Concentrate Questions and Answers EU Law: Law Q&A Revision and Study Guide (3rd edn)

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8. Competition and Merger Law

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https://doi.org/10.1093/he/9780198853190.003.0008

Published in print: 06 August 2020

Published online: September 2020

Abstract

The Concentrate Questions and Answers series offer the best preparation for tackling exam questions. Each book includes typical questions, bullet-pointed answer plans and suggested answers, author commentary, and illustrative diagrams and flowcharts. This chapter presents sample exam questions along with examiner's tips, answer plans, and suggested answers about EU competition. The questions on competition law range from a general overview question, to questions which surveys the basic concepts and requirements of Arts 101 and 102 TFEU. The 2007 Lisbon Treaty made little substantive change to the competition law provisions, which can be found in Arts 101–106 of the TFEU. More significant is the Competition Regulation 1/2003 and the Merger Regulation, 139/2004.

Keywords: EU law, competition law, Article 101 TFEU, Article 102 TFEU, merger law, 2007 Lisbon Treaty

Are You Ready?

In order to attempt questions in this chapter, you must have covered all of these topics in both your work over the year and in revision:

- The procedural aspects of competition law, but which may not be covered in any significant way in all courses including competition law.
- The basic concepts and the main requirements of **Arts 101 and 102 TFEU**, which are the main focus of this chapter.

- The **2007 Lisbon Treaty**, although it made little substantive change to the competition law provisions.
- Depending on the coverage in your course, you should be aware of the **Competition Regulation 1/2003** and the **Mergers Regulation 139/2004**.

Key Debates

Debate: the place of competition law within the Treaty and EU generally

As one of the original policy areas of the EU from its first establishment, competition is now a well-established and largely settled area of law; its place in the EU is still however subject to discussion.

Question 1

Why is competition law policy an integral and necessary part of the EU?

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Caution!

■ This is a question which allows you considerable freedom in how you answer, but does require you essentially still to address the question of why competition law was included, when the central element of the original EEC was the common or single market consisting of the various freedoms.

Diagram Answer Plan

Suggested Answer

The EU as originally established was aimed at the establishment of a common market and the progressive approximation of the economic policies of the Member States.[1] The **Preamble to the EU Treaty** generally sets out these basic objectives.

[1] This first question is one which concerns an overview of the topic and its place in the EU legal order.

The main objectives of the EU[2]

[2] To answer this you must consider the main objectives of the EU which are outlined in the **Preamble to the EU Treaty**.

The general aims include the creation of the Common Market, which was to be achieved by abolishing obstacles to the freedom of movement of all the factors of production, namely goods, workers, and providers of services and capital. The Treaty also provided for the abolition of customs duties between the Member States and the application of a common customs tariff to imports from third countries. There were to be common policies in the spheres of agriculture and transport, ↵ and a system ensuring that competition in the Common Market is not distorted by the activities of cartels or market monopolists.

The main objectives of EU competition policy[3]

[3] This should be followed in turn by a consideration of the main objectives of competition policy itself.

EU competition policy was based both on the extensive American experience of the concentration of power in the market place in too few hands and also, to some extent, on the post-Second World War German legislative experience with large undertakings and cartels. Attitudes were also influenced by the desire to protect emerging and expanding industries and companies and to encourage the rebirth of European industry after the devastation of the Second World War. Thus, one of the fundamental positions of the competition law to be established was that there should be no barriers against the entry to the market of new companies and industries. The broad policy objective of competition law, therefore, which was formulated by the European Economic Community, was to maintain and encourage competition for the benefit of the Community (now Union) and its citizens.

Competition law was therefore constructed to ensure the maintenance of the Common Market. One of the aims of the internal market is to establish and maintain European-wide competition to stimulate the entire economy of the Community (now Union) for both the domestic and world markets and thus assist European capital in competing in the world market. Competition law is designed to help achieve a single market and the integration of the Union, to encourage economic activity amongst small- and medium-size enterprises, and to maximise efficiency by allowing the free flow of goods and resources. At the same time it must be ensured that companies do not become too successful, to be able to eliminate competition, thereby starting to dominate a market, or to cooperate in such a way with other companies as to act as one unit to the detriment of consumers and smaller firms in the Union. Competition law may also be regarded therefore as necessary to prevent these undesirable developments from being realised. In order to retain fair competition, more so in a capitalist free market, some form of intervention on the part of the state is required. Action is concentrated on the larger players in the market rather than the small and medium business enterprises.

The **Preamble to the old EC Treaty** stated that the 'removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition'. Whilst these aims are not so prominent in the **EU Treaties** as revised by the **Lisbon Treaty, Art 3(3) TEU** refers to a

highly competitive social market economy and **Art 3(d) TFEU** provides an exclusive competence to the Union with the 'establishing of the competition rules necessary for the functioning of the internal market'.

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General Treaty Articles in support of competition policy[4]

[4] It is useful to supply some brief details of the general Treaty Articles which act in support of the overall objectives of the EU and its competition law.

Article 10 EC (now 4(3) TEU) has also been pleaded as a general principle of law supporting the argument that competition law also applies in respect of the Member States and not just undertakings so that they are prohibited from encouraging or requiring acts or conduct by companies which may distort competition in the Union. **Article 12 EC (now 18 TFEU)** too has featured in cases on competition law to ensure equal access to markets and the distribution of goods and services without discrimination.

The broad aims are then expanded in three sets of rules:[5] one relating to the activities of legal persons —that is, the business undertakings, which now includes rules on concentrations and mergers; one relating to anti-dumping measures; and, finally, one relating to the activities of the Member States, principally state aid. The rules concerned with private undertakings are further subdivided into: **Article 101 TFEU** for agreements between cartels involving more than one entity; **Article 102 TFEU**, concerned with dominant positions, dealing predominantly with one entity but also applicable to one or more undertakings; and the rules applicable to concentrations and mergers. The specific EU competition rules are generally designed to intervene to prevent agreements which fix prices or conditions or the supply of products, to prohibit agreements which carve up territories, to prevent abuses of market power which have the effect of removing real competition, and to control mergers which would also remove competition.

[5] Then it is suggested you provide a brief overview to the main provisions of competition law and the secondary legislation in order to explain how it is to be pursued in the EU legal order.

The role of the Commission[6]

[6] Additionally, outlining the role played by the Commission in EU competition law helps provide a complete answer.

