LEVEL 6 - UNIT 6 – EUROPEAN UNION LAW
SUGGESTED ANSWERS - JANUARY 2013

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the January 2013 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners’ reports which provide feedback on student performance in the examination.

SECTION A

Question 1

The application of the concept to the two situations is clearly similar; each deals with the non-contractual liability of a defendant in relation to breaches of obligations imposed by EU law. However they are different in origin. Art 340 TFEU which imposes liability on the institutions has been part of the treaty from the start. Member state liability (MSL), by contrast, is a creation of the European Court, initially in Francovich (1991) and then more fully articulated in Brasserie du Pêcheur/Factortame (No 3) (1996).

Art 340 has been held to apply to a range of types of liability, including what amounts to vicarious liability for the negligence of officials while on duty, although the concept of ‘course of employment’ is quite narrowly interpreted: Sayag v Leduc (1969). In addition, a distinction is drawn between mere non actionable, excusable errors and actionable ones: Richez-Parise (1970). With this caveat, faute de personne or operational negligence appears to operate in accordance with the generality of national laws imposing liability for breach of statutory duty.

Faute de service or negligent application of policy is more controversial. Many claims have challenged the decisions of the Commission in managing the Common Agricultural Policy, and also decisions in other policy areas at a time when these were subject to active and detailed administrative management. Such claims often entail a challenge to the formulation of policy, rather than its application and operation. The difficulty is that, although it is perfectly legitimate to challenge the legality of a policy and its implementation, this is typically seen as a matter of public law, and suitable for judicial review, rather than a damages action based on a breach of duty owed to an individual.
The ECJ developed the Schöppenstedt (1971) formula to keep the Art 340 jurisdiction within bounds in relation to this class of claim. In addition to proving causation and damage: Lütticke (1969), claimants had to demonstrate that their loss arose from a serious and manifest breach of a higher order of legal rule – either general principles of law such as those now enshrined in the Charter of Fundamental Rights – human rights, proportionality, subsidiarity – or a breach of a treaty or ‘framework’ regulatory provision. The intention was to allow claims arising from demonstrable non-compliance with mandatory legal norms, while denying those arising from those who were disadvantaged by the legitimate exercise of administrative discretion, as for example in the Second Skimmed Milk Case (1978) where claims were not allowed as being within the scope of what operators in the sector had to accept as ordinary risk, even though the Regulation under which the Commission acted had been annulled. In Bergaderm (1998) the ECJ stated, by way of clarification and modernisation, that where there was significant discretion vested in the institution, the test was whether it had ‘manifestly and gravely disregarded’ the limits on this discretion. In a case of no or limited discretion, the breach itself might be sufficiently grave, by analogy with the MSL case of Hedley Lomas (1996).

Turning to MSL, in Francovich it was already clear that there had been a serious breach by Italy. Its failure to implement the directive in question had been twice condemned in Art 258 TFEU proceedings, thus clearly engaging its obligations under Art 4 TEU. The action initially sought a remedy by applying the vertical direct effect of the directive, but it was held not to meet the criteria for this. The ECJ recast the question posed in the Art 267 TFEU reference so as to invite the national court to impose non-contractual liability on the state. All that was necessary was to establish the principle, as causation, damage, seriousness and the existence of a measure designed to benefit individuals were all manifestly present.

Brasserie du Pêcheur/Factortame (No 3) gave the ECJ an opportunity to articulate more clearly the scope of MSL. The court made clear that the Art 4 obligation of the states was comprehensive, and could apply to non-implementation and mis-implementation of directives, but also to administrative actions, the introduction of national legislation and any exercise of state power which conflicted with EU law. However, MSL was to be assessed in the same way as Art 340 liability, as the two are equivalent; this point is reiterated in Bergaderm.

