LEVEL 6 - UNIT 6 – EUROPEAN UNION LAW

SUGGESTED ANSWERS – JUNE 2010

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 June 2010 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

1. The main aim of the Brussels I Regulation (BR I) is to provide a simplified system for determining where actions are to be brought and judgments enforced.

In relation to claims which have a connection with at least one EU state, the underlying basis for the allocation of jurisdiction to the courts of a state in principle follows the defendant’s ‘domicile’, although this is not a simple concept due to variations of approach. In most states domicile and residence are roughly equivalent, but in the UK domicile has a different legal meaning, so there is a separate definition provided for the purposes of the Regulation.

This largely follows the earlier ‘conflict of laws’ rules by which courts resolved these matters. Suing the defendant in his home court was seen as being fair and reasonable.

There are exceptions to the general rule, allowing the weaker party (consumers, employees, the insured in relation to insurance disputes) to bring action in their home state. This reflects the fact that these parties would have particular difficulties in taking action abroad, and their opponents are, almost by definition, larger and better resourced, and it is therefore reasonable to expect them to litigate abroad.

It may also be possible to bring the claim where the cause of action arose. This is particularly relevant in accident cases; a tort, particularly in areas such as the Low Countries, may easily involve parties from several states, and the evidence is likely to be most easily available locally.

There are some bases of exclusive jurisdiction, such as immovable property, where some states assert public interest arguments, and in any event the local law will apply, and only local courts can order any necessary
rectification of property registers. This has required an exception for disputes over holiday lettings, since otherwise a dispute over the inventory of a holiday flat in the Canary Islands, let by one UK resident to another, where no issue of title to the property arises, would have to be litigated in the Canary Islands.

Areas of concern have arisen over the exclusion of arbitration proceedings, over the conflict between the ‘court first seised’ principle in BR I and the traditional *forum non conveniens* rules, and over the apparent tendency of the rules in BR I to exclude a non-EU venue even where it may have the closest connection with the case.

In relation to arbitration proceedings, much of the concern is over whether there is an arbitration provision at all, and also other proceedings ancillary to arbitration. The general position, as stated in *Marc Rich v Società Italiana Impianti* (1991) is that all such proceedings are excluded from the Regulation, although in *van Uden v Deco-Line* (1998) it was held that proceedings for provisional measures were not caught by the exception.

English lawyers (and judges) have had reservations about the ‘court first seised’ rule, which seeks to prevent duplication of actions by requiring that all claims other than the first be stayed until the first court has accepted or declined jurisdiction. In the past, there was an element of ‘forum shopping’ to get the most favourable jurisdiction. This was reinforced by the *forum (non) conveniens* principle and enforced by anti-suit injunctions. The ECJ has however made it clear that the Brussels regime must prevail: *Turner v Grovit* (2004).

The ECJ in the *Owusu* case (2005) ruled very firmly that the Brussels regime applied to cases where a non-EU venue came into question, even though there might be a strong case for that venue on traditional *forum non conveniens* principles. The case concerned an accident at a Jamaican resort. One defendant (the lessor of accommodation) was UK domiciled, but all other defendants were Jamaican domiciled, and the witnesses were in Jamaica. It was held that the UK courts could not relinquish jurisdiction as this would undermine the whole structure of the Brussels regime.

Enforcement is based on virtually automatic recognition, provided the defendant was properly joined in the earlier proceedings. It has seen fewer problems.

The European Small Claims Procedure is intended to provide a simpler summary procedure for small claims. It provides for a written procedure, based on standard documentation. There is the option of an oral hearing. The Brussels rules on jurisdiction will apply, but usually the court of the defendant’s domicile, or the claimant’s home court in consumer cases will come into question. In addition to the exclusions of BR I, employment matters are also excluded. It is optional, and relates to claims valued at less than €2000. As it is a very new procedure, problems have not yet manifested themselves.

(b) The purposes and operation of Art 263 TFEU.

This Article relates to the action for annulment – the ECJ is considering the legitimacy of the formal acts of the other institutions.
This actually combines several sub-jurisdictions (i) ‘appeal’ against quasi-judicial decisions (e.g. in competition cases) (ii) judicial review of the vires of secondary legislation and administrative decision making (iii) ‘constitutional’ judicial review in cases of disputed institutional competence.

There is a very short time limit of two months. The challenge must be immediate, as measures will be taking effect. This is comparable to the three month limit for judicial review in the UK.