The Commission is given the task under **Art 105 TFEU** and **Regulation 1/2003** of ensuring that competition in the EU is not distorted by companies setting up their own rules and obstacles to trade, thereby replacing the national rules and obstacles which the EU is trying to abolish by application of the free movement of goods provisions.

The relationship with other rules and policies[7]

[7] You should consider its relations with other policies of the Union and the reasons why it is considered to be a necessary policy in the Union.

These rules seek to prevent the creation of artificial barriers to trade on the national boundaries. Competition law is therefore inextricably linked to other Union policy areas, especially to the free movement of goods, because it would prove impossible to have one without ensuring having the other. To have prevented the Member States on the one hand from restricting the movement of goods just to allow private companies to do it by their agreements and practices would defeat the objectives of the first policy, and, vice versa, to prevent companies from artificially dividing the markets, but to allow the Member States to do so, would undermine a competition ↵ policy. A further argument for having an effective competition policy is that some multinational companies are in a better position to divide the market than some Member States, because they have the same or greater turnover than the gross national product (GNP) of some of the EU Member States and so need to be subject to international control.

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Judicial consideration of the policy[8]

[8] Finally, support the answer by looking at how it was viewed in case law by the Court of Justice.

The application of the rules by the Commission and the interpretation of the rules by the Court of Justice have not been done in isolation by looking at the provisions alone, but in the light of the objectives of competition policy. The rules are also applied in the light of the general objectives of the Treaty. In ***Commercial Solvents v Commission (6 and 7/73)***, the CJEU held:

> The prohibitions in **Arts 85 and 86 (now 101 and 102 TFEU)** must be interpreted and applied in the light of **Art 3(f) EEC Treaty (now 3(d) TFEU)**, which provides that the activities of the Community shall include the institution of a system ensuring that competition is not distorted, and **Art 2 EEC Treaty**, which gives the Community the task of promoting throughout the Community harmonious development of economic activities.

The case of ***Metro v Commission (26/76)*** is also a good example, whereby the Commission, in pursuit of a goal, was forced to rely on **Art 2 EC** to justify particular decisions reached. The agreements in question were deemed to satisfy competition rules because they helped to maintain employment. This latter case serves as an example of where the Commission, in carrying out its tasks in relation to competition law, is also required to balance this policy with other policies such as regional development or concern for unemployment and which may cause it to modify its position on the behaviour of companies. The Court of First Instance of the European Communities (CFI) (now the General Court) is now the primary EU court concerned with competition cases; it has also stressed the importance of the competition policy to the Union political and constitutional order in ***Courage v Crehan (C-453/99)***.

The general economic climate also influences the Commission, particularly in respect of merger policy, in that in times of poor economic growth, the Commission may treat mergers as being more acceptable because of the efficiency gains to be achieved and the greater ability the emerging company will have in the world market. General developments in competition law were dealt with in the article by Slot.[9]

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[9] Cited in the 'Taking Things Further' section at the end of the Chapter.

Competition law policy cannot, therefore, be pursued alone and it is to be concluded that competition law is an inextricable part of the EU and its policies.

Looking for Extra Marks?

- If there is time, provide details on further leading cases to illustrate competition law in practice: ***BRT v SABAM (127/73)***, ***Consten & Grundig v Commission (58/64)***, ***STM (56/65)***, *and* ***United Brands (27/76)***.
- Outline the changing enforcement regime and maturing of the system through national enforcement agencies under **Regulation 1/2003**.
- Discuss EU involvement in merger control and **Regulation 139/04**.

Question 2

Branches of two non-EU Member State companies, the Red Dwarf Mining Corporation (RDMC) and Green Giant Mining (GGM), have moved into the EU to exploit the remaining European deposits of tin. In informal meetings of the management of the two companies, which took place before their move into the EU, they decided on a strategy to work the European market to their advantage. They have restricted supplies to customers in and outside the EU to drive up prices and thus profits for their parent companies. So far RDMC have secured 42 per cent of the market and GGM have secured 23 per cent.

Complaints have been made by competitors and customers to the Commission, which is investigating. The companies claim the investigations cannot apply to either companies or agreements from outside the EU.

a. Advise RDMC and GGM.

b. Would your answer be any different if RDMC and GGM formally merge prior to any action being taken?

Caution!

■ **You are not supplied with any real facts to come to definitive conclusions on the second part of the question, thus all you can do validly in answering this question is to generally describe the EU concern and involvement in mergers.**

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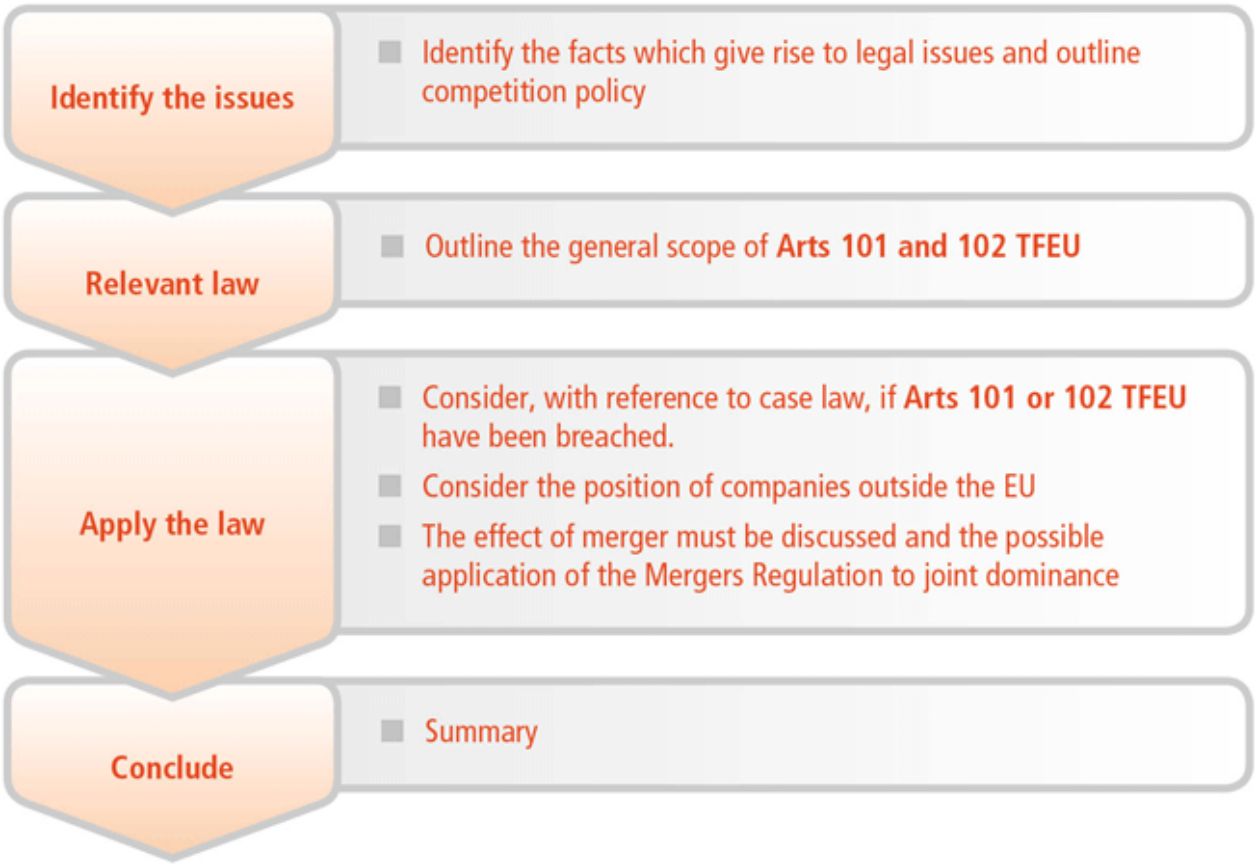
Diagram Answer Plan



