allowed to advertise products via the Internet on third party platforms and used online search engines,
 - a) The practice at hand did not amount to a restriction of the customers to whom distributors may sell
 - b) The practice at hand amounted to a restriction of passive sales to end users
 - c) The practice at hand could not be considered a selective distribution system
 - d) The practice at hand did not amount to a practice that affected or distorted market competition

5. One of the aspects that the Court of Justice of the European Union does not clarify in the Coty ruling is:
 - a) An analysis of the Block Exemption Regulation benefit
 - b) Enforcement problems arising from the lack of a contractual relationship
 - c) A definition of “luxury good”
 - d) What happens with blanket bans on internet sales

B. True or False:

6. _____ In 2012, Coty decided to change the terms of the agreement *inter alia* by providing that the sales on the internet should be done in order to preserve the luxurious character of the brand and through an “electronic shop window” of the authorized store. Furthermore, the amended agreement prevented the distributor from using, on the online marketplace, a different business name or a third-party website “discernible to the public”.

7. _____ The CJEU, in its reasoning, essentially followed (was in line with) the Opinion issued by Advocate General Wahl.

8. _____ The CJEU clarifies its earlier *Pierre Fabre* ruling, confirming that the organization of selective distribution networks is not prohibited by Art. 101(1) TFEU when distributors are chosen on the basis of objective, proportional and non-discriminatory criteria & when the characteristics of the product itself require a network that preserves their quality and proper use.

C. Short Answer questions:

9. The main question that the Court of Justice of the European (“CJEU”, hereinafter) answers is whether a clause which prohibits authorised distributors from selling, in a discernible manner, on third-party online platforms is compatible with Article 101 TFEU. With its decision the Court implicitly affirms that the market ban _____ (Does / Does not) amount to a restriction by object. What are the main arguments the CJEU sets down to justify that this type of selective distribution system organized to protect a luxury image is compatible with Art. 101 (1) TFEU?

10. Does:

(a) this ruling apply to conflicts relating to parties having less than 30% of the market shares? Explain.

(b) this ruling apply to partial or total platform bans? Explain.

THE USE OF PASSIVE CONSTRUCTIONS IN LEGAL WRITING

EXERCISES

Photocopiable worksheet 15.1

These sentences contain many examples of active voice. Rewrite them, using passive voice, so that they sound more natural.

- 1** In America in the late 19th century, the owners of dominant companies in industries such as sugar, tobacco, steel and oil established a series of trusts to create a monopoly in their industries.

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- 2** Some people acting on behalf of these trusts often coerced shareholders of other companies in the same sector into joining the trusts.

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- 3** The shareholders transferred ownership of their shares. The shareholders received dividend-paying certificates in exchange.

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- 4** The trusts grew so powerful that politicians agreed that somebody had to do something to bring them under control.

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- 5** Before lawmakers introduced the Sherman Act, so-called barons had controlled whole industries.

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- 6** 'Muckraking' journalists led the campaign against Standard Oil, which the authorities finally brought before the courts 20 years later.

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- 7** No one has ever calculated what advances people could have made by the market leader had the authorities allowed it to continue to increase its market share.

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- 8** Regulators were investigating the firm for its alleged abuse of its dominant position.

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Photocopiable worksheet 15.1 [continued]

9 Lawmakers introduced the Single European Market in 1993. Since then, it has protected the free flow of labour and capital within the EU.

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10 People have argued that antitrust laws have done more harm than good. Nobody can calculate how various factors would have affected markets if regulators had not enforced antitrust measures.

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11 People may bribe or even threaten small companies in order to persuade them to join cartels.

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12 Somebody needs to prevent this sort of coercive behaviour.

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13 The directors made the accountant conceal evidence of the collusion.

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14 Critics of regulation have pointed out that antitrust laws cannot defeat predatory pricing, but that people can rely on a truly free market to undermine such activities.

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15 The CEOs of the three companies agreed upon the cartel, and their companies entered into an unofficial agreement a few weeks later. Regulators only discovered the existence of the cartel when a former director, who the company had sacked, tipped off the OFT.