As a result the claimant must establish that the rule is intended to benefit him, damage, causation and a sufficiently serious breach. If the state has no discretion, e.g. non-implementation of a directive: Dillenkofer (1994) or failure to apply mandatory rules: Hedley Lomas (quantitative restrictions), the breach alone may be sufficiently serious; but in other cases, a range of factors must be considered – including whether the action complained of is deliberate or accidental, obvious or technical (e.g. BT (1993)), in an obscure area or acte éclairé.

There is now a tolerably clearly articulated basis for MSL. It is clear that states which manifestly disregard their obligations will be found liable. The English courts readily held that this was the case in Factortame (No 5) (1999). It is still debatable whether the BT decision is too lenient as regards mis-implementation, although the force of this criticism may be lessened by the availability of mechanisms for challenging these issues by way of judicial review, which may be more appropriate.
Question 2

The basic structure of the entity which began its existence as the European Coal and Steel Community, expanded to become the European Economic Community and is now the European Union (EU) is that of an intergovernmental entity regulated by a treaty between the states who are the high contracting parties. Such treaties generally operate at the level of public international law to create obligations, enforceable by the states one against another. It does not necessarily follow that the treaty creates legal rights and obligations which are directly effective and can be relied on in proceedings in the national legal system.

In van Gend en Loos (1962) the ECJ was asked to adjudicate on whether treaty provisions in the Rome treaty had direct effect, so that those affected could rely on them in proceedings in national courts, or whether it was for the Commission to pursue alleged failures by Member States using the procedures in Art 258 TFEU. The treaty was silent on the subject. Only Regulations have explicit direct effect. The conclusion of the ECJ, which has had immense influence on the subsequent development of the EU, was that the Treaty provisions did, in principle, have such effect, provided that they were ‘clear, precise and unconditional’ in creating rights and liabilities. The rationale was that the Member States had created a unique new entity which entailed a new legal order, operating in parallel with national law, and only by according direct effect to this order could those affected be assured an effective and timely remedy, as the Art 258 procedure was not adequate for this purpose. Shortly afterwards, the ECJ also ruled in Costa v ENEL (1964) that EU law prevailed over national law, although it took some time for all national legal systems to accept this concept.

In van Duyn (1974) the ECJ indicated that provisions of a directive which met the ‘clear, precise and unconditional’ criteria could in principle have direct effect. However, directives are not intended to be the actual legal rule but are instructions to Member States to ensure that their law achieves the intended outcomes of a harmonisation initiative and, accordingly, time is allowed for this task to be addressed. Direct effect therefore applies to directives with some modification. Only vertical effect is given, so the directive is binding on and applies only to the state, as laid down in Becker (1982) and Marshall (No 1) (1986), including all its emanations. One criticism is that there is no absolute clarity as to what is an ‘emanation of the state’. In Foster v British Gas (1990) a number of characteristics were identified as characterising such an emanation: ‘a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals’. However, later cases have sometimes treated this as an exhaustive definition and sometimes as more of an indicator. In any event, under modern conditions, following extensive privatisation of former state activity, it can be very difficult to categorise certain entities as state or private sector.

In addition, the directive will not normally acquire direct effect until the implementation date has passed: Ratti (1979), although, in order to secure the principle of the useful effect of EU law, states must not prior to this date take any action that is liable to compromise seriously the result prescribed by the directive: Inter-Environnement Wallonie (1997).

Where a directive does not meet the ‘clear, precise and unconditional’ test and in cases involving the legal liability of individuals, there can be no direct effect: Marleasing (1990), Faccini-Dori (1994), Pfeiffer (2004). However, in such cases,
the principle of ‘useful effect’, and the obligation of Member States to comply with EU law (Art 4 TEU), combine to create an interpretative obligation on national courts, namely, to interpret and apply national law compatibly with the requirements of the directive: Von Colson (1984), Marleasing, Pfeiffer. While this obligation does not require an interpretation which completely negates the national rule in question (Wagner Miret (1993)) there is, nevertheless, a strong assumption, particularly in the case of implementing legislation, that the state intended to give effect to its EU obligations, and the interpretation exercise should be approached in this light. This is the doctrine referred to as “indirect effect”. This assumption is particularly stressed in the more recent cases, such as Pfeiffer: it is evident in the approach taken by the English courts, exemplified in cases such as Pickstone v Freemans (1989) and Litster v Forth Dry Dock (1990).