Suggested Answer

Competition law is one of the fundamental policies of the Union and is generally mentioned in **Arts 3 of both the TEU and TFEU.**[1] **Article 3(d) TFEU** refers to the 'establishing of the competition rules necessary for the functioning of the internal market'.

[1] This problem question will involve you in a general consideration of the application of the principal provisions of both **Arts 101 and 102 TFEU** and consideration of mergers.

The facts[2]

[2] Outline the pertinent facts.

The relevant facts in this case are that the branches of two non-EU Member State companies are pursuing a strategy agreed on outside the EU, which involves the restriction of supply to customers to drive up prices and profits. As a result, it would seem that both companies have secured a sizeable share of the EU market.

The applicable law[3]

[3] You should briefly outline the scope of **Arts 101 and 102 TFEU**.

The two principal provisions to combat anti-competitive behaviour are **Arts 101 and 102 TFEU**.

Article 101(1) TFEU prohibits agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between the Member States and which have as their object or effect the prevention, restriction, or distortion of competition within the internal market. **Article 101(2) TFEU** provides that any agreements or decisions prohibited pursuant to this Article shall be automatically void.

p. 165 ↵ **Article 102 TFEU** applies where individual organisations have a near monopoly position or share an oligopolistic market with a small number of other companies and take unfair advantage of this position to the detriment of the market, other companies, and the end consumers. **Article 102 TFEU** provides that the abuse by one or more undertakings of a dominant market position within the internal market or in a substantial part of which affects trade between Member States is prohibited.

Next it is necessary to determine whether the factual circumstances amount to a breach of either **Art 101 or 102 TFEU**.[4]

[4] You need to determine whether the case concerns an agreement between the parties contrary to EU competition law, or whether it concerns the abuse of a dominant position by the parties.

The possible breach of Art 101 TFEU[5]

[5] Apply **Art 101** with the assistance of case law to the facts.

In order for **Art 101 TFEU** to be breached, it must be shown that there is a form of agreement or concerted practice which may have affected trade between Member States. No actual agreement is necessary to breach **Art 101 TFEU** and a concerted practice will suffice. In ***ICI v Commission (Dyestuffs)***

(48/69) general and uniform increases were witnessed from a small number of leading producers. The Court of Justice defined a concerted practice as a form of coordination between enterprises that had not yet reached the point of a true contract relationship but which had in practice substituted cooperation for the risks of competition. See also the ***Sugar Cartel*** *case* ***(Suiker Unie v Commission (40–48/73))*** in which the firms responsible for the alleged breach said there was no plan. The CJEU held there did not have to be one. In the ***Polypropylene*** **cases (T-7/89, T-9/89, and T-11/89)**, the CFI (now the General Court) held that expressions of intention, even if not in writing, of particular conduct could constitute an agreement of concerted practice. Countering these cases is the ***Wood Pulp*** *case* ***(C-89, 104, and 125–129/85)***. The CJEU held that parallel conduct could not be regarded as proof of a concerted practice unless that was the only plausible explanation for the conduct. In the present case, providing there is some indication that an agreed practice is being pursued, it is likely that a concerted practice between undertakings will be established. In ***C-199/92P Hüls AG v Commission***, the CJEU held that, to be a concerted practice, there is no need to demonstrate either conduct in the market or restricted competition, merely a requirement to demonstrate that there was participation.

Next, the agreement must be one which has the object or effect of restriction of competition which may affect trade between Member States. **Article 101(1) TFEU** focuses on particular practices which would offend competition law. Amongst these are those listed under **Art 101(1)(b) and (c) TFEU**, which limit markets or supply. In the present case the agreement is clearly one which has this object.
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In fact, even a potential impact will do; see the ***Consten*** and ***Grundig*** *cases* ↵ ***(56 and 58/64)***. To infringe **Art 101 TFEU**, the practice complained of must be capable of affecting trade between Member States. The cases of ***Consten*** and ***Grundig*** and the ***Cement Association (8/72)*** are examples of the requirements for this. It has to be probable in law or fact that the agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. If there is an impact on the pattern of trade, then there is an effect on trade. The restrictions on supply and the consequent price increases would clearly fall into this category; therefore a breach of **Art 101(1) TFEU** is probable. A set of Guidelines issued by the Commission in 2004 (OJ 2004 C101/81) summarises the case law of the CJEU on effect on trade between Member States.

Article 102 TFEU[6]

[6] Apply **Art 102** with the assistance of case law to the facts.

Article 102 TFEU may also be breached if there is an abuse of a dominant position by a single undertaking in the EU. Dominance must be established both in terms of the product and geographic market.

