UNIVERSITY OF LUCERNE

FACULTY OF LAW

Written exam questionnaire for the course

European Economic Law

(Fall Semester 2025)

Note: 6

Examiner	Prof. Dr. Sebastian Heselhaus
Date/Time of exam	16 December 2025 09.00 – 11.00 a.m.

Instructions on Written Digital Examinations (BYOD)

- This exam contains **3 numbered pages** (cover page included). Please check the questionnaire. If a page is missing, report it to the supervisor immediately.
- Write your answers on your private notebook/laptop in a new word document. In the header insert the following information: Title of the exam, exam sequential number, matriculation number, page number / number of pages, language. Write your answers in Arial font, 11 pt., line spacing 1.5, colour black.
- Filename: Exam sequential number_matriculation number_title of exam; example: 01234_44000888_EuropeanEconomicLaw
- Notes on this questionnaire are not taken into consideration.
- Indicate clearly to which question number your answers refer.
- You have **two hours (120 minutes)** to complete the exam (exception: granted prolongation requests)
- You can achieve a maximum of **100 points**.
- The exam is closed book. The following legal texts and provisions are relevant for the exam: Treaty on the European Union, Treaty on the Functioning of the European Union. The rules declared in the information sheet on the use of own legal text during the examination and the information sheet on written examinations apply. (no electronic sources).
- All answers are to be **substantiated** unless indicated to the contrary in a specific question. If possible, answers need to refer to the appropriate statutory law.
- In case of incorrectness during examinations, the faculty has the right to mark the examination with the grade 1 (failing grade) (§ 52 Abs. 2 StuPO 2016). Furthermore, the faculty may request the dean to take further sanctions under § 48 Universitätsstatut (SRL no 539c).
- **At the end of the official examination time** convert your Word document into a PDF document. For submission follow the instructions of the examination supervisor. Make sure you are available by e-mail for at least 30 minutes after the examination time has expired.

Good luck!

This closed book exams contains 4 questions and 2 cases **(100 points)**.

Question 1:
The lecture covered six areas of EU competition law (in a broad sense). Please identify these six areas, explain the specific main risk to open competition each area addresses, whether they accept conflicting objectives, and how these objectives are balanced or resolved within the case theory of each area **(12 points)**.

Question 2:
Regarding the fundamental freedom of free movement of goods, the ECJ case law has developed three main formulas (principles). Identify these three formulas, explain their function and legal elements, and assign them to the main specific steps within the case theory (or legal structure) for assessing a restriction on the free movement of goods **(12 points)**.

Question 3:
The EU fundamental freedoms are binding on Member States and on EU institutions. Do they also bind private persons (horizontal direct effect)? Please provide a substantiated answer for the following fundamental freedoms:

- The freedom to provide services
- The free movement of workers
- The free movement of goods

If private persons are not directly bound, can a Member State (indirectly) be held responsible under the respective fundamental freedom for restrictive actions carried out by private persons **(12 points)**?

Questions 4:
The TFEU includes a very strict regime for the control of state aid. Please explain this strictness by referring specifically to the provisions and structure of Article 107 TFEU and Article 108 TFEU **(9 points)**.

Case 1:
EU Member State G possesses a rich heritage of archaeological sites, visited by thousands of tourists annually. To ensure the highest quality of information for tourists, national Law No. 666 of 2024 (the '666-Law') requires that any guided group of two or more tourists must be led by a guide holding a certificate of archaeological studies issued by a university in G. Groups not meeting this precondition are prohibited from visiting the sites. A group of 21 tourists from Member State F is visiting G and seeks to enter an archaeological site, led by their guide, a citizen of F with a university diploma in archaeology obtained from a university in F. The site authorities refuse entry to the group.
Is the 666-Law compatible with the relevant EU fundamental freedom **(25 points)**? (Assume that no secondary legislation applies.)

Case 2:
The company "MacroHard" produces software for computers and laptops. Globally, it holds an 80% market share in the word processing software sector with its program "Litera". In October 2025, it launches a new update of "Litera." This update includes a pre-installed new search engine called "Crawler" with a new AI function for detailed research on the internet and for optimizing texts. The software provides the option to uninstall the search engine. However, as "Crawler" is optimally suited for integration with "Litera," buyers are warned during the uninstallation process that deleting the engine might cause the software "to run improperly". The European Commission believes this practice violates EU competition law under the TFEU. During the investigations, "MacroHard" states that their testing with various third-party search engines revealed a performance slowdown in two cases while the search engines were in use. Since "MacroHard" could not test all existing search engines globally, they decided to warn customers about the possible risks, leaving the choice to them.
Does this practice by "MacroHard" breach Article 101 TFEU or Article 102 TFEU **(30 points)**?