Privileged applicants, that is member states and major institutions, have full access to the court, but non-privileged applicants have severely limited access. The intention was to limit this to cases in categories (i) and (ii) where there was administrative action targeted at them, but the interpretation of ‘direct and individual concern’ has been contested. Direct concern has been interpreted as existing when the measure in question confers no discretion, so it will be applied in a specific way: *Alcan* (1970), *International Fruit* (1971) cf *Differdange* (1984). Where the measure gives the state (or an EU institution) discretion, then in principle an improper exercise of that discretion will give rise to a separate action. Individual concern was interpreted very early as relating to measures which applied specifically to the applicant as though he were the addressee, distinguishing him from all others: *Plaumann* (1963). This has usually proved possible only where there is a measure which is applied to a defined and closed class: *Bock, Toepfer*. In *Piraiki-Patraiki* there was individual concern where existing contractual arrangements were interfered with, and in *Codornìu* where intellectual property rights were affected, but these are exceptional cases. There is a further problem with regulations; in the past these had to be ‘decisions in the form of a regulation’, which was often the case in relation to anti-dumping measures, and some detailed CAP regulations.

Two vexed issues have been establishing parameters for access by non-privileged applicants, and dealing with the argument that in the absence of Art 230 there may be no alternative remedy. This would create a serious lacuna in the system and deny legal protection and remedy to individuals: *UPA* (2002), *Jégo-Quéré* (2002 and 2004). The response of the ECJ was to assert that the system was a complete one and any failures were to be laid at the door of the member states. Art 263 now deals with the specific issue by allowing challenge to ‘a regulatory act which is of direct concern to [the applicant] and does not entail implementing measures’ although there is as yet no case law on this specific point, and indeed ‘regulatory act’ is not defined, so its precise meaning remains to be established by case law.

The substantive grounds for review are not clearly drafted. There is overlap between them, although as they are cumulative that is not a particular issue. Most relate to the legal basis of the contested act, but abuse of power has been used to deal with inappropriate use of powers, even when their existence is not in doubt.

(c) Non-contractual liability under Art 340 TFEU in relation to both official acts of the institutions and the activities of officials.

Although the Article provides for liability in accordance with principles common to the member states, in practice there has been a restrictive approach. This is in part because the principles were established while the initial six member state community was in existence.
In relation to officials liability will attach only when they are actually fulfilling the objectives of the institution; other activities which in national law (as for example the law of the UK) might be seen as being in the course of employment, such as transporting an official visitor between locations of his visit, are not included: \textit{Sayag v Leduc} (1968).

In all cases the error needs to achieve a level of seriousness; minor slips will not count: \textit{Richez-Parisse} (1970). Again, some national systems would impose a stricter standard, while recognising that not every minor error can be characterised as negligent in law.

Where the error is an operational one, these are the primary limitations, but where the challenge is to an alleged breach in relation to policy, there is an even greater level of restriction. In some national legal systems errors in relation to policy are seen as non-justiciable, and even where errors in relation to \textit{ultra vires}, improper procedure and irrational or seriously inappropriate decision-making can be dealt with through judicial review, there is not usually liability in damages.

The \textit{Schöppenstedt} (1971) formula regulates such cases. Where it is in effect the creation of a policy, or a discretionary decision at a policy level, there is liability only if there is a sufficiently serious breach of a higher order legal norm and cause and effect must be shown.

Many of the cases date back to the period when the Commission was responsible for managing the agricultural sector in detail under the CAP; changes in policy inevitably had negative practical impacts on some economic actors, even though they were overall in the public interest. Many applicants sought damages, but few succeeded; generally it was held that the decisions in question only had the ordinary effects of any exercise of discretion and were therefore no more than the general vicissitudes of life: \textit{Skimmed Milk II} (\textit{Bayerische Vermehrungsbetriebe v Council and Commission} (1978)).

‘Serious’ appears to relate to the nature of the breach rather than the consequences; see \textit{Amylum} (1979) where what was seen as an excusable error in approach to a calculation had a major financial impact, but did not attract liability.

Higher order norms may be within the EU legal order, for example Treaty articles, and legislative regulations, or independent of it, for example general principles of law, human rights etc.