The product market

The product must be a unique product which is not interchangeable. It must be assumed that there is no substitute for the raw metal tin. Is there dominance? We are only told that RDMC has 42 per cent and GGM has 23 per cent of the market in the Community. In ***United Brands (27/76)***, the share of 45 per cent was considered sufficient but the next competitor had only 16 per cent, a greater difference than here with 42 per cent and 23 per cent. In the ***Hoffman La Roche*** *case* ***(86/76)*** the CJEU rejected the Commission finding that 43 per cent constituted dominance but instead referred only to a very large market share as being necessary. Thus, considering each company individually, it would be arguable whether RDMC or GGM alone would be dominant. Whilst there is no definitive word from either the Commission or the Court on this point, the Mergers Regulation states that concentrations whose market share does not exceed 25 per cent would not be considered to impede competition. However, **Art 102 TFEU** may apply to one or more companies and the combined share would be 67 per cent, which in a joint action would be a position of dominance. Difficulties in interpreting the requirements of **Art 102** may be resolved by consulting the Commission notice on it: Guidance on its enforcement priorities in applying Article 82 EC Treaty (now **102 TFEU**) to abusive exclusionary conduct by dominant undertakings (OJ C45/7).

According to the CJEU in ***Compagnie Maritime Belge Transports (C-395 and 396P/96)***, an agreement within the meaning of **Art 85(1) (now 101 TFEU)** may result in undertakings being so linked that they become and act as a collective entity as far as their competitors and ↵ customers are concerned and as such a collective dominant position can arise, which can then be abused in the manner noted here.

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The geographic market

The geographic market is also satisfied as it is the whole of the EU; see the ***United Brands (27/76)*** and ***Tetra Pak (T-51/89)*** cases.

Abuse

It then has to be shown that there is an abuse of dominant position. Limiting production is one of the grounds listed in **Art 102 TFEU**, as was refusal to supply in the ***United Brands*** case; therefore an abuse can be shown in the present case.

Effect on trade between Member States

Finally, trade between Member States must be affected. In the ***Commercial Solvents v Commission case (6 and 7/73)*** it was held that conduct which has the effect of altering the competitive structure within the Common Market will satisfy the requirement of effect on trade between the Member States. This would be the case with RDMC and GGM. Thus a breach of **Art 102 TFEU** is also likely to be established.

A significant objection of the two firms is that the companies and the agreements are from outside the EU and they would argue that they cannot be touched by the EU competition law rules. However, the position in the EU is that the competition rules apply to all undertakings whose operations or agreements affect trade between Member States and have as their object or effect a restraint on competition in the Union. The ***ICI Dyestuffs** case (48–57/69)* considered that the unity of conduct in the market between the parent and the subsidiary was the decisive factor in the case. The ***Wood Pulp** case (C-89, 104, and 125–129/85)* is also instructive. In this case the pricing agreements took place outside the EU but the implementation took place within the EU; therefore, if the agreements led to anti-competitive consequences through the activities of branches, they would infringe **Art 101 TFEU**.

The fact that the breaches are committed in the Union[7] puts the companies within the territorial jurisdiction of the Treaty and thus the Commission and the General Court, even where the parent companies have no direct physical involvement and the agreements were outside of the EU (***ICI Dyestuffs*** case).

[7] Consider the fact that the companies' head offices are based outside the EU and whether this will affect the ability of the Commission to investigate and prosecute a breach of EU law.

If the undertakings merged?[8]

[8] You are required to address the alternative situation in which the companies merge.

In the alternative, it is necessary to consider the effect a merger would have. If the merger takes place outside the EU, as is assumed to be the case here, it may still be a concentration with a Union dimension as far as the **Mergers Regulation 139/04** is concerned; see the Decision of the Commission in ***Matsushita/MCA (IV/M37)***. **Article** ↵ **1** states that it applies where there is a worldwide turnover of more than €5,000 million and an aggregate EU-wide turnover of each of at least two of the undertakings of more than €250 million. An EU dimension may nevertheless pertain, if:

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(a) the combined aggregate worldwide turnover of all the undertakings is more than €2,500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings is more than €100 million;

(c) in each of at least three Member States, the aggregate turnover of each of at least two of the undertakings concerned is more than €25 million;

(d) the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than €100 million.

This information is not provided in the problem,[9] but if the turnover does not reach these thresholds then the merger is not one of an EU dimension. If they do exceed the thresholds the companies are required under **Art 4(1)** to inform the Commission. Failure to do so will render them liable to a fine under **Art 14**. The Commission will determine under **Art 2** whether the concentration is compatible with the common market with a view to declaring it compatible or suspending it. This may be difficult to enforce outside the EU but an extraterritorial merger was blocked in the ***GE/Honeywell decision (M2220)***. However, recourse to **Art 102 TFEU** may still be necessary to combat the anti-competitive behaviour.

[9] As was outlined in the caution, without being supplied with the facts, you can only generalise.

Joint dominance short of merger[10]

[10] Consider whether the **Mergers Regulation** applies to the situation of joint dominance of a market by the activities of more than one company (or whether this this should be caught by **Art 102 TFEU**).

A formal merger agreement might not be required to be subject to the **Mergers Regulation** and even independent firms may be subject to it. In joined cases ***France v Commission (C-68/94)*** and ***Société Commerciale des Potasses et de l'Azote (SCPA) v Commission (C-30/95)***, the CJEU determined that the **Mergers Regulation** applies also to collective dominance although, as noted, collective dominance short of merger may be caught under **Art 102 TFEU**. A reference to the CJEU would be required, however, to be certain about this.

Looking for Extra Marks?

■ If time, present a complete summary of the findings at the end of the answer: that there was a concerted practice which had the object or effect of affecting trade and was thus in breach of **Art 101 TFEU**; that, although there was not an individual breach of **Art 102 TFEU**, collective dominance and thus a breach was likely; and finally that the **Merger Regulation** may be applicable to the possible merger.

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Question 3

Widgets Ltd (W) is a UK manufacturer of the widgets which are fitted into beer cans to ensure that the drink has a frothy head. It holds 40 per cent of the EU market. There are three other European manufacturers of this product, the largest of which is Krimskrams GmbH (K) in Germany, which holds 30 per cent of the EU market. The rest of the EU market, valued at more than €1,000 million p.a., is made up by two other EU companies with less than 10 per cent of the market between them and imports from the USA, Japan, Korea, and China.

W and K are the only manufacturers of the machines which produce the widgets.

Press reports have noted that, following the twice-yearly Convention of European Widget Manufacturers (CEWM), prices of the UK- and German-built widgets rise, followed shortly by the prices of other manufacturers. The companies stated, in a recent statement, that there was never any form of agreement between them in respect of pricing policy. However, W and K have now decided to merge to consolidate their position in the European and world market for widgets. They have also refused to supply spares for the machines to the non-EU manufacturers.

In the light of the developments, the Commission has commenced an investigation into the actions of the companies to determine whether any breach of EU law has been committed.