Question 1:

The six areas are:

- fundamental freedoms (negative legislation of cross-border trade prohibiting any restrictions but subject to justification. Positive legislation for each fundamental freedom in the form of secondary legislation implemented through different legislation procedures including the council, the commission and the council of ministers)
- prohibition of cartels under art. 102 TFEU (agreements and concerted practices of undertakings or associations of undertakings distorting, restricting, or preventing competition is prohibited if it affects trade between member states)
- prohibition of abusing a dominant position in the market under art. 102 TFEU (see case 2 for details)
- prohibition of state aid under art. 107 TFEU (mst. influence the market mechanism on the supply side – e.g. China and the economic automobile sector. See question 4 for details)
- Services of general economic interests in the sense of art. 106 TFEU (functioning of the market for imperative services in the general interest. E.g. Corbeau. Special rules to make sure there's no market failure by securing the relevant markets financially)
- public procurement (mst. impact the market mechanisms on the demand side by awarding private contractors with public service obligations. If the preconditions are fulfilled this leads to certain legal consequences as best execution duty, transparency of selection criteria, nexus to the contract matter, clear measurements for compensation, no complete freedom of choice regarding the selection of tenders by including non-economic criteria as in the Wienstrom-case)

Question 2:

The three principles are based on the Keck-, Dassonville-, and Cassis-de-Dijon rulings of the ECJ.

The Keck-formula states that mere restrictions on the modalities of sales (imports and exports) which don't affect cross-border trade between member states and allow an equal access to the market for all market participants aren't included in the scope of protection of the free movement of goods under art. 34 TFEU. It's therefore an exemption from the scope of protection which has allowed things such as the store opening hours act in Germany.

The Dassonville-formula broadened the scope of interference under art. 34 TFEU as it stated that all measures of member states, act or omission, in law or in fact, directly or indirectly, actually or hypothetically are accepted as interferences if they hinder cross-border trade by only 1 Euro Cent. It's therefore being scrutinized under the interference of the scope.

The Cassis-de-Dijon Formula extended the grounds of justification under art. 34 TFEU and the written grounds of art. 36 TFEU by accepting unwritten grounds of justification too if they are an imperative requirement in the public interest and do not pursue purely economic goals. While the written grounds can justify all discriminations (open and hidden), the unwritten grounds can only justify hidden discriminations. Note that all grounds need to pass the test of proportionality.

Question 3:

It depends.

Some do some don't. The ECJ accepted the binding character for private entities in art. 45, 49 and 56 TFEU. The other fundamental freedoms have not yet been broadened this far.

The freedom of services under art. 56 TFEU covers also private entities in a horizontal effect. This was stated in different cases by the ECJ but only if the private entity holds a certain amount of market power and can influence the market.

The freedom of workers under art. 45 TFEU also binds private entities and has therefore a horizontal direct effect. This was explicitly stated in the cases Bosman where the UEFA was being held accountable because of their market influence, but also in Angonese where a merely small private bank in northern Italy required a specific language certificate from certain schools to accept applications.

The free movement of goods does not bind private entities horizontally. This was decided clearly in the Francovich case by the ECJ. But states can be liable for restrictive actions and even not implementing directives as decided by the ECJ in the Faccini Dori case where this led to a state liability case and the claimant received damages.

Question 4:

State aid is in difference to interferences with the fundamental freedoms much stricter. While restrictions of the fundamental freedoms can be justified via written and unwritten grounds, state can not be justified based on material grounds. There are some explicit and binding exemptions listed in art. 107 para. 2 lit. a – c TFEU and some which the commission can accept under art. 107 para. 3 lit. a – e TFEU. But other state aid is strictly prohibited.

To determine a state aid, the ECJ has laid down very strict and narrow criteria in the Altmark case. If these are fulfilled, it's not a state aid and therefore compatible with the provisions of the treaty. But if they are fulfilled the procedure of art. 108 TFEU will come to play. These 4 criteria are:

- There must be a clear public interest obligation, which means the interest must be a public one and the obligation must be based on the law, a contract or something similar.
- The selection criteria must be communicated transparently and in advance. Additionally, they must be materially connected to the matter of the obligation. This secures the possibility to prove a selection in retrospective.
- The compensation shall only cover what is necessary to complete the public service obligation including an adequate revenue margin.

- The selection must be based on a public procurement process (selective or open procedure). The direct award procedure may only be used when the awarded undertaking is within usual market offers in comparison with typical, well-run companies.