2. Regulation 1/2003 has primarily changed the approach to the enforcement of Art 101, rather than the substantive rules, although these have also been modernised to some extent. The Article deals with anti-competitive behaviour between undertakings, whether these are competitors at the same level in the market (horizontal) or operating collusively rather than collaboratively at different levels (vertical). It is therefore still necessary to demonstrate that there is a formal or informal agreement: \textit{Quinine} (\textit{ACF Chemiefarma v Commission} (1970)), or a concerted practice (CP). This is intended principally as an anti-avoidance mechanism. In many cases it is difficult to obtain evidence of collusive arrangements. The parties know they are prohibited so will avoid creating evidence or disclosing it. Despite the very broad meaning given to ‘agreement’ e.g. in \textit{Quinine}, CP allows for inferences to be drawn from the commercial activities of the parties: \textit{ICI v Commission} (1972).
It is however necessary to carry out a full analysis to ensure that the facts clearly indicate conscious parallel behaviour and not a common response to external forces applying to all.

The situation must then be analysed to establish that it has an anti-competitive intent or effect within the EU or a substantial part. There is now more focus on establishing what the relevant market is; see the Notice on the Definition of the Relevant Market. There is also a greater awareness that vertical arrangements assist in the orderly planning of production and distribution, and may assist new entrants by allowing them to work with collaborators. See the Commission Guidelines on Vertical Restraints.

The main thrust of the Regulation is to devolve enforcement to National Competition Agencies (NCAs). They will handle routine and regional cases, leaving the Commission free to deal with the largest and most complex cases. Enforcement procedures have been updated accordingly.

The onus is now firmly on the parties to assess the compliance of their arrangements, aided by Block Exemptions and ‘soft law’ guidance.

This has been accompanied by the abolition of negative clearance and although there is still power to grant individual exemption in special circumstances, there has been no instance of the Commission doing so, or even considering an application.

In addition there has been encouragement of private enforcement in particular through making Art 81 explicitly directly effective. Such an effect had been provisionally accepted in some national courts (e.g. Garden Cottage Foods (1983)).

There is express recognition that the activities of smaller undertakings are less likely to have a significant adverse impact on the market. Provided they avoid the use of ‘black-listed’ means such as overt price fixing, they are protected by the relevant market threshold provisions. The two principal instruments are:

NOAMI – this notice exempts the activities of enterprises with less than 10% of the market where they are competitors and 15% otherwise, but these limits are reduced where there is a ‘network effect’ such that at least 30% of the market is covered by agreements – this is to deal with the creation of entry barriers where the network of agreements in effect prevents access, as in Brasserie de Haecht (1967) as qualified by Delimitis (1991).

Vertical block exemption, namely Regulation 2790/99, which extends the upper market share limit to 30%, which is generally considered the point at which market power becomes a significant factor. The principal prohibited provisions are price fixing, prohibition of passive selling outside the agreed territory, indirect restrictions going beyond the essential ingredients of a selective distribution system, non-compete obligations extending for more than five years and post –termination restrictions. The aim is to permit exclusive and selective distribution systems, which are recognised as having advantages on organising trade, allowing new entrants and providing for customer service, while seeking to prevent the market compartmentalisation identified and prohibited in Consten & Grundig (1966).

3. Critically evaluate the following:
(a) The effectiveness of the actions of the Commission as guardian of the treaties under Art 258 and 260 TFEU.

Art 258 authorises the Commission to ensure that MS comply with their obligations under the Treaty. There are three main areas which need to be monitored: transposition of directives, correct application of legal rules and other activity. The first is monitored through an electronic database of transposition notifications, the other through complaints lodged with the Commission and its own investigations of issues giving rise to concern.

The Commission will pursue concerns with the MS informally and formally following a formal notification in the administrative stage. This enables any misunderstandings to be resolved. The Commission is anxious to be seen as a regulator which respects principles of good governance, and assuring compliance is as importance as punishing default. Indeed there is much provision of guidance and information before compliance is due to encourage MS to act timeously. If the MS persists in default, or there is a genuine difference of opinion over whether the MS is in default, the matter cannot be resolved. However, around 80% of files are closed prior to formal action being taken. The final pre-litigation stage is the issue of a reasoned opinion, which both formally represents the Commission's final stance on the matter, and a last opportunity for the MS to give way. The Commission then has the option of taking the matter to the ECJ for a ruling. Such rulings are declaratory.

Now, under Art 260, there is the possibility of returning to the ECJ if the MS has not complied to secure a financial penalty, thus providing an effective remedy for non-compliance. Under the Treaty of Lisbon this procedure has been accelerated, as it is no longer necessary to issue a further reasoned opinion before invoking Art 260.