Of course, if even this fails, there may be room for the operation of the principle of MSL.

**Question 3(a)**

The Commission has a number of functions, and one of them is to ensure that Member States comply with their obligations. There are three principal means by which the Commission carries out its duty under Art 258 TFEU to monitor this. Firstly there is an electronic database tracking the implementation of all directives. If Member States have not notified transposition measures, the Commission will make enquiries. However, the Commission now stresses that it wishes not just to police implementation, but to assist the states, so the Commission facilitates discussion groups at which states can discuss issues relating to implementation and any problems may be identified and resolved. The Commission also carries out some investigations on its own initiative, typically looking at a particular economic sector which has given cause for concern, although the resources for this are somewhat limited. Finally there is a procedure whereby anyone may make a complaint to the Commission. All complaints must be considered, but the Commission has discretion over which to pursue. In the past there were frequent complaints about a lack of transparency: in particular, complainants were not adequately informed of the progress of the complaint. There are now service standards to address this issue, but some concerns over performance remain.

Initially, once the Commission has established a basis for further action, it is raised with the Member State concerned informally. There is now an on-line procedure, named PILOT, for managing this initial phase of the administrative stage of proceedings. According to the Commission’s Annual Reports some 80% of issues are resolved at this stage. However, these interactions are not published. Those issues which cannot be resolved informally result in a formal administrative stage of the process, initiated by a formal written statement of complaint. If the matter is not resolved, the Commission may issue a formal reasoned opinion, setting out in full the basis of the non-compliance. This represents the full formal statement of the Commission’s case, but remains confidential at this stage, a restriction which some observers, in particular NGOs, have criticised.

The Commission also has full discretion whether and when to invoke the judicial stage of proceedings by seising the ECJ. Although the initial judgment of the court is declaratory, prospective financial penalties can be attached where the breach is non-transposition of a directive. Furthermore, enforcement proceedings generally no longer require a fresh reasoned opinion, following amendments to Arts 258 and 260 in the Treaty of Lisbon. There is no doubt that the Commission
actively pursues its responsibilities in this area, although the complaints of lack of transparency are largely justified.

**Question 3(b)**

This Regulation (which has recently been recast, with some amendments, as Regulation 1215/2012) exists to simplify the trans-national litigation process within the EU. Concerns over the complexities of trans-national dispute resolution were seen as hampering the internal market by inhibiting businesses and consumers from engaging in cross-border transactions. By creating a single EU-wide regime for most forms of civil litigation (arbitration, family law and some other specialised areas are excluded), these concerns are addressed. The Regulation sets out rules on jurisdiction: the default rule is that it follows the domicile of the defendant: Art 2. However, Section Two contains special rules, which include conferring jurisdiction where the cause of action has a link to another state, e.g Art 5 for actions in contract and tort. Consumers and others seen as in a weaker position are permitted to sue in their home courts (e.g. Art 15 for consumer contracts). The rules, although providing a number of options, are mandatory. This can lead to inconvenience, as in Owusu (2005), where an action arising out of a holiday accident in the Caribbean had to be litigated in England as one defendant was domiciled there, even though the witnesses and most of the defendants were in the Caribbean. The Regulation also adopts the ‘court first seised’ rule in relation to disputes over jurisdiction, a practice which has proved difficult for some litigants who are used to the common law interventionist approach to these issues, see Turner v Grovit (2005) and West Tanker (2009). The recast Regulation seeks to reduce the scope for abuse of the ‘court first seised’ principle for tactical reasons.

The Regulation also provides for a simple means of enforcing judgments in other states: the traditional impossibility of achieving this was in the past a significant deterrent to international business. This aspect of the Regulation has created few major issues and appears to operate efficiently.

