CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

LEVEL 6 - UNIT 6 – EUROPEAN UNION LAW

JUNE 2022

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2022 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report,** which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

In general, the candidates showed reasonable knowledge and understanding of the basic legal rules and were able to explain these by reference to relevant case law. The extent to which they were able to do this it was reflected in the strength of their marks. in all cases marks were lost because parts of questions were not attempted.

Evaluation and application continue to be the weaker aspects. but this was particularly marked in relation to evaluation as candidates enter the total of eight questions from Part A and only four from Part B.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

This question produced two very competent answers. Both addressed all issues accurately and with appropriate reference to case law. Neither really followed through with explicit evaluation.

Question 2(a)

This question produced one answer which was reasonably well informed and showed some indication of how the Articles had devolved in order to deal with problematic issues. It could have dealt with the earlier stages of the administrative procedure in more detail.

(b)

This question produced two answers. One was little more than a close paraphrase of the Article. The other demonstrated some understanding of the relationship with MSL but did not really address the case under Art 340 itself.

(c)

Not answered by the candidates who attempted this question.

Question 3

There was quite a lot of paraphrasing. The answer then went on to deal reasonably with the factors relating to dominance, although the coverage was relatively broad in general and the precise significance of difference of the size of market share, for example, was not really covered in detail. There was relatively limited coverage of the various forms of abuse.

Question 4(a)

Candidates were able to identify the salient features in broad outline. Concepts such as *acte clair* were not sufficiently engaged with.

(b)

Attempted with generally limited success. Only one candidate actually engaged with specific areas, and then only really with supremacy.

Section B

Question 1(a)

Candidates provided copious paraphrasing of the legislation, but most of the discussion was on irrelevant topics and key features such as the relevant block exemption were not discussed.

(b)

Again, there was no identification of the relevant block exemption.

Question 2

Not attempted.

Question 3(a)

Candidates appear to be familiar with the relevant legislation but sought to apply it rather strangely and with no reference to the concept of similarity of products.

(b)

A Candidates demonstrated familiarity with the relevant legislation and in this case, case law. Application was reasonable but lacked precision.

Question 4.

Responses showed a reasonable understanding of the basic legal principles, although in one case there appeared to be no familiarity with the relatively recent changes, and in the other, there was no reference to alternatives to action under A263. Application was less strong and in one case limited to one of the three acts which should have been considered.

SUGGESTED POINTS FOR RESPONSE

LEVEL 6 - UNIT 6 – EUROPEAN UNION LAW

Question Number	Suggested Points for Responses	Marks (Max)
1	Direct effect – reliance on EU law to the exclusion of inconsistent national law due to the supremacy principle: Costa v ENEL. Regulations explicitly directly applicable and effective: Art 288 TFEU. Treaty articles capable of direct effect if clear precise and unconditional: van Gend en Loos. Directives not designed to have direct effect but to be transposed and subsumed in national law but capable of direct effect if clear precise and unconditional: van Duyn, provided the transposition date had passed: Tullio Ratti. Vertical direct effect available against the state or an emanation thereof: Foster; Farrell. Horizontal effect as between natural and legal persons. Available in relation to treaty articles: Defrenne. Directives can have vertical but not horizontal effect: Marshall; Faccini-Dori. Direct effect is the most effective remedy where available, but has limitations, e.g. establishing that provisions are clear precise and unconditional, problems in identifying whether emanation of the state is involved as a result of the privatisation of much previously governmental activity, preferential position of public sector employees, cf Marshall and Duke v GEC Reliance. Indirect effect – arises from the obligation on the state (including the courts) to ensure fulfilment of the obligations arising out of the Treaties: Art 4.3 TEU. An obligation to interpret national law consistently with relevant EU law so far as it is possible to do so (but not contra legem: Wagner-Miret). Originally seen as relating to remedies: von Colson, but later expanded to cover all national law of whatever date and whether or not intended to implement the EU law in question: Marleasing Indirect horizontal effect can be useful when dealing with directives (Marleasing) and where the EU provisions are not clear precise and unconditional. There must however be national legislation to interpret. There is also uncertainty, and possible variation in national practice, as to the interpretive discretion given to the courts. Member State Liability – developed by the ECJ initially in Francovich; failure to transpose a Directive which was not clear precise and unconditional regarded as a breach of the Art 4.3 obligation. Subsequently expanded to cover a range of failures by the state: Brasserie du Pêcheur/Factortame III to a range of failures including failure to eliminate an existing illegality, legislating inconsistently with EU law, incorrect transposition.	**25**