Advise the Commission as to the likelihood that the Court of Justice will uphold their claim:

a. that the companies have breached either Art 101 or 102 TFEU;

b. that the companies have breached the Mergers Regulation.

Caution!

■ This is a general question which concentrates on the main principles of each of the areas covered rather than going into precise details of any provision in particular, hence your answer should reflect this approach.

■ Whilst the question has been split into two parts, this does not mean that you should spend 50 per cent of the time on each. If this was intended or required by the examiner, it would normally be made clear that each part carries 50 per cent of the marks. There is considerably more law and more to write about for Part (a) in this question but you have to decide the appropriate balance.

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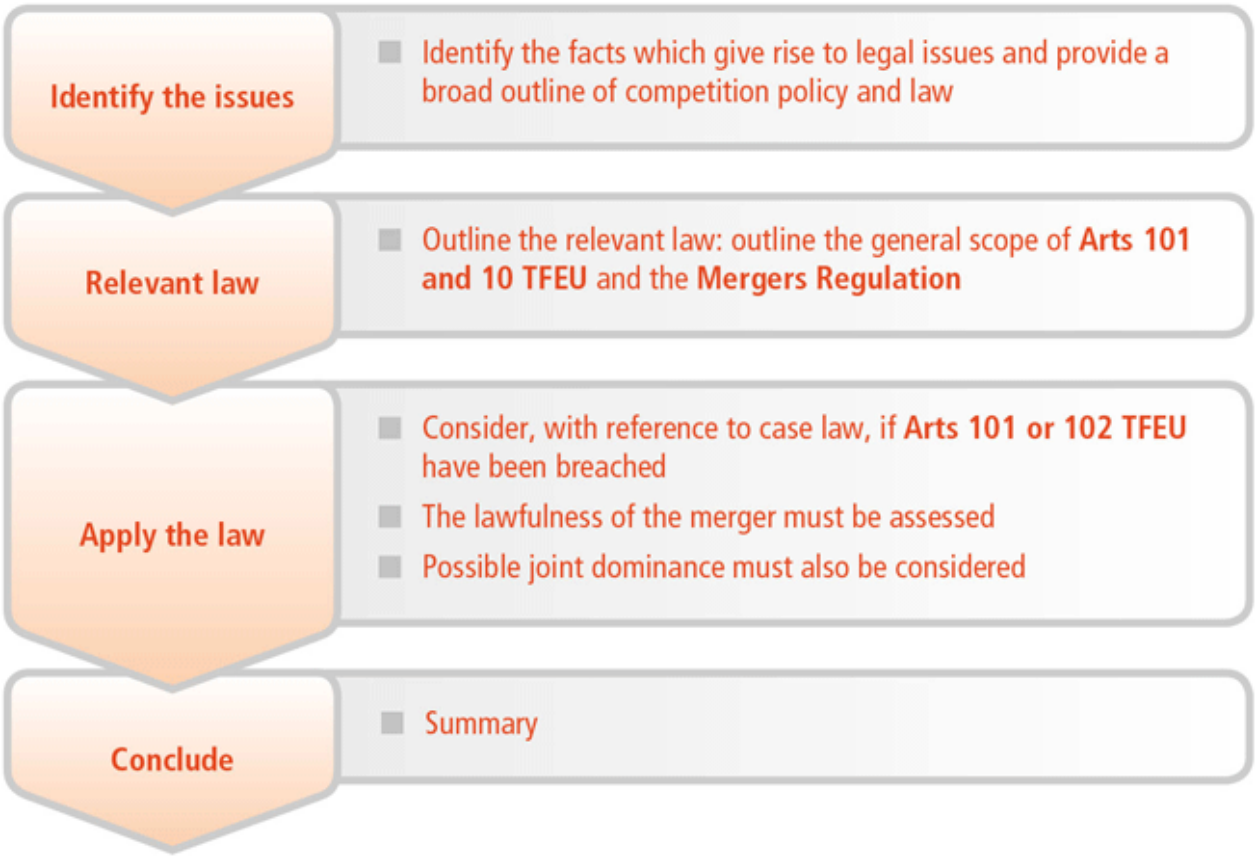
Diagram Answer Plan



Suggested Answer

General introduction[1]

[1] This is a general problem question on competition law covering aspects of **Arts 101 and 102 TFEU** (ex 81 and 82 EC) and the **Mergers Regulation**.

Competition law in general is designed to ensure there is healthy competition in the EU which will benefit not only the EU market but also consumers.[2] The EU competition law policy seeks to achieve this by outlawing any behaviour which is contrary to this credo. Competition law in the EU therefore attacks concerted action which is anti-competitive and individual actions which abuse market strengths to the detriment of competition. The EU has also enacted legislation to combat anti-competitive mergers which have a European dimension.

[2] It is always good to introduce generally the area of law and what it seeks to achieve.

Factual issues[3]

[3] As with other problem-type questions, the factual issues to be tackled need to be identified.

The issues to be considered in the answer are: the price rises which occur after the meeting of CEWM, the decision to merge, and the refusal to supply spares for the machines.

The law to be applied[4]

[4] This question asks you to consider whether the companies have breached either **Arts 101 or 102 TFEU** or the **Mergers Regulation 139/04**.

The law applicable to this answer is as follows. **Article 101(1) TFEU** prohibits agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between the Member States, and which have as their object or effect the prevention, restriction, or distortion of competition within the internal market. **Article 101(2) TFEU** provides that any agreements ↵ or decisions prohibited pursuant to this Article shall be automatically void.

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Article 102 TFEU provides that the abuse by one or more undertakings of a dominant market position within the internal market or in a substantial part of it, which affects trade between Member States, is prohibited.

The **Mergers Regulation 139/04** establishes a division between large mergers with a European dimension, over which the Commission will exercise supervision, and smaller mergers which will fall under the jurisdiction of national authorities.

Now to turn to each of the provisions in turn.[5]

[5] Thus you can concentrate on whether the main requirements of these elements of EU law have been infringed by the actions of the parties.

Possible breach of Art 101 TFEU

First of all, the possible breach of **Art 101 TFEU** will be considered. In order for it to be breached it must be shown that there is an agreement which may have affected trade between Member States.