Although the performance of the Commission has improved, general areas of concern still include – (i) the overall length of time taken, in particular the periods conceded to states to rectify defaults, (ii) failure to act effectively on complaints, (iii) the confidential nature of the administrative stage and associated lack of transparency.

(b) The role of the European Parliament (EP).

Originally the EP was seen as being ineffective. It had no effective legislative role, and was little more than the equivalent of a select committee. There have been many changes, so the EP is now directly elected and has greatly enhanced powers. It does not have a direct legislative power of initiative, although in practice most national legislation is introduced to the legislature by the executive, so this is hardly a major blemish. Under the ordinary legislative procedure there is co-decision, so the EP has at least the power of veto, as it does under the assent procedure. In practice the legislative programme is discussed in advance by the Council, Commission and EP.

The EP now has at least co-control over the budget, especially discretionary items. It approves new Commission, and can hold the whole Commission to account. It is however arguable that a power to remove an individual Commissioner would be more effective and proportionate than a threat to remove the whole Commission.
Although directly elected the main, and perhaps inevitable, problem, given the physical size of the EU today, is that the EP is still seen as remote. There is little publicity for its routine work, much of which is in any case technical and of little interest to the man in the street. The democratic deficit is now reputational and perceptional, not based on formal shortcomings in the powers of the EP.

(c) The equal treatment of men and women under the TFEU.

The original treaty provision specified equal pay, this was initially due to French concerns that their existing measures in this area could be undermined. What is now Art 157 TFEU has been expanded to cover equal treatment more generally, and this has been supplemented by secondary legislation and jurisprudence.

The equal treatment principle is directly effective, vertically and horizontally: Marshall (1986), Defrenne (No2) (1976). This has also been considered by the English courts on various occasions McCarthys v Smith (1980), Murphy (1988), Jenkins v Kingsgate (1981).

There is an expanded notion of ‘pay’ to include all remuneration and benefits. The ET Directive also brings retirement ages (cf Defrenne (No1) (1973) and Griesmar (2001) and matters relating to pregnancy into scope. See also extension by jurisprudence in cases such as Dekker (1987), Webb (1989). The original directive dating from 1975 has been replaced with Dir 2006/54. This focuses on equality of treatment in relation to social security and also on issues of harassment. It also consolidates into the directive the implications of the Barber (1990) decision on benefits under occupational social security/pension schemes.

Equal treatment is the best established area of social policy impacting on the economic aspects of the four freedoms. However, it is still not wholly effective. There is ample evidence that equal pay has not been achieved, as male and female earnings are still significantly at variance. There have been many individual victories, but the war is still in progress.

4. Critically evaluate:

(a) Foglia v Novello (No 1) (1980);

This case was collusively brought in an Italian court on a point of French revenue law, albeit with EC relevance. The ECJ rejected the reference on the basis that it was confected and did not relate to a legitimate dispute.

The case is a striking example of the limitations of the obligation to accept an Art 267 reference. The court will only deal with a reference which is necessary to dispose of bona fide proceedings. It can be compared to Melilicke (1992), which was essentially brought to obtain a ruling on a point of academic law. It could be argued in Foglia that the ECJ was being too sensitive, since there was a legitimate point of law at stake, albeit that the means by which it came to the court were artificial.

(b) the CILFIT criteria;

This case seeks to clarify when an Art 267 (3) TFEU court need not make a reference, which is a tacit derogation from the apparently unconditional obligation. It reiterates that the reference must be necessary, and not a
moot point – see eg Owusu (2005) and also that the MS court may rely on an existing ECJ ruling, as originally held in da Costa (1962), but also stipulates the acte claire criteria under which the MS court may make a ruling itself.

There must be no doubt of the correct interpretation. This is controversial, as different language versions may create doubts, and MS courts are supposed to take account of this, and also of the special expertise of the ECJ in relation to EU legal concepts. In effect the MS court is being trusted to identify any scintilla of doubt. The UK courts do – eg Henn & Darby (1980), Else (1993). There is also some degree of protection in that a serious failure to make a necessary reference may attract a Köbler (2003) damages action.

The case is an uneasy compromise. The ECJ had concerns over the volume of references. MS courts desired greater autonomy, but there were risks that divergent approaches would be introduced, thus sabotaging the essential function of Art 267, which is to ensure that there is a single authoritative and consistent approach to interpretation.