The commission shall keep state aid under constant review according to art. 108 para. 1 TFEU. If they detect some irregularities, they will give the member state notice and the chance to defend themselves under art. 108 para. 2 TFEU. Then the commission will decide whether the aid was lawful or not and if it comes to the decision that it's not it can tell the member state to alter and abolish the state aid. Then the state must get the money back as it was the case in Auer/Germany (with the production plant).

However, if the member state doesn't comply the commission has the competence under art. 108 para. 3 TFEU to directly appeal to the ECJ (and not the GC).

And if the council (on application by the member state) doesn't decide within three months the commission can decide freely. This gives them a big power, especially since the commission pursues the goals of the union and not the member states and is therefore in favour of the union interests.

Case 1:

The law-666 could violate the freedom of services under art. 56 TFEU.

Since there's no secondary law available it must be scrutinized whether the primary law is directly applicable. This is the case when the provision is sufficiently precise and unconditional which the ECJ has stated repeatedly for the freedom of services as the legal elements and consequences are clear. Therefore, the guide can rely directly on the provision of the treaty.

The scope of protection of art. 56 TFEU covers temporary services which don't fall under art. 49 TFEU (freedom of establishment). In this case the guide wants to lead one tour and it's not clear if he wants to settle, so he falls under the subsidiary provision of art. 56 TFEU and not art. 49 TFEU.

Services are defined as any kind of service being usually provided for renumeration. Tour guides usually render services by explaining the tourist site. The services have to be rendered as a self-employed activity as otherwise they would fall under the freedom of workers under art. 45 TFEU which is primary to the freedom of services. To distinguish there are certain criteria established by the jurisprudence of the ECJ which will be applied in a case-to-case approach. These are for example if the service provider has a certain freedom regarding his working hours, he is not subordinate and if he is burdened with the chance/risk of revenues/losses. In this case the tourists are clearly not the employer of the guide as the service is being provided one time only.

There needs to be a cross-border issue (hindering the services across the borders of EU member states). This scope of territoriality can be fulfilled by an active, passive, both or correspondence activity (e.g. Alpine Investments). In this case it's an active activity as the guide from F enters the country of G (both mst.) with the tourists.

The personal scope of art. 56 TFEU covers both private persons as well as legal persons in conjunction with art. 62 and 54 TFEU. The guide is therefore within the scope since he's a natural person.

There's an exemption for public authority services under art. 62 TFEU i.c. with art. 51 TFEU which is not relevant in this case since tour guiding is not a state competence.

There's a jurisprudence of the ECJ which exempts measures from the scope of protection if they only affect the modalities of the service, don't hinder the market access and affect all market participants equally/unilaterally. This is not the case here since the law-666 of G only affects external tour guides and not the domestic ones. Therefore this exemption can't be applied.

Eo ipso all legal elements are given and the scope of protections is complete.

The interference is being defined by the ECJ when a member state (it's legislative, executive or judicial bodies) or EU institutions or even private entities (if they have enough market influence) implement measures, in law or in fact, act or omission, directly or indirectly, actually or potentially hindering cross-border services. In this case the law-666 from mst. G hinders foreign tour guides from rendering their service in G by requiring a certificate of archaeological studies issued by a domestic university and prohibiting other tourist groups from the site. They also enforce this law by not letting the group in factually. This makes it economically much harder for external guides to provide their guiding services in G therefore hindering market access for foreigners which concludes a hidden discrimination. It's clearly a relevant interference.

Interferences can be justified either by the written grounds of justification under art. 52 i.c. with art. 62 TFEU. These are the grounds of public policy, public security and public health. These reasons can justify both hidden and open discriminations. In this case it's not sufficiently clear how the law should secure one of the written grounds of justification. G defends itself by applying the consumer protection (securing the highest quality of information) but this is not connectable to one of the written grounds.

The court repeatedly accepted unwritten grounds of justification too if they are imperative requirements in the public interest and are not of purely economic nature. Consumer protection is often used accepted as one of these unwritten grounds and therefore an applicable ground of justification.

By applying the test of proportionality, the ECJ secures that the grounds of justification are not used to secretly discriminate member states and to protect the domestic economy. The 4 steps are the suitability, coherence, necessity and appropriateness in a narrow sense. A measure is suitable if it is in any way useful to achieve the pursued goals which is easily the case here. Coherence refers to the way the member state approaches similar issues and if he handles them adequately. This can only be assumed with these case facts. The necessity is only fulfilled if there's no other way the member state could achieve its pursued goal equally well. The ECJ is very strict here which could be a problem for G. Prohibition is a hard measure, and the same result of consumer protection could easily be achieved by requiring a document stating the capability of foreign tour guides and accepting these documents. Since the guide in this case studied in a university of F he should be as qualified as domestic guides. The ECJ will rely here on the principle of mutual recognition. It's clear that the measure here is not necessary. As a last step the ECJ would check

the precondition of the appropriateness in a narrow sense. This doesn't need to be done in detail here since the measure is already without doubt unnecessary. G would probably argue that foreign tour guides are not as well educated about the national culture of G, as domestic ones, but this is only a minor reason to implement such restricting laws. But in my opinion, it's equally clear that the measure is highly inappropriate as it interferes intensively with the freedom of services and only protects merely semi-important goals of consumer protection and therefore securing the historical culture of G. In an understanding of a functioning liberal market such restricting measures are not allowed.