**Question 3(c)**

Initially the only area specifically addressed was equal pay for men and women, included in the Rome Treaty at the instance of the French, who had concerns that other founding member states, who did not provide for this, would be at a competitive advantage. By the 1970s the coverage had expanded in the Equal Treatment Directive (76/207) to equal treatment of men and women more widely in the workplace, with a very extended notion of equal pay, and protection in relation to pregnancy and maternity. This directive also pioneered an expanded concept of discrimination, indirect as well as direct. Increasing adoption of human rights norms, operating together with social policy issues, led to a new generation of anti-discrimination legislation, which covered disability, age, ethnicity and sexual orientation as well as gender, and applied to a range of settings, not just the workplace. (See now Dirs 2000/43, 2000/78 and 2006/54).

In the UK at least, these EU measures have led the way, certainly in relation to employment and gender. Rights have consistently been secured through litigation to secure the application of EU norms, from Marshall (No 1) (1985) to Pickstone (1989) and Webb (1993) to recent cases such as Attridge Law (2008) - discrimination by association with a disabled person and English v Sanderson (2009) – discrimination by misattribution of sexual orientation. In all these cases English law had failed to keep up with evolving EU norms, although it is to be hoped that the Equality Act 2010, which is largely based on the Directives, has completed the process.
There is no doubt that there is a well-intentioned and comprehensive, if complex, body of legal norms now in place, although it is notable that statistics regularly demonstrate that even the original aim of equal pay has not been achieved and even progress is slow and limited.

**Question 4**

One key function of the EU is the development of an internal market based on a ‘highly competitive social market economy’: Art 3 TEU. This is a shared competence between the EU and the Member States: Art 4 TEU. Originally, operating under Reg 17, the Commission took full operational responsibility for all EU-level competition issues. But, there was a fundamental review some years ago, which led to a rebalancing. Now, operating under Reg 1/2003, there is an explicit sharing of responsibility, with the National Competition Authorities taking responsibility for smaller-scale and regional issues, leaving the Commission to focus on very significant cases, such as those concerning Microsoft and Intel, and major merger activity. In addition, the modern regulatory approach has abandoned detailed management through individual exemptions and negative clearance, as well as the infamous ‘comfort letters’. The Commission establishes a regulatory framework through Block Exemptions and ‘soft law’ guidance, such as the Notice on the Definition of the Relevant Market, but undertakings and their advisors are responsible for determining how to structure their agreements to comply with the law.

Art 101 deals with collaborative anti-competitive behaviour. Initially both the Commission and the ECJ (and then the General Court) interpreted it very broadly; the objective was to bring activity within scope, so that it could be examined and regulated, even if it was eventually permitted. This course was seen as preferable to leaving activity outside scope, as it could not then be regulated. This approach was of course the result of political and ideological choices. There has always been tension between the champions of free markets (e.g. the Chicago school) and those who favour a more managed approach.

All undertakings of whatever form are within the scope of competition policy: Höfner (1991), but Art 101 does not apply to arrangements between divisions within a single entity: Volkswagen & VAG Leasing (1995). The article applies to agreements, whether formal or informal: ACF Chemiefarma (1970) (the ‘Quinine’ case), and concerted practices. This last category was incorporated mainly to avoid evidential issues, since not all defendants admit the existence of informal agreements, unlike the Quinine participants. There is, however, a problem here. Where there is a ‘oligopolistic’ market, that is, one where there are a few large players, behavioural analysis can fail to differentiate between the natural working of this oligopolistic market, where each player must react to the actions of the others, and conscious but undocumented voluntary parallel action, which is a prohibited concerted practice: Dyestuffs (1969) and Woodpulp (1993) fall on opposite sides of the line, but demonstrate how difficult the analysis can be.