(c) the approach by the Court of Justice to the concepts of ‘court or tribunal’ and ‘court against whose decisions there is no judicial remedy under national law’ under Art 267;

In the first case, difficulties arose where decision making was devolved to bodies other than courts in the strict sense, such as professional regulatory bodies. Criteria were developed: whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent: Broekmeulen (1981). The body must also, in the case, be resolving a dispute, not acting administratively: Standesamt Stadt Niebült (2006). The major exclusion is of arbitrators. They may have to apply EU law, but are excluded from Art 267: Dorsch Consult (1998).

All courts may make a reference, but Art 267(3) courts must refer. In some MS systems the actual supreme court has a selective jurisdiction, hearing appeals only with leave. A lacuna exists if the lower court does not make a reference and the higher court refuses leave. The conclusion in Lykeskog that in such cases the lower court is NOT an Art 267(3) one could result in abuses if the MS procedures do not provide for the issue of a reference to be effectively considered at the leave stage in the supreme court. This was addressed by the HL by amending its rules of procedure. If necessary, a reference can be made at the leave stage. It is assumed the UK Supreme Court will adopt the same procedure.

SECTION B

1. A directive does not have direct applicability.

It may have direct effect if precise and unconditional: van Duyn (1974) and the implementation date has passed: Ratti (1979).

It can have vertical direct effect against the state or an emanation of the state: Marshall (1986).

Here Alexa is clearly working for an emanation of the state (without needing to investigate the Foster (1990) criteria). She should be able to rely on the
directive exactly as in Marshall. Inconsistent national provisions will be inapplicable.

A directive does not have horizontal direct effect: Faccini-Dori (1994).

If Bevis can establish that he is working for an emanation of the state he can rely on vertical effect. Foster provides that the entity must have special powers, be under state control and providing services beyond those between private individuals. Although there is state funding, this is probably not so here: Doughty v RR (1992).

Directives do have indirect horizontal effect, in that national legislation must be interpreted consistently ‘so far as it is possible to do so’: Marleasing (1990). UK courts have accepted that they can, particularly in the case of implementing legislation, give effect to the underlying intention of parliament to legislate compatibly, rather then traditional semantic methods of construction: Pickstone (1989), Litster (1989). This can involve reading words in or down, but there must be no fundamental violence to the intent of the legislation.

Here it is easy to read the training requirements compatibly, but the different technical standards may not be capable of being read together. Only the latter will actually assist Bevis on the facts.

Member states are under an obligation to comply with all obligations under EU law Art 4.3 TEU. Failure to do so may expose them to an action for non-contractual damages: Francovich (1991), Factortame III/Brasserie du Pêcheur (1996). Any breach of EU obligations, including mis-transposition of a directive, can be counted.

The EU law must be intended to confer rights on individuals in a sufficiently clear and direct way, must be sufficiently serious and there must be a causal link between the breach and the damage. The first and third criteria are met.

Relevant issues for seriousness are whether the breach is obvious or technical, intentional, is shared with other MS etc. Non-transposition is always serious: Dillenkofer (1996) but this is mis-transposition and there is no such assumption. Here it is fairly obvious, and there is no apparent reason for it. However, if it were the case that the two standards were largely identical, and were not designed to be different, then the UK might argue that this was not a serious breach, but an excusable technical error: British Telecom (1996).

To summarise: Alexa is advised that she can in all likelihood rely on the Directive by way of vertical direct effect. In her claim against the hospital, the statutory duty of the defendant will be deemed to be that in the Directive. Bevis is advised that it is unlikely that he can demonstrate that his employer is an emanation of the state, and cannot rely on vertical effect. There is no horizontal direct effect. He may seek to rely on the interpretative obligation, which is treated as a strong one by the English courts. This would have the effect that the UK legislation would be interpreted consistently with the Directive for the purposes of Bevis’ claim, but the wording may be seen as too divergent. Bevis may therefore seek a remedy against the state under the Francovich principle, which is clearly relevant.
2. (a) The levy is a fiscal measure. Fiscal barriers are inconsistent with the single market. This is dealt with in Art 30 TFEU which prohibits national customs duties and charges having equivalent effect (CHEE), and Art 110 TFEU which prohibits discriminatory internal taxation. These are mutually exclusive.