Case 2:

Since there's no secondary legislation it needs to be established that the primary law (art. 101 or 102 TFEU) is both directly applicably as the ECJ stated repeatedly since they are sufficiently precise and unconditional.

To distinguish between right legal grounds in this case we need to look at the prohibition of cartels under art. 101 TFEU and the abuse of a dominant power under art. 102 TFEU more closely. Art. 101 TFEU applies to market behaviour where at least two parties enter in a concerted practise. It therefore applies to multilateral agreements. Art. 102 however covers market behaviour which contains of measures being unilaterally imposed on other market competitors. Since in this case there is not really an agreement between the users of Crawler and the company MacroHard art. 101 TFEU is not applicable. Since it's more of a business decision solely decided by MacroHard alone forcing the consumers to adapt art. 102 TFEU shall be applied.

The territorial applicability has been established by the ECJ in different cases as Gencor or Intel. In Intel v. Commission the ECJ accepted the implementation principle as well as the qualified effects principle. Since MacroHard has a market share in the word processing software sector it's clear that the European internal market is being affected by the market decisions. Therefore, the territorial applicability is fulfilled.

The material applicability covers in principle all market sectors. It's not clear why this case should be exempted from the material applicability. However, it should be mentioned that parent companies can be held accountable for the behaviour of their subsidiaries.

Addressees of art. 102 TFEU are undertakings. Undertakings (defined by the ECJ in the Poucet-case) are all economic market participants regardless of their legal form and the way they are financed. MacroHard is clearly an undertaking.

The relevant markets here are the market for processing software and the market for AI research machines and AI text optimization programmes. Within the market for processing software MacroHard has 80% market share globally which clearly gives them the power to influence the market and implement measures effectively. Therefore, it has a dominant position in the market since its actions can affect trade between member states. The other two markets mentioned (AI research / AI text) are not described extensively in the case facts. Therefore, it can be assumed that within these markets there are no dominant positions by MacroHard.

The anticompetitive behaviour or the market abuse in the sense of art. 102 TFEU can be described in many ways including the non-exhaustive list (“in particular”) of art. 102 lit. a – d TFEU. There are some core market abuse mechanisms as price fixing or market sharing. In this case the possible abusive market behaviour could be the fact, that the new search engine “Crawler” is being included in the new update of the program “Litera” (dominant position here). Additionally, the buyers are warned to deinstall “Crawler” as it could affect the performance of “Litera” (again dominant position here). This adds up to lead at least some of the consumers to keep “Crawler” therefore giving MacroHard a competitive advantage compared to other market participants in the AI search engine market. This behaviour is typically described as abusive bundling and states a serious distortion of the usual market mechanisms. User will much more likely use “Crawler” and not other similar and even better developed AI search engines. Plus, MacroHard can include this market advantage in their price model. These effects are only possible due to the dominant position of MacroHard and would not be equally effective under normal market rules.

Since there’s no legal grounds for justification mentioned in the provisions of the treaty the ECJ started to examine the justification within the bullet of the abuse of the dominant position. Here MacroHard states that they tested with various third-party search engines, but they could not test all third-party search engines. Therefore, they only wanted to warn users and leave the freedom of choice to them. This argument is focusing on the protection of the users meaning actual and potential consumer protection. In this case this sounds clearly like an excuse for the aggressive market strategy chosen by MacroHard. Before implementing “Crawler” the dominant program “Litera” was functioning properly, and users were satisfied which can be derived from the dominant market position. However, it’s unclear why MacroHard should not bring out two different buying options. One with only “Litera” (same as before) and one with the integration of “Crawler” for those who want it. By only selling a bundle of both programs MacroHard clearly abuses its dominant position in the market by using an unnecessary distorting measure to achieve consumer protection. This goal could easily be achieved through other measures as the mentioned example above with the different product offers.

It can therefore be concluded that in this case MacroHard would be sanctioned under art. 102 TFEU as their market behaviour reflects an abuse of a dominant position not compatible with EU competition law.