



ELSA the Netherlands  
Moot Court  
Competition

# CASE OF THE COMPETITION

## 2023

Contact:

Iris den Hartigh

Vice President in charge of Competitions ELSA the Netherlands

[competitions@nl.elsa.org](mailto:competitions@nl.elsa.org)

The case for this year's edition has been written by Yasmine L. Bouzorraa

## *Commission v Blue Water Fish*

1. Over the past decades, obesity rates have increased consistently. According to Our World in Data, 22.82 percent of people living in the EU were considered obese in 2019, compared to only 9.3 percent in 1975. This development is worrying, as obesity is linked to several associated illnesses, such as type 2 diabetes, high blood pressure, heart disease and several types of cancer. As a result, high obesity rates lead to increasing medical costs, lower life expectancy and diminished quality of life. In order to tackle all of these issues, several countries around the world, including some European Union (EU) Member States, have started running campaigns to inform citizens of how to adopt a healthier lifestyle. These campaigns do not only aim to get citizens to exercise or to get enough sleep, but also look to help citizens develop healthy eating habits.
2. Several EU Member States have noticed the significant effects of their newly adopted policies regarding healthy food choices. Foods labeled as 'healthy', including vegetarian and vegan options, as well as fish-based options, are selling much better than before. On the other hand, sales of food items deemed 'unhealthy', including sugary goods and processed meats, have steadily declined. Member States have also started to notice a small but significant decline in new diagnoses of certain diseases associated with obesity.
3. While Member States take pride in tackling the issue of obesity related illnesses, the newly developed eating habits of EU citizens lead to significant problems, as well. The increased sales of fish-based products have led to a decrease of the already vulnerable tuna populations around the world. Several sub-species of tuna suffer from over-fishing more than ever.
4. Blue Water Fish bv is concerned with the rapid decline in tuna populations, not only because of the possibility that certain sub-species go extinct, but also because their business relies heavily on the sales of tuna. Blue Water Fish is responsible for around 56 percent of tuna sold in the EU. In order to ensure future business, Blue Water Fish seeks to find a method to sell tuna without ever having to fish for it. In this context, Blue Water Fish sets up its own tuna farms. Contrary to salmon, tuna is notoriously difficult to farm. This is partly because tuna reaches sexual maturity at around

five to six years of age. For to start reproducing – which is of course critical in tuna farming – a farmer must therefore care for this tuna for an extended period of time, which can be highly expensive. On top of that, it takes a long time for tuna to grow big. This adds to production cost.

5. Methods to farm tuna do exist. For example, some farms catch tuna, to feed it and slaughter it when it is grown.

However, such farms do not breed the fish, and as a result, worldwide tuna stocks are still depleted. 6. Blue Water Fish seeks to breed tuna in captivity, through a specific method that helps tuna reach sexual maturity in a much smaller timeframe than usual. However, developing such a method comes at tremendous cost. In order to minimise the financial burden on the company, Blue Water Fish agrees to develop and exploit its tuna farm together with The Truest Tuna bv. The Truest Tuna sells approximately 5 percent of tuna sold in the EU and is a relatively new undertaking that seeks to promote sustainable fishing. While The Truest Tuna already sells tuna with a Sustainable Fisherwomen™ ecolabel, the thought of selling tunawith no negative environmental effects at all still remains attractive to the undertaking.

7. By June 2021, Blue Water Fish and The Truest Tuna have developed a sustainable tuna farm, that yields tuna harvests beyond what was expected. The ingenious method of tuna farming comes at a cost for the consumer. Tuna farmed by Blue Water Fish and The Truest Tuna is around 230 percent more expensive than regular tuna on the market. However, consumers become increasingly more environmentally sensitive and are often willing to pay more for a sustainable product. Both undertaking sell the farmed tuna under their own label at exactly the same price point.

8. In spite of the success of its farmed tuna, Blue Water Fish sees its profits plummet. Even this new fine-tuned method of farming tuna has proven time-consuming and expensive. While Blue Water Fish believes that farmed tuna is the future, it decides to reinstate its unsustainable methods of tuna fishing in order to stay profitable. This method lacks the Sustainable Fisherwomen™ ecolabel and leads to significant over-fishing. Blue Water Fish now sells both regular tuna and farmed tuna.

9. Blue Water Fish soon realises that it needs to sell more fish in order to remain as profitable as before. In an attempt to undercut its competition, Blue Water Fish lowers the price of its regular ocean caught tuna by almost 30 percent, which is only slightly above average variable cost. This will help Blue Water Fish to gain control of a greater part of the tuna market.

10. On 4 October 2021, Competitors of Blue Water Fish that sell unsustainable tuna notice the price change in the tuna

market and see their margins become slimmer rapidly. Blue Water Fish's tactics soon prove effective. Some of the smaller producers of tuna without the Sustainable Fisherwomen™ label are no longer able to sell their product at market price without losing money. They are effectively pushed out of business.

11. Two competitors of Blue Water Fish that are responsible for around 5 percent respectively percent of the tuna market notify the European Commission of Blue Water Fish's alleged anti-competitive behaviours on the basis of Article 102 TFEU.
12. The Commission investigates Blue Water Fish. In its Decision of 31 October 2022, the Commission accuses Blue Water Fish of anti-competitive behaviours on the basis of Article 102 TFEU for lowering the price of its regular tuna. According to the Commission, Blue Water Fish has abused its dominant position in the market of tuna. This abuse is moreover aggravated by the significant negative effects on the environment of Blue Water Fish's over-fishing practices. The Commission also accuses Blue Water Fish of anti-competitive price fixing on the basis of Article 101 TFEU in relation to the price point of its farmed tuna.
13. On 20 November 2022, Blue Water Fish challenges the respective Commission Decision.
14. In response to the Commission Decision of 31 October 2022, Blue Water Fish notes that it could have never abused its dominant position, because, according to Blue Water Fish, the undertaking does not at all have a dominant position in the first place. While Blue Water Fish sells a significant amount of tuna, it does not sell any other fish which, according to Blue Water Fish, the relevant market is comprised of, such as salmon and mackerel. For reference, Blue Water Fish is responsible for around 6 percent of all fish sold to consumers in the EU. Therefore, according to Blue Water Fish, there has been no breach of Article 102 TFEU.
15. With regard to Article 101 TFEU, Blue Water Fish denies any price fixing. However, the undertaking admits it worked closely together with The Truest Tuna, in order to develop and exploit their shared tuna farm. Therefore, there is no agreement and Article 101 TFEU cannot apply. However, even if there was an agreement, Blue Water Fish argues that its close relationship with The Truest Tuna is justified, because of the sustainability benefits of such an agreement, which would ultimately outweigh possible anti-competitive effects.
16. In November 2022, the case is referred to the General Court.

You are assigned as legal counsel to Blue Water Fish and the European Commission respectively and charged to represent them in proceedings before the General Court.