	Requirement for seriousness, e.g. Köbler, but automatic for non-transposition: Dillenkofer. A useful action of last resort. Ensures Member States take their responsibility seriously. The requirement of seriousness sets a relatively high bar by analogy with the noncontractual liability of the EU: Bergaderm. While appropriate where the state is given a broad margin of discretion, can be unduly restrictive.	
		Question 1 Total: 25 marks
Question Number	**Suggested Points for Responses**	**Marks (Max)**
2(a)	Art 258 TFEU is one of the principal mechanisms by which the Commission ensures the application of the Treaties and of Union law pursuant to Art 17 TEU. The Guardian of the Treaties jurisdiction. Art 258 relates to the formal procedure. It is necessary to consider the informal procedure which precedes it. The Commission can (but is not obliged to) act on complaints about the actions of the Member States. It can initiate its own investigations, and it routinely monitors the progress that states make in the transposition of Directives. Modern practice is to facilitate transposition by encouraging dialogue and the reporting of difficulties. The initial approach to a state is informal and 80% of issues are resolved at this stage either because the state satisfies the Commission that it is not in contravention of EU law, or the state recognises that it is in contravention and takes remedial action. If not resolved the Commission issues a formal notification. The state has an opportunity to respond to this. If not resolved the Commission will issue a reasoned opinion thus triggering the formal Art 258 procedure. If the state does not comply with the recent opinion the Commission may, but is not obliged to, bring the matter before the CJEU. Art 259 provides for a Member State to bring another before the CJEU, but only after the Commission has considered the case made by each state and issued its own reasoned opinion. This procedure has been very little used. Art 260 provides for the CJEU to give judgment against a Member State if it is satisfied that he has failed to comply with its obligations and to require it to take the necessary measures to comply with the judgment. In most cases a further application to the court is necessary if the Member State fails to comply with the judgment and the court can then impose a financial penalty. Where the infraction is the non-transposition of a directive a penalty can be imposed at the initial hearing. The advantages of this procedure are that it is flexible and gives ample opportunity for Member States to rectify any errors informally and	**13**

	without publicity. It also allows for ill founded complaints to be resolved summarily. Disadvantages are that the Commission has considerable discretion in deciding whether to pursue a complaint. While there is no more transparency in communicating with complainants over the progress of a complaint, this does not extend to the decision to investigate. The Commission also has considerable discretion in deciding whether to pursue matters to the court. The two-stage process before the court in cases not involving non-transposition is long winded, and there is no ultimate power to compel a state to comply with the judgment.	
Question Number	**Suggested Points for Responses**	**Marks (Max)**
2(b)	This article covers a range of potential liabilities. It covers 'faute de personne' which can be roughly equated to vicarious liability for the acts of the officials of the institutions. However the scope of this liability is significantly narrower than vicarious liability in English law. Sayag v Leduc – driving an official visitor from one Euratom site to another was not within scope. Richez v Parisse – negligent advice on pension rights was not within scope as the negligence was not manifest and obvious. It potentially covers liability for economic loss resulting from unlawful policy, but this is narrowly confined. Even where there has been an annulment of the relevant legislation liability is often rejected as loss is seen as resulting from the operation of normal economic constraints: Second Skimmed Milk Case. Any breach must be a manifest breach of a higher legal norm or a manifest disregard of the boundaries of the discretion afforded to the institution. A recent example is Dyson where the method of testing the efficiency of vacuum cleaners adopted by the Commission was flawed, and the relevant regulation was annulled, but the claim for compensation failed because the errors did not involve a manifest and grave disregard on the limits of the discretion of the Commission or a sufficiently serious breach of the principles of equal treatment and sound administration.	**6**

Question Number	Suggested Points for Responses	Marks (Max)
2(c)	This Regulation governs issues of which court has jurisdiction over a range of disputes and also the enforcement of judgements in the courts of other Member States. The general principle of the Regulation is that jurisdiction follows the domicile of the defendant. There are exceptions where the claimant is a consumer, employee or insurance policyholder, and where there is an exclusive jurisdiction clause. This was linked with a principle that the court first seised of a case had prima facie jurisdiction unless it relinquished it. This conflicted with the common law principle of forum non conveniens. It also did not allow for anti-suit injunctions. This in turn led to disputes over jurisdiction: The Front Comor. Jurisdiction under the Regulation is mandatory, and as a result cases may not be released to a jurisdiction which clearly has a closer connection: Owusu v Jackson. Enforcement of judgements has proved more successful. The Regulation now provides a relatively straightforward procedure for registration and enforcement. This is one of the modifications made in the recasting of the Regulation. The Regulation also provides for a relatively simple small claims procedure, enabling such claims to be pursued across national boundaries within the EU. The Regulation appears to have met to a significant extent its objective of providing mechanisms whereby natural persons and SMEs could pursue claims across national boundaries, thus creating a level playing field and pursuing the objectives of the single market. However, some of the jurisdictional issues have been more controversial, although the recasting has eliminated some of the most controversial aspects in relation to the court first seised principle.	**6**
	Question 2 Total:25 marks	
Question Number	**Suggested Points for Responses**	**Marks (Max)**
Q3	Art 102 prohibits the abuse of a dominant position. Dominance itself is a neutral concept. Most elements initially addressed in United Brands; a dominance involve the undertaking being in a position to operate free of the normal constraints of the market by virtue primarily of a high and durable market share in the relevant product and geographical markets. Cross elasticity of demand, now formalised in the Notice on the Definition of relevant market through the SSNIP test is the primary method of determining the relevant product market. Market share is treated as being the definitive factor in a true monopoly: Hilti, or where there is a very high market share: Hoffman LaRoche.	**25**