The article applies where either the object or effect is to affect competition, so, if intention is proved, there is no need to establish it has worked: STM (1966). This rule can again be seen as an example of the policy of the Commission and ECJ to be inclusive, so that behaviour is within scope and can therefore be regulated. There has been a lengthy debate on whether there is, or should be, a ‘rule of reason’, which in this context means a rule requiring the pro- and anti-competitive elements of an agreement to be balanced. The concept comes from US anti-trust law, but has never been adopted in the EU. Here it should be noted that Art 101 (3) provides for agreements to be legitimised in certain circumstances and this renders a separate rule of reason largely unnecessary.
Almost all mainstream economic theory regards horizontal anti-competitive agreements in the form of ‘classic cartels’, which entail market sharing and/or price maintenance, as being unacceptable. This view is reflected in the Article 101 jurisprudence. Vertical agreements are more problematic. By definition, they restrict intra-brand competition and there will ordinarily be inter-brand competition which will restrain any unacceptable behaviour. This reality is reflected in the approach under Art 101. There is an explicit recognition of the value of vertical agreements in, e.g. allowing entry to a market: Nungesser (1982), or strengthening the distribution chain for a particular brand using selective and exclusive distribution agreements, some of which are now covered by block exemptions (e.g. Reg 330/2010). The balance between intra-brand competition and inter-brand competition seems to have been struck effectively: Consten & Grundig (1966), Metro (1977).

As noted above, Art 101 (3) provides for permissible collaboration. This generally exempts technical collaboration, for example research and development, but there is an overlap with permissible vertical agreements in particular.

Although the Commission and General Court continue to identify and deal with many classic anti-competitive arrangements, there does appear to be a change in approach. Small players, whether those within the Notice on Agreements of Minor Importance, or within the market share requirements of the Vertical Agreements Block Exemption: Reg 330/2010, are allowed to conduct business freely, as long as they are not fixing prices or prohibiting passive parallel trading. The leniency provisions for those who disclose wrongdoing encourage ‘repentance’ and the move towards behavioural and structural remedies, rather than financial penalties indicates a more nuanced approach to a complex area of economic activity.

SECTION B

Question 1

This question relates to free movement of persons. This was originally one of the single market freedoms (free movement of labour) and therefore linked to economic activity: Art 45 TFEU. Now free movement rights are also based on the status of EU citizenship: Art 21 TFEU. However, citizenship per se only guarantees the right of free movement and residence for up to three months. Rights to extended or permanent residence and rights in relation to family members still largely depend on economic activity (with exceptions for students and persons of independent means): Art 7 Dir 2004/38.

Reet is an EU citizen and Archil, as her spouse, has certain rights irrespective of his nationality (Dir Art 2). Reet appears to be a worker, which is an autonomous EU concept: Hoekstra (1964), Levin (1982), Lawrie-Blum (1986), Kempf (1986), Bettray (1989) since, although she is not employed full time, there is nothing to suggest that her work is not genuine and effective. A worker (whether employed or self-employed) has the right to long-term residence and to be accompanied by family members. Archil therefore has the right mentioned in Dir Art 7 to reside in the UK, subject to proof of status and the issue of a residence card; he is also entitled to work: Dir Art 23. His rights continue notwithstanding separation from his spouse: Diatta (1985). He has not yet acquired the right to permanent residence. At the latest he would acquire this after five years from the marriage in June 2009; however, he could acquire it earlier if he has been recognised as Reet’s partner when they started living together under Dir 3 (2) (b).
On divorce Archil will not lose the right of residence as the marriage has lasted at least three years with at least one spent in the UK: Dir Art 13 (2) (a), but, if the divorce occurs before Archil acquires the right of permanent residence, he must prove he is a worker at all material times until the five year point is reached: Dir Art 13 (1). This appears to be the case at present.