Whilst the companies have declared that there was no formal agreement between them, it has been demonstrated that no actual agreement is necessary to breach **Art 101 TFEU** and the Article allows for a concerted practice to suffice. In the case of ***ICI v Commission (Dyestuffs) (48/69)*** general and uniform increases were witnessed from a small number of leading producers. The Court of Justice defined a concerted practice as 'a form of coordination between enterprises, that had not yet reached the point of true contract relationship but which had in practice substituted cooperation for the risks of competition'.

In a particular instance there would be a need to show the similarity of rate and timing of increases and whilst not having to prove the existence of agreements; there is still a requirement to establish that some form of contract existed.

In our case it is the meeting of CEWM that should establish this. See also the ***Sugar Cartel*** *case* ***(Suiker Unie v Commission) (40–48/73)*** in which the firms responsible for the alleged breach said there was no plan. The CJEU held there did not have to be one. The ***Wood Pulp*** *cases* ***(C-89, 104, and 125–129/85)*** would, however, increase the burden on the Commission to demonstrate that in this case, there were no other plausible explanations for the parallel price increase other than by agreement of concerted action. The ***Hüls*** *case* ***(C-199/92P)*** makes it clear that it is not necessary to show conduct or impact on the market, but it is the taking part that counts.

Object or effect

Thus, if it is considered that a concerted practice is in existence it must be shown that the object or effect of it was to restrict competition. A potential impact will be sufficient for the requirements of the Article; ↵ see ***Consten*** and ***Grundig (56 and 58/64)***. Price-fixing, which was the object of the present activity, clearly offends as it is an example provided by **Art 101(1)(a) TFEU**; therefore this aspect is established in the present case.

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To some extent the same question of an impact on trade is applied to determine whether there has been an effect on trade between Member States. The cases of ***Consten*** and ***Grundig (56 and 58/64)*** and the ***Cement Association (8/72)*** are examples of the simple requirements for this to be met. If there is an impact on the pattern of trade then there is an effect on trade. Clearly price increases will impact on the pattern of trade between Member States.

Breach of Art 102 TFEU (establishing dominance)

Article 102 TFEU will be breached if there is an abuse of a dominant position in the EU. Dominance must be established both in terms of the product and geographic market. The Commission has published a Notice on the Definition of the Relevant Market (OJ 1997 C372/5) which provides a

summary of the case law and Commission methodology and hence guidelines for determining the relevant markets. The first product market is widgets for beer tins. The product market of spares for the widget machines will be considered here. In the ***United Brands*** *case (27/76)*, it was held it must be a unique product which is not interchangeable. In the absence of any evidence to the contrary, this is the position in the present case. It then has to be considered whether there is dominance. We are informed that the two companies, Widgets and Krimskrams, have 40 per cent and 30 per cent respectively of the market in the EU. Taken individually, the market share of 40 per cent held by Widgets might not, in view of the case of ***United Brands***, be enough on its own to constitute dominance, especially where the next competitor has 30 per cent. If this is uncertain, then it is even more unlikely that the 30 per cent held by Krimskrams would be enough to constitute market dominance.

Joint dominance of widgets market[6]

[6] The possibility of joint dominance must also be entertained.

However, **Art 102 TFEU** also covers the situation of one or more undertakings which together occupy a dominant position. If the two parties were subject to a joint decision of the Commission, the resultant market share of the two companies of 70 per cent would most probably be held to be a position of dominance. In fact, according to the CJEU case of ***Compagnie Maritime Belge Transports (C-395 and 396P/96)*** an agreement within the meaning of **Art 85(1) EEC (now 101 TFEU)** may result in undertakings being so linked that they become and act as a collective entity as far as their competitors and customers are concerned and as such a collective dominant position can arise under **Art 102 TFEU (ex 86 EEC)**, which can then be abused.

p. 173 ↵ The supply of spares for the machines is also a separate market in which, in the case at hand, the 100 per cent share of the market by the two companies will establish complete dominance; see the ***Hugin*** *case (22/78)*. It may however be argued that, in respect of the machines, the refusal to supply only has effects outside the EU, but in the ***Commercial Solvents*** *case (6 and 7/73)*, where the supply was outside the EU market, the CJEU held that this fact did not remove its jurisdiction as the effect would still be prominent in the EU market. See also the ***Wood Pulp*** *case (C-89, 104, and 125–129/85)* in this respect.

The geographic market is also satisfied as it is the whole of the EU; see ***the United Brands*** and ***Tetra Pak (T-51/89)*** cases.

The abuse

The abuse which offends the EU regime is the price-fixing in respect of the widgets and the refusal to supply in respect of the spares, specifically noted in **Art 102(a) and (b) TFEU**.

The ***Continental Can** case (6/72)* also suggested that a further form of abuse could be the merger itself but this point can now be addressed under the **Mergers Regulation 139/04**.

The merger[7]

[7] The next topic for consideration is the lawfulness of the merger.

After merger the companies have 70 per cent of a market for widgets estimated at over €1,000 million and 100 per cent of the machines and spares supply market.

Article 1 of the **Mergers Regulation** states it applies where there is a worldwide turnover of more than €5,000 million and an aggregate EU-wide turnover of each of at least two of the undertakings of more than €250 million. **Article 1(3)** provides that an EU dimension may nevertheless pertain, if:

- **(a)** the combined aggregate worldwide turnover of all the undertakings is more than €2,500 million;
- **(b)** in each of at least three Member States, the combined aggregate turnover of all the undertakings is more than €100 million;
- **(c)** in each of at least three Member States, the aggregate turnover of each of at least two of the undertakings concerned is more than €25 million;
- **(d)** the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than €100 million.

Whilst we know the share of the EU market we do not know the share of the world market. If they do exceed the limits of **Art 1**, **Regulation 139/04** requires them to inform the Commission. By failing to inform the Commission (**Art 4(1)**) they can be fined (**Art 14**).

The Commission will determine under **Art 2** whether the concentration is compatible with the internal market. The facts do not reveal whether this merger has taken place. If it has, the
p. 174 Commission ↵ may investigate with a view to declaring it compatible or suspending it. If not, the abuse of a collective dominance on the part of the two companies may still breach the Mergers Regulation according to the CJEU in the cases of ***France v Commission (C-68/94)*** and ***Société Commerciale des Potasses et de l' Azote (SCPA) v Commission (C-30/95)*** or **Art 102 TFEU** according to ***Compagnie Maritime Belge Transports (C-395 and 396P/96)***; however, an application to the General Court would be necessary to determine this. Collective dominance has been further considered in the ***Airtours*** case ***(T-342/99)*** in which it was held that three conditions must be shown by the Commission. There needs to be market transparency, the tacit coordination must have been

maintained over a period of time in pursuit of the common policy, and that common policy must be safe from market disturbance. In this problem question, there is insufficient information to assess whether these conditions have been satisfied.[8]

[8] There may not be a clear, definitive answer you can provide, in which case try to present, first of all, both sides or possible solutions but then suggest that a reference under **Art 267 TFEU** may be needed for the CJEU to decide the matter.