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Photocopiable worksheet 15.2

Look at the extracts below from Listening A. First, complete each gap using one word from the box. Then decide whether the speaker uses semi-informal (SI) or more formal (F) language. What do you notice? How could you make the semi-informal sentences more formal?

down get get going guess have helped I'd in is make
newcomer other out over over themselves used

- 1 The new cars aren't working as well as hoped, actually. (SI/F)
- 2 People just don't seem to be taking as many cab rides as they to – trying to cut on their expenses, I And the new subway connection to the airport hasn't us, either. (SI/F)
- 3 The problem, we've heard that a 's planning to enter our market. (SI/F)
- 4 Well, these guys call the Orange Team or something, and all their cars are orange, and they've been advertising all the place ... (SI/F)
- 5 Don Belmont called me the day and said he wanted to meet and a beer. (SI/F)
- 6 I thought it was a good idea to together and talk things, you know, how business is and things like that. (SI/F)
- 7 And then Don started talking about prices, and if there wasn't something we could do to it harder for these Orange boys to a foothold our territory. (SI/F)

dirt for from in into left lower of
off on on on over still to to up

- 8 Belmont suggested we cool our competition a little and agree some things, like territory and prices. (SI/F)
- 9 He said we should agree to our prices below those of the Orange Team, but also fix a certain lower limit that we both adhere, so that our losses wouldn't be too great. (SI/F)
- 10 I mean, there's no harm talking about things a beer, is there? (SI/F)
- 11 Even if you only discuss the idea of dividing territory or price-fixing with a competitor – that's what Mr Belmont's suggestion amounts, you know – even if the suggestion is never put practice, it is still an infringement the law. (SI/F)
- 12 Of course, it's very hard an evidentiary standpoint the case to be proven, but it's a violation. (SI/F)
- 13 Another suggestion he had was a discount airport trips, a special price, really cheap, that'd help us to hold to what's of the airport business. (SI/F)

LEGAL WRITING (1 h.)

Prepare a case brief for the COTY Case, using materials such as the CJEU judgment, the Advocate-General opinion and official press release, answers to reading comprehension questions, etc. Remember the use of passive constructions. You may also find the following Language box useful.

LANGUAGE BOX

- a. to fall within/outside the scope of Article (...)/Regulation (...)/EU Law
- b. enforcement of Competition Law
- c. imperative reasons of overriding public interest outweigh adverse effects on competition
- d. to dismiss an action on the grounds that....
- e. the Court took the view that
- f. to meet the conditions/criteria for benefiting from an exemption
- g. to bring an appeal against the judgement of [] before the []
- h. to refer a question to the ECJ for a preliminary ruling
- i. to amount to
- j. effect/object-based approach
- k. to play a role
- l. the court pointed out / noted that ...
- m. in the first instance, the court ruled ...
- n. the question before the court is whether ...
- o. the court reversed the ruling of the first instance.
- p. the court drew the conclusion that ...
- q. the court upheld/affirmed the decision of the lower court.
- r. based on this, the Court holds that
- s. the issue in this case is ...
- t. the instant case involves the following circumstances ...
- u. the court remanded the case back to the lower court for further proceedings.
- v. the arguments provided by the Court are/ are not valid/justified...
- w. to put under pressure
- x. a ban that constitutes/does not constitute...
- y. restrictions of competition "by object" or by "effect"
- z. decisions and concerted practices

Use the following model to prepare your case brief

Although individuals or law firms usually have their own preferred ways of structuring a case brief, a typical one will include the following elements:

A The name of the case, the names of the parties

Cases acquire their names from the parties involved, with the name of the party who initiates the action appearing first.

Useful terms

Plaintiff: the party who files a complaint in a civil suit in a trial court

Defendant: the party being sued

Appellant: the party who appeals the judgment of a lower court

Respondent: the responding party in an appeal

B A summary of the facts of the case

The circumstances leading to the dispute should be described briefly, but in all necessary detail. The history of the case, including the ruling of the lower courts, should also be mentioned.

Useful phrases

The facts of the case are as follows: ...

The lower court held that ...

C The legal issue's involved in the case

The point of law around which the case revolves or the legal issue it raises should be identified. This issue is often stated in the form of a question that can be answered with yes or no, or in the form of an indirect question beginning with whether.

Useful phrases

The question raised by this case is whether ...

D The ruling or holding of the court

The decision of the court in the case should be stated. This statement can take the form of an answer to the legal question raised by the case.

Useful phrases

The court held/ruled that ...

E The reasoning of the court

Here, an account of the reasons leading to the decision of the court is given, usually making reference to previous cases and established principles of law.

Useful phrases

The court argued/reasoned that ...

Listening B: MERGER CONTROL

(From Unit 15 *Competition Law*, pp. 216-217)

Introduction:

An important area of anti-competitive policy is merger control. Lawyers working for governmental institutions are involved in the investigation of proposed mergers. Their work is aimed at preventing the creation of structures that will lead to anti-competitive activities.