Wiener should initially seek to establish it is a CHEE – any charge imposed by reason of the goods crossing a frontier. In the past this has been rigorously interpreted, and the amount of the charge (Cmn v Italy – Statistical Levy (1969)) and the absence of protectionist intent (Diamantarbeiders – Social Funds Case (1969)) have been held irrelevant. Even cases of similar charges on the domestic product, but charged at a different time or in a different manner have in the past been accepted as CHEE. However, many of these are old cases, and the levy may today be seen as being part of the internal environmental taxation system.

Given that the levy is at the same rate on all goods covered, it is unlikely that it will be seen as discriminatory taxation. In Cmn v Sweden (2008) it was held that the distortion caused by the differential taxation must be significant, and the different collection mechanism is unlikely to have this effect. Commission v Ireland (1980), where a differential of several weeks in the date for payment constituted discrimination, is to the contrary, but may not be followed in the light of the more recent case.

Wiener is therefore advised that it may seek to argue that the measure is a CHEE, and that there is support for this in the case-law, but that it is at least possible that it will be seen as legitimate internal taxation.

(b) Under Art 34 TFEU MS may not impose quantitative restrictions (QR) or measures having equivalent effect (MEQR) on imports. QRs are actual prohibitions or quotas (Geddo (1973)) but MEQRs are very widely defined. Originally in Dassonville (1974) the definition covered any trading rules capable of affecting trade actually or potentially, directly or indirectly. In Keck (1993) this was restricted to rules relating to the products, not selling arrangements, which would only be caught if they had specifically differential effects.

Distinctly applicable MEQRs are those where different requirements are applied to the imported product. They can only be justified on the grounds laid out in Art 36 TFEU which must not be applied so as to provide improper protection to the national product (Cmn v UK – Newcastle Disease (1982)).

Indistinctly applicable MEQRs apply to all products but and their legality is only called into question if the impact on the imported product is greater then on the domestic – e.g. idiosyncratic packaging rules: Walter Rau (1982).

Cassis de Dijon (1979) importantly established that (a) under the ‘rule of recognition’ in principle goods produced in any MS according to its rules should be acceptable in all MS (b) under the ‘rule of reason’ proportional indistinct MEQRs which were required to address ‘mandatory requirements’ relating to a range of important interests, including the Art 36 TFEU grounds, but extending inter alia to consumer protection, and environmental protection (Cmn v Denmark – bottles (1988)).
(i) Mike would have to show that the prohibition of beach bars was not just a *Keck* selling arrangement, as it prima facie appears to be, but had a differential effect on imports. This will be difficult. It is not the level of impact on him, but the distortion of trade flows which has to be considered.

(ii) The requirement to use specified bottles is an indistinctly applicable MEQR. It does not relate to an Art 36 TFEU ground, but is potentially a mandatory requirement: *Cmn v Denmark – bottles*. It must satisfy the test of proportionality. Requiring recyclable plastic may be a legitimate objective, but to specify these two seems not to be proportionate. It might even be seen as disguised protectionism, although that is not a specific factor in the rule of reason.

(c) It is a basic principle that states may deal as they see fit with purely internal situations, so Giorgios cannot directly complain of his loss of his business. However he may be able to argue that the measure amounts to an MEQR in the same way as UK traders tried to argue that UK Sunday trading legislation was: *Torfaen* (1989), *Stoke-on-Trent* (1992).

On the face of it there is a state interference with trade, but it is a selling arrangement as in *Keck*, and there is a presumption that this does not interfere with interstate trade, unless Giorgios can demonstrate that there is some differential effect. It is the prohibition on beach bars which affects Giorgios, and it is difficult to see how he can demonstrate any specific impact on trade flows.

3. (a) Advise Mirabelle and Amadou on the following issues:

There are provisions for the recognition of various types and levels of qualification. Dirs 77/249, 98/5 and 2005/36, the latter of which is designed to form a general framework. Insofar as M holds formal qualifications within the framework, she should be able to rely on mutual recognition. Slovenia cannot insist on her acquiring a Slovenian qualification if she holds the same qualification. This would apply to the French degree, assuming it is of the same level and standard. Slovenia can examine whether the degree covers all the required elements, but can only insist that Mirabelle make good any shortfall.

The part degree is not a recognised qualification. However, when assessing what qualifications Mirabelle requires in Slovenia, she should be given credit for what she has acquired and have to study only for the balance needed: *Morgenbesser* (2003).