Looking for Extra Marks?

■ You could mention that a review of merger policy has been taking place, with a commission paper published in 2014 COM (2014) 449 final, but which recommended only limited changes.

Question 4

'Even though **Art 81 [now 101 TFEU]** is meant to cover concerted actions as opposed to abusive conduct covered by **Art 82 [now 102 TFEU]**, both provisions need to be interpreted in conjunction with each other.' (Van Bael and Bellis)

Discuss.

Caution!

■ As with other slightly cryptic essay-type questions, it would be easy to lapse into writing all you know about the two Treaty provisions rather than addressing the question specifically.

■ The question is suggesting that, rather than treating the two provisions as mutually exclusive and thus never to be considered as overlapping or covering the same ground, in fact there are circumstances when both provisions may need to be taken into account when considering certain factual circumstances.

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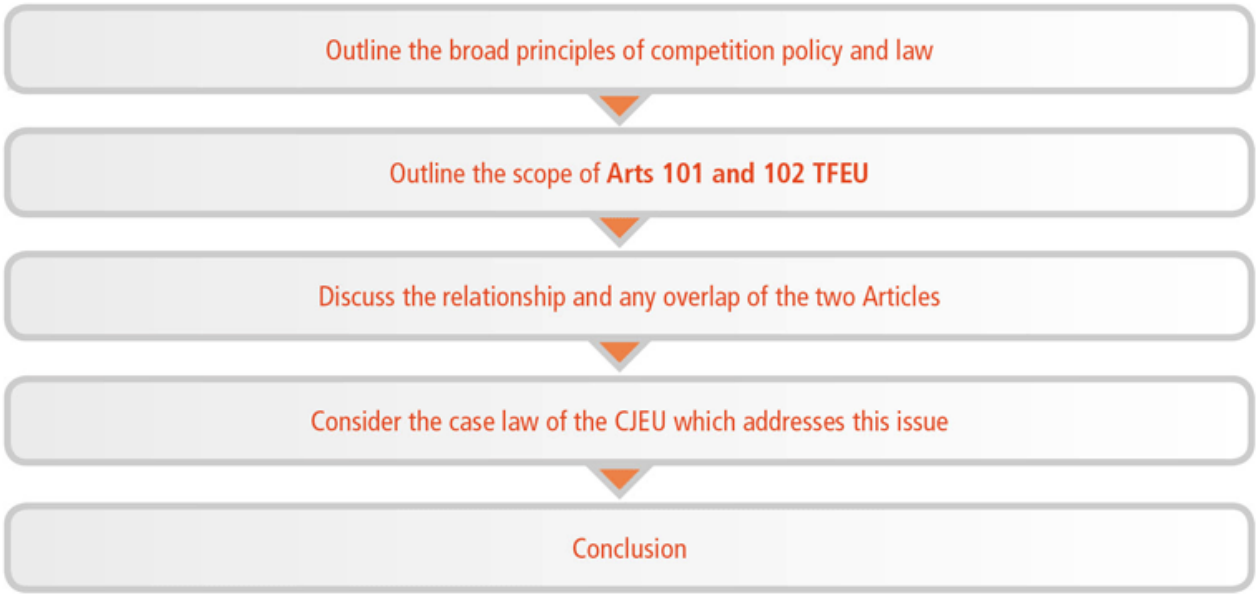
Diagram Answer Plan



Suggested Answer

Competition law policy[1]

[1] This question requires you to consider the relationship of **Arts 101 and 102 TFEU** to each other.

EU competition law is one of the fundamental policies[2] of the EU and is generally mentioned in **Art 3 of both the TEU and the TFEU**. Its aims are to prevent anti-competitive behaviour which will distort the competitive balance of the EU market. EU competition rules are generally designed to intervene to prevent agreements which fix prices or conditions or the supply of products, to prohibit agreements which carve up territories, and to prevent abuses of market power which have the effect of removing real competition, and to control mergers which would also remove competition.

Whilst these aims are not so prominent in the **EU Treaties** as revised by the **Lisbon Treaty, Art 3(3) TEU** refers to a highly competitive social market economy and **Art 3(d) TFEU** provides an exclusive competence to the Union, the 'establishing of the competition rules necessary for the functioning of the internal market'.

[2] Start with a general outline of the area of law and overall policy.

Articles 101 and 102 TFEU[3]

[3] You should then outline the basic legislative regime under the Treaty and then briefly outline the specific area covered by **Arts 101 and 102 TFEU**.

Two main provisions have been enacted to tackle two different situations. **Article 101 TFEU** deals with anti-competitive practices arising as a result of agreements or concerted actions of two or more undertakings and **Art 102 TFEU** concerns the abuse of a position of dominance by one or more undertakings.[4]

[4] Then you should address the quotation and consider whether the provisions do need to be interpreted in conjunction with each other or whether they can be regarded as mutually exclusive.

Article 101(1) TFEU deals with restrictive practices. It sets out the prohibitions and details of the consequences of the failure to observe ↵ the prohibition and provides a framework by which exemptions from the prohibitions can be obtained.

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Article 101(1) TFEU prohibits agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between the Member States, and which have as their object or effect the prevention, restriction, or distortion of competition within the internal market.

Article 101(2) TFEU provides that any agreements or decisions prohibited pursuant to this Article shall be automatically void, although there are ways in which an agreement may be held to be acceptable. The terms of an agreement may be acceptable as being consistent with one of the exemptions provided by the **Vertical Restraints Regulation 330/2010**.

Article 102 TFEU applies where individual organisations have a near-monopoly position or share an oligopolistic market with a small number of other companies, and who take unfair advantage of this position to the detriment of the market, other companies, and the end consumers. **Article 102 TFEU** provides that the abuse by one or more undertakings of a dominant market position within the internal market, or in a substantial part of it, which affects trade between Member States, is prohibited. The requirements are therefore a dominant position, abuse of it, and the effect between Member States.

The scope of Articles 101 and 102[5]

[5] Consider further the scope of the two articles using case law to support your comments.