Archil is potentially liable to removal on public policy grounds, on the basis of his drug addiction and criminal life-style. Any such decision must be made on the basis that his personal conduct means that he constitutes a ‘genuine, present and sufficiently serious threat’: Dir Art 27 as interpreted in Tsakouridis (2010). Earlier case law suggests that convictions as such are not in themselves enough to justify expulsion and an analysis of ‘dangerousness’ is required: Santillo (1980) which moves the analysis on from the position in Bouchereau (1977). However, there is no uniform standard of public policy and the Member State retains a margin of appreciation: Jany (1999), but the authorities must take all circumstances into account. These will include the length of stay, the family situation (here there is a child), and the extent of Archil’s social integration: Orfanopoulos (2004). As Archil has not attained the enhanced level of protection given by permanent residence, if the convictions indicate a serious involvement with a criminal lifestyle, expulsion may be legitimate, although, as it appears he has not received substantial custodial sentences, the threshold may not be met. There are procedural safeguards, in that Archil must be given a reasoned decision and he has the right of appeal: Dir Arts 30-31.

To summarise, the advice to Archil is that, subject to the issues related to conduct mentioned above, he has a right to reside here despite separation, and that right will survive divorce if he is a worker. He will in due course become entitled to permanent residence.

**Question 2(a)**

One key function of the EU is the development of an internal market based on a ‘highly competitive social market economy’: Art 3 TEU. This is a shared competence with the Member States: Art 4 TEU. Art 102 deals with one aspect of competition law, namely, abuse of a dominant position. The abuse may be exploitative (aimed at consumers in the shape of excessive prices, tying in products and similar activity) or anti-competitive (aimed at excluding potential competitors by depriving them of entry to the market). Dominance itself is not prohibited, but abuse is prohibited with no derogations.

Dominance is not defined in the article. It is a somewhat difficult concept to define. The ECJ has described it as the ability to behave without regard to the ordinary disciplines of the market: United Brands (1978). Dominance cannot exist in a vacuum. It must exist in relation to particular economic circumstances ‘the relevant market’. This market has several aspects, with the geographic market and the product market normally being the most important. One important reference point, albeit in the form of soft law, is the Commission Notice on the Definition of the Relevant Market. In general terms, the geographic market is all areas where trading conditions are similar: United Brands, prima facie this is the whole of the EU: Hilti (1989-94). However, activity in a single key location, e.g. a major port, may affect trade in the EU as a whole: Sealink (1994). When considering the product market, the essential test is substitutability: United Brands, Continental Can (1973). The factors to be considered in this regard are cross-elasticity of supply and demand. The Commission places great reliance on the SSNIP test, i.e. whether demand is sensitive to a small but significant non-transient increase in price. It is also necessary to undertake an evaluation of entry barriers, including Intellectual
Property issues. It may be that at any given moment there is dominance, but the market will ‘correct’ this quickly. The Commission has been criticised for taking a ‘snap-shot’ rather than examining the market over time.

Here, apparently, the geographic market is the EU, as there is no evidence of any regions with different market conditions. It appears there is no currently available alternative product, so bifacial diodes are a product market in themselves. We are told there is the potential for alternative suppliers to enter the market, but there are high entry barriers. In this situation it is likely that Alltek will be found to be dominant in relation to bifacial diodes.

Abuse can be described as improper exploitation of the dominant position. Generally a producer is entitled to adopt whatever pricing policy it wishes. Charging low prices is ordinarily not abusive. There is an exception, which can constitute an anti-competitive abuse, namely, ‘predatory’ pricing. But, predatory pricing entails selling below cost: Akzo (1991) and here the price is neither below average variable costs, nor below average total costs. Therefore the predatory pricing exception will not apply.

Discounts may be abusive, if based not on quantity but on tying the customer in: Hoffmann-La Roche (1979). The discounts being offered by Alltek are ‘all requirements’ discounts and therefore they should be advised that they are probably abusive, although there has been criticism that an over-restrictive application of this approach penalises ordinary commercial practice.