(b) Mirabelle has the right under Art 21 TFEU to move freely within the EU for a period of three months. She also has the right under Art 45 TFEU to take up employment and under Art 49 TFEU to establish herself in business. She can therefore in principle reside in Slovenia if she continues to work as a worker, whether employed or self-employed, or acquires the business.

Under Directive 2004/38 these rights are associated with the right to be accompanied by family members, including a spouse, of any nationality. Amadou’s prior status is immaterial for these purposes: *Metock* (2008). The right of residence can be refused only on limited grounds that Mirabelle or Amadou represents a serious threat to public order etc. on the basis of their personal conduct, and there is no evidence of this. Amadou and Mirabelle must however have suitable health insurance and not be a burden on public funds (this is not automatic if Mirabelle will be running her own business,
and will therefore not be automatically enrolled in the employees’ health insurance scheme). However these rights do not necessarily attach to a co-habitee: Reed (1986), although under Art 3.2 (b) of the Directive, if the relationship is ‘durable’, Amadou’s entry and residence should be ‘facilitated’, although it is not an absolute right.

Amadou would be allowed to work – Reg 1612/68, but is not specifically entitled to access to education (children of the worker are, but not spouses). He cannot therefore insist on an EU right to enrol at university.

(c) This will depend on whether Nina is a dependant. Assuming Mirabelle is covered by Dir 2004/38, Nina’s nationality is irrelevant; she is in principle covered as a direct ascendant. Dependency is a question of fact, and in the changed circumstances may well be established. Even if she is not entitled, there is an expectation that MS will facilitate entry of other dependants: Art 3.2 (a).

4 The advice will depend on whether Summum is identified as occupying a dominant position. If so, this may not be abused. Otherwise, Summum is, effectively, free to pursue all lawful economic means of maximising its business and dealing with competitors. This is an area where soft law in the form of the Notice on the Definition of the Relevant Market is of considerable significance. Dominance must be assessed by reference to the geographic market, the product market and the temporal market (although there seems to be no evidence of seasonality). The basic question that has been asked by the court in the past is, can Summum behave in a way which indicates they are not bound by ordinary disciplines of the market: United Brands (1978).

Geographic market: on the facts appears to be EU, except Scandinavia, which appears to be distinct, as the pattern of trade there is different – as in United Brands, so this clearly amounts to the EU or a substantial part.

Product market. It is important to establish the extent to which there are separate markets: United Brands/Continental Can (1973). Look at substitutability – SSNIP test and the Notice on the Definition of the Relevant Market. Consider also entry barriers. If there are separate markets it is easier to establish dominance in one of them. Once it is established whether there are separate markets we can look at market share in each of them. A very high share is presumptive proof of dominance: Hoffman La Roche (1979). Lower share may still indicate dominance, if, for example, the market is fragmented: United Brands/Michelin. It is immaterial that dominance has been achieved by merger.

Apply to facts. If plastic trays are held to be a distinct product market Summum is likely to be found to be dominant in EU except Scandinavia – it holds a 50% share in a relatively fragmented market and is the only EU wide player. If the market is food/drink packaging, Summum’s share falls to 30% which is marginal. It is the generally accepted boundary of ‘market power’: Coca Cola (2000). It is not possible to be categoric on the facts available.

Dominance is not itself prohibited. Abuse is. Ordinarily, price cutting in the face of competition is ordinary market behaviour; it will benefit consumers. However predatory pricing (where the price charged is (i) below average variable costs, or (ii) below average total costs and demonstrably designed to eliminate a competitor) may be an abuse. Need to analyse whether the
cost cutting qualifies: *Akzo (1991)*. This is foreclosure of the market – abuse aimed at potential competitors, not consumer abuse: *Intel (2009)*.

In relation to discounts, again the issue is foreclosure of the market and abuse which excludes competitors allowing subsequent exploitative abuse. Ordinary discounts for quantity are normally acceptable as they reflect the market reality of economies of scale. Tying in by ‘all requirements’ or cumulative discounts may be abuse as it places additional pressure on customers not to deal with other suppliers: *Hoffmann La Roche*.

Assuming Summum is dominant, it must accept some restrictions on its actions. Competitors are not subject to these, and therefore Summum’s ability to respond to their entry into the market is compromised.

Any deep discounting will raise suspicions of predatory pricing, so clear evidence of the various costs and calculations must be available. It is likely that any discounts other than simple discounts for quantity are likely to be seen as abusive foreclosure.