At first sight, therefore, there seems to be at least a different focus of the two Articles, with **Art 101 TFEU** aimed at two or more undertakings in collusion and **Art 102 TFEU** aimed at just a single entity. However, it can be observed in the case of ***Ford v Commission (25 and 26/84)*** that the unilateral action of one undertaking may still fall foul of **Art 101 TFEU**, whereas **Art 102 TFEU** expressly provides that it also applies to the activities of one or more undertakings.

The relationship of **Arts 101 and 102 TFEU** is highlighted in a case concerned with the difficulties in dealing with the realities of complex commercial cross holdings. In ***BAT v Commission (142 and 156/84)***, the Court of Justice had to determine whether the Commission decision was correct that the acquisition of a minority holding in a competing company was not an infringement of **Arts 81 and 82 EC (now 101 and 102 TFEU)**. Two applicant and competitive companies had objected to the decision. The companies, whose activities were the subject of complaint, had remained independent after their agreement to establish cross holdings, so **Art 81 EC (now 101 TFEU)** was considered first. The Commission's decision that no anti-competitive object or effect had been established was upheld by the Court. Furthermore, no control by a particular company had been proved, and so there was no case under **Art 82 EC (now 102 TFEU)** ↵ either. However, the CJEU did consider that, although an acquisition of a share of another company or cross holdings might not restrict competition, it may lead to conduct restricting or distorting competition. Thus, it becomes necessary to consider the application of both Articles in such complex situations.

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Concentrations/Mergers[6]

[6] The issue of concentration or mergers is the area which highlighted the potential overlap of the two provisions or where both provisions might be considered as applicable to the factual issue.

Originally the Commission was of the view that **Art 81 EC (now 101 TFEU)** would not apply to concentrations or otherwise termed: mergers. Thus, if competition was restricted or distorted by a concentration of companies, **Art 82 EC (now 102 TFEU)** was the appropriate measure with which to tackle it. This policy was pursued by the Commission in the case of ***Continental Can (6/72)***[7] when the Commission tried to remedy an abuse of a dominant position which had been achieved by takeovers and substantial holdings in European companies by an American company. It was the first attempt at merger control in this way by the Commission. It was not successful, mainly because the Commission

failed to establish the relevant markets, rather than failing to show abuses by the concentration. The view of the Court of Justice in the case was, however, instructive in respect of the relationship of **Arts 81 and 82 EC (now 1010 and 102 TFEU)** and the restrictive approach to the problem adopted by the Commission. The Court of Justice considered that, by refusing to consider the use of **Art 81 EC (now 102 TFEU)** as well, the Commission had handicapped itself.

[7] The ***Continental Can*** case is the case which prompted a rethink on the part of the Commission about the application of the provisions.

The Court of Justice held that:

> **Articles 85 and 86 EC [now 101 and 102 TFEU]** seek to achieve the same aim on different levels, viz. the maintenance of effective competition within the Common Market. The restraint of competition which is prohibited if it is the result of behaviour falling under **Article 85 EC [now 101 TFEU]**, cannot be permissible by the fact that such behaviour succeeds under the influence of a dominant undertaking and results in the merger of the undertakings concerned. In the absence of explicit provisions one cannot assume that the Treaty, which prohibits in **Article 85 EC [now 101 TFEU]** certain decisions of ordinary associations of undertakings restricting competition without eliminating it, permits in **Art 86 EC [now 102 TFEU]** that undertakings after merging into an organic unit, should reach such a dominant position that any serious chance of competition is practically rendered impossible. Such diverse legal treatment would make a breach in the entire competition law which could jeopardise the proper functioning of the Common Market.

Thus, firms could avoid **Art 101 TFEU** by establishing close connections but ones which did not constitute full merger and thus be caught by **Art 102 TFEU**. This would allow them to escape the applications of both and to partition the market, and thus defeat the aims of the EU competition policy. In support of the discussion on mergers is the 2013 article on European merger control by Moeschel.[8]

[8] Cited in the 'Taking Things Further' section at the end of the chapter.

p. 178 ↵ In any case **Arts 101 and 102 TFEU** cannot be interpreted in such a way that they contradict each other, because they serve to achieve the same aim. So, depending on the circumstance, it would be wise to consider the possibility of the application of both **Arts 101 and 102 TFEU**. Following the ***Continental Can*** case, it was realised that a new approach was required to tackle the problems of concentrations and, after some delay, the first **Mergers Regulation (4064/89)** was enacted. This has

been considered by the CJEU as applicable to situations of collective dominance rather than **Art 102 TFEU**. See the cases of ***France v Commission (C-68/94)*** and ***Société Commerciale des Potasses et de l' Azote (SCPA) v Commission (C-30/95)***. Therefore, under certain circumstances it might also be necessary to consider the application of the **Mergers Regulation (now 139/04)** as well. Case law also demonstrates a link between the two main competition law Articles in that the CJEU has held that an agreement within the meaning of **Art 101(1) TFEU** between legally separate undertakings may nevertheless result in undertakings being so linked that they become and act as a collective entity as far as their competitors and customers are concerned. As such, then, it can lead to a position of collective dominance which is then capable of being abused, contrary to **Art 102**. See ***Compagnie Maritime Belge Transports (C-395 and 396P/96)***. It is the conclusion, therefore, that some activities clearly need to be considered in the light of both **Arts 101 and 102 TFEU** and the **Mergers Regulation**.

Looking for Extra Marks?

■ You could mention that a review of merger policy has been taking place with a commission paper published in 2014 COM (2014) 449 final, but this only recommended limited changes and is still the latest statement on any possible future changes.

Taking Things Further

■ Eilmansberger, T, 'How to Distinguish Good from Bad Competition under Article 82: In Search of Clearer and More Coherent Standards for Anti-Competitive Abuses' (2005) 42 CML Rev 49.

Focuses on what constitutes abuse in what is now Art 102 TFEU cases.

■ Lianos, I, 'Collusion in Vertical Relations under Art 81 EC' (2008) 45 CML Rev 1027.

Highlights what constitutes collusion for the purposes of what is now Art 101 TFEU.

■ Moeschel, W, 'European Merger Control' (2013) 34 ECLR 283.

■ Slot, P J, 'A View from the Mountain: 40 Years of Developments in EC Competition Law' (2004) 41 CML Rev 443.

p. 179 ↵ ■ Witt, A, 'From Airtours to Ryanair: Is the More Economic Approach to EU Merger Law Really about More Economics?' (2012) 49 CML Rev 217.

A closer look at merger policy in action in the EU.

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