**Question 2(b)**

There will be an investigation by the Commission (or perhaps more likely by National Competition Authorities). The burden of proof is on the Commission: Reg 1/2003 Art 2. The investigation may involve a ‘dawn raid’ and there are various powers to obtain information from Alltek. The detailed procedure is regulated by Reg 773/2004. The investigation must respect the rights of the defence as set out in Arts 5 and 6 of the European Convention on Human Rights and the Charter of Fundamental Rights. Alltek may offer undertakings or be subjected to behavioural or structural sanctions, although financial sanctions are available.

**Question 2(c)**

The appropriate remedy is an action for annulment to the General Court under Art 263 TFEU with a time limit of two months from the date of the decision. The decision is addressed to Alltek, so no question of locus standi will arise. If there are procedural irregularities in the investigatory process, these may be relied on, but the ground relied upon to support the annulment is likely to be ‘misuse of powers’ on the basis that the decision does not adequately correspond to the evidence.

**Question 3(a)**

The ordinary legislative procedure is defined in Art 289 TFEU. The legislative initiative is with the Commission: Art 17 TEU, but the procedure entails collaboration of the Commission, European Parliament (EP) and Council. Both the EP and Council must accept a legislative text. If both accept the Commission’s draft the measure is adopted at first reading. If the EP accepts the Council’s common position it is accepted at second reading, and if a text is agreed in the conciliation and trialogue procedure and approved by EP and Council it is adopted at third reading. Throughout this process lobbying can take place. George could
seek to influence the approach of the EP fraction to which his party in the UK is aligned.

More significantly, national parliaments have a defined role in relation to EU legislation. This is enshrined in Art 12 TEU. Specifically, as George considers that this issue could be dealt with at national level, issues of subsidiarity arise. The Subsidiarity Protocol to the TEU provides that national parliaments may challenge legislative initiatives. George may be able to persuade the UK parliament to issue a reasoned opinion in relation to this draft directive. If sufficient national parliaments do so, the Commission must respond as prescribed by the Protocol. If one third do so, the Commission must reconsider, and if it decides to proceed, must give reasons. If a majority do so, the Commission must produce a formal, reasoned opinion justifying its approach if it intends to maintain it (Protocol Art 7).

**Question 3(b)**

The appropriate remedy will be an action for annulment under Art 263 TFEU. The UK is a privileged applicant, therefore has *locus standi* to make the application if George can persuade the Government to initiate the action. In theory subsidiarity challenges are covered by Art 8 of the protocol, so the UK Parliament itself could make the challenge. However, there is no precedent for this and it is not clear how Parliament would make the necessary decision. George is not a privileged applicant, and clearly the directive is not of individual concern to him, as he does not meet the Plaumann (1963) test, nor is it a regulatory act, as it is made by a legislative process. He cannot therefore mount an annulment action personally. A challenge here is likely to be on the basis of non-conformity with the treaty – i.e. failure to respect subsidiarity effectively - although plausibly a challenge could also be made on the ground of lack of legal basis: the Art 263 grounds overlap and are not mutually exclusive.

**Question 3(c)**

This part of the question relates to Art 267 TFEU references. Under Art 267 the ECJ has the final responsibility for, *inter alia*, interpretation of EU legislation. This jurisdiction is conferred in order to secure conformity. Clearly the UK courts are entitled to use Art 267. The United Kingdom Supreme Court will be an Art 267 (3) court, one from which there is no recourse in the national system as explained in Lyckeskog (2002), and therefore is, in principle, obliged to make a reference, but the lower courts also have a discretion to make a reference. As this case involves the interpretation of a directive and its relationship with national law, it will be wise to obtain a definitive ruling on the meaning of UK law first: Henn (1981). The obligation to refer is based on Cilfit (1982). The Art 267 (3) court must make a reference if the answer to the question asked is genuinely required in order to give judgment (and is therefore not irrelevant or factitious), and the point is not *acte éclairé*: Da Costa (1962), or *acte clair*. The policy and practice of the English courts is that any significant doubt by a judge as to the correct interpretation will mean that the issue is not *acte clair* and this will trigger a reference: Samex (1983). Here there would appear to be a disputed interpretation and the courts will not wish to run the risk of a Köbler (2003) action imposing member state liability for failing to make a reference that was clearly required.
Question 4