You will hear an excerpt from a speech on the evaluation of mergers given by a representative of the South African Competition Tribunal to an audience of business people and lawyers. The purpose of the Competition Tribunal is to adjudicate competition matters in accordance with the South African Competition Act. The speaker outlines the steps taken in the evaluation of mergers.

10.1. Listen to the speaker and answer these questions:

1. Which of these phrases best expresses the main purpose of this part of the speech? The main purpose is ...
 - a. to compare South African merger regulation with that of other countries.
 - b. to convince the listeners of the importance of merger control.
 - c. to help companies planning to merge to formulate their arguments in favour of merging more effectively.
 - d. to explain the reasons for renewing the Competition Act.

2. What does the speaker mean when he says that “there’s no public policy presumption against mergers”?
 - a. The merger evaluation process primarily seeks to prevent proposed mergers based on exaggerated claims from being carried out.
 - b. The competition authorities acknowledge the fundamental necessity of corporations to restructure their business to increase productivity.
 - c. Merger investigators tend to favour small-scale mergers that do not infringe on competition requirements.
 - d. A merger that has been designed with the aim of dominating the market will not be approved.

10.2. Listen again and choose the best answer to each of these questions:

1. According to the speaker, what is the first step in the evaluation of a merger?
 - a. determining whether the merger will lead to the company having small or a large market share?
 - b. analysing the effect of the merger on competition.
 - c. defining the state of international trade in the product.

2. The speaker recommends that when a company argues that a merger will increase its efficiency, the company should:
 - a. present data to support this claim.
 - b. refer to the economies-of-scale idea.
 - c. speculate on the advantages that can be expected to result.

3. According to the speaker, the third and final step in the evaluation process involves:
 - a. considering the effect of the merger on public interest.
 - b. surveying public opinion regarding the merger.
 - c. deciding whether the merger can be administrated effectively.

Outline of the presentation contents:

Opening:

- *Topic*: How are mergers evaluated?
- *Legal foundation*: Competition Act (Section 16) lays out the criteria to be employed in the merger evaluation process.
- (*Presentation overview*)

Body: Three key steps:

1. Analysing the effect of the merger on competition.

- Sophisticated analysis which considers a range of factors such as:
 - The nature of (a)
 - The state of (b)
 - Past(c)
 - The prospect that one of the firms (d)
- It is possible that a merger that leads to a large market share might be (e), whereas one that results in smaller market shares might be (f)

2. Defining the market.

- Predictably, the parties define their market (g) Conversely, competition authorities tend to have (h) definitions of the market.
- If a merger impedes competition, the tribunal and investigators must:
 - ask whether there are not (i) from the merger.
 - avoid presenting ideas or analyses based on (j)
 - not exaggerate the efficiencies (k)
 - bear in mind that the evidence regarding the mergers' efficacy as a corporate strategy is (l)
 - not simply assert the economies-of-scale argument but present (m)
 - not demand that the merger should be permitted because there are significantly bigger (n) elsewhere in the world
 - be prepared to support with (o) the argument that turning down the merger will result in the death of one or even both parties.
- The problem with efficiency defences is that they need to be evaluated (p), before the merger has been consummated, which means that the claims are (q)

3. Assessing the impact on public interest.

- It is a controversial step as on public interest grounds an anti-competitive merger may be (r) and a merger that's judged to have no negative impact on competition may be (s)
- The Act specifies the (t) that may be considered but it'll always be a difficult judgement call.
- Again, cynicism and (u) do not help.

Ending

- There is no public policy (v) These transactions are an aspect of corporate restructuring that is (w) and

- The vast majority of mergers are expected to be easily approved; even those that do run into objections are susceptible to (x)

- However, mergers that are devised (y) will fall foul of the Act. Better (z) to save time, money and considerable frustration down the line.

CASE SUMMARY PRESENTATION _ MAIN STRUCTURE

Following Michael Makdisi & John Makdisi (LexisNexis 2009)

OPENING

Topic/Legal Case:

BODY

1. Parties and facts of the case:

- (a) Name of the case and name of the parties:
- (b) Summary of the facts:
- (c) Legal issue:
- (d) Arguments (each party's opposing arguments):
- (e) Procedural history (what events within the court system led to the present case):

2. Judgement

- (a) Ruling or holding:
- (b) Dicta (brief explanation about the ruling):

3. Rationale

- (a) Reasoning of the court:
- (b) Dissent (the dissent's opinion, if valuable):

4. Final comments or remarks (personal commentary):

CLOSE