This question relates to the free movement of goods, which is one of the foundations of the internal market referred to in Art 3 TEU. It is a basic requirement of this market that states may not interfere with the operation of free trade. There is a temptation for states to do so, essentially as a form of neo-protectionism to protect their own economy against competition. Arts 28-36 and 110 TFEU deal with the regulation of this area. Barriers to free movement are divided into fiscal barriers, sub-divided in turn into customs duties and CHEE: Art 30; discriminatory internal taxation: Art 110 and non-fiscal barriers, quantitative restrictions and MEQR: Art 34-6. These categories are mutually exclusive: Lütticke (1969).

Situations (i) and (ii) relate to non-fiscal issues. Quantitative Restrictions are actual quotas or embargoes on the product: Geddo (1973) and there are none apparent here. We are here clearly dealing with activities of the state itself so Arts 34-36 are engaged: Buy Irish (1981). Measures having equivalent effect (MEQR) is a broad concept. MEQR may be distinctly applicable, i.e. they only affect the imported product, or indistinctly applicable, i.e. they apply across the board, to products whatever their origin, but with a differential impact on the imported product: Rau (1982). The classic definition of MEQR is the Dassonville (1974) formula: ‘trading rules actually or potentially, directly or indirectly affecting trade between Member States’. This formula was modified by Keck (1991) so as not to apply to most ‘selling arrangements’ as opposed to rules on ‘product characteristics’. Impact of the rule of recognition and rule of reason (for indistinctly applicable MEQR only) in the leading case of Cassis de Dijon (1978) established both a rule of recognition, namely that a product lawfully produced and marketed in a Member State in accordance with its legal requirements should normally be lawfully marketable throughout the EU, and also a rule of reason, applicable only to indistinctly applicable MEQR, namely, that these could be legitimate to the extent that they constituted a proportionate means of addressing a ‘mandatory requirement’ of the Member State in question. Under Art 36 any MEQR can be justified by reference to an exhaustive list of derogations, subject to various conditions.

Applying these propositions to the facts, situation (i) appears to concern a selling arrangement, therefore outside the scope of MEQR and therefore legitimate, unless we can identify some factor which causes it to have, exceptionally, a differential impact on imports and thus take it outside the reasoning in Keck. One possible argument is that the rule appears to operate so as to prevent a form of promotion of products specifically from elsewhere in the EU. Situation (ii) concerns a classic indistinctly applicable MEQR; the provisions referred to are essentially recipe rules. The rule of recognition should apply unless there are pressing reasons to apply the rule of reason. There is no apparent reason presented in relation to the additive: habit or tradition are not justifications. Strength regulations may be legitimately imposed for protection of the consumer, but labelling rules are usually all that is proportionate, as in Cassis itself.

To summarise, the Luxembourg authorities appear to have imposed legitimate selling arrangements, unless it can be shown that these have a differential impact. However, the Italian authorities appear to be implementing MEQRs which are almost certainly disproportionate, and therefore unlawful.

It is clear that the measure described in (iii) is fiscal. Excise duties are generally part of the internal taxation system so we will need to consider the measure in question under Art 110 not as a CHEE. Art 110 (1) requires equivalent treatment
for ‘similar’ products. ‘Similar’ means organoleptically (as perceived by the senses) and in the use to which they are put: John Walker (1986), Roders (1993).

Here we are dealing with different varieties of whisk(e)y, which are essentially the same product, so are clearly similar for present purposes. There appears to be direct discrimination in relation to the rates of duty and no justification for the 50% discrepancy. The preferential treatment of small producers is in principle acceptable on socio-economic grounds: Commission v France (Dessert Wine) (1986). However, concessions to small enterprises should be available regardless of nationality: Hansen (1978). Art 110 (1) applies: this is direct discrimination with no apparent legitimate explanation, so the Irish measures appears to be illegal and can be challenged before the national courts.