	With a lower market share more account taken of other factors such as the relative fragmentation of the market, vertical integration, entry barriers: United Brands. Generally accepted that these criteria are appropriate. There has been some criticism that the Commission can look at evidence over a relatively short time frame, producing a 'snapshot' of the situation at a given time, whereas the market reality is dynamic, and the perceived dominance is purely transient and does not justify full investigation or intervention. Abuse may be anti-competitive, i.e. are targeted at remaining or potential competitors, or exploitative, targeting customers, and ultimately consumers. Some abusive practices are essentially exploitative such as obtaining a monopoly rent. Some are capable of being either exploitative or anti-competitive depending on context such as tying and bundling: Hilti; Microsoft; Intel. Some are essentially anti-competitive such as predatory pricing: Akzo Chemie; all requirements and cumulative discounting: Hoffman LaRoche. These can be seen to benefit the consumer through lowering prices in the short term, but have the potential for exploitative abuse if competitors are driven out of the market in the long term. The approach of the Commission has been criticised for: Adopting a short-term, or snapshot, approach as outlined above Imposing duties on dominant, and in particular super dominant, undertakings which prevent them adopting generally acceptable commercial practices such as discounting. This protects competitors who may be less efficient. The Commission recognise this and for the past decade has been adopting a less aggressive policy in relation to anti-competitive abuse.	
		Question 3 Total:25 marks

Question Number	Suggested Points for Responses	Marks (Max)
4(a)	The object of Art 267 is to ensure uniformity of interpretation and application of EU law across the Member States by giving the CJEU ultimate authority to rule on the interpretation of the Treaties and the validity and interpretation of other EU legislation. The CJEU has generally taken a realistic approach to identifying those bodies in member states which qualify as courts or tribunals. The Dorsch Consult criteria of independence, permanence, compulsory jurisdiction, application of rules of law and inter partes procedure have been generally accepted. The exclusion of arbitral panels has caused inconvenience, but this is mitigated by the acceptance that a permanent arbitral body may qualify as a tribunal: Merck Canada. In general, while the CJEU requires the referring court to provide an account of the factual context of the case and the national legal issues involved, it confines itself delivering an opinion on the points or points of	**15**

	EU law referred to it and does not make findings of fact or dispose of the case. Part 267 envisages that a reference is mandatory for courts of final instance, but the strictness of this obligation has been mitigated by the CILFIT criteria. The criterion that the reference is necessary to enable judgment to be given does rightly exclude academic or hypothetical questions: Meilicke, but may be deployed slightly over zealously where there is a genuine question, albeit presented in a rather artificial way: Foglia v Novello. CJEU has accepted since Da Costa, the case which immediately followed van Gend, that where there is an existing decision this empties the obligation to refer imposed under Art 267.3 of its content. This can be problematic as CJEU not self binding, earlier decision may be analogous but not identical, error in relying on earlier decision may give rise to Member State liability if sufficiently grave and manifest (Köbler). The option to make a reference therefore still exists. By the 1980s expertise in EU law, at least in the original member states, was widespread among the legal and judicial professions. Not every point of law pleaded actually required reference to the CJEU if the answer was clear and obvious. While accepting that there would be cases when a reference was unnecessary for this reason CJEU urged caution, particularly in relation to autonomous concepts of EU law, such as "worker", "court or tribunal" and where there was a possibility that differing forms of words in the various language versions of the provision in question might need to be reconciled. In turn, national courts needed to have appropriate standards for assessing whether or not there was a genuine difference of opinion as to the interpretation of the provision as the UK did: Else; Samex; Henn & Darby. National courts are also required to formulate references with sufficient clarity and precision and providing the full context. There is now comprehensive guidance in the Recommendations last updated in 2019.	
Question Number	**Suggested Points for Responses**	**Marks (Max)**
4(b)	Many of the leading cases in which CJEU has identified and elaborated the principles of EU law have arisen from preliminary references. Virtually any provision of the Treaties and legislation is capable of giving rise to an issue in national proceedings. Important examples include the supremacy of EU law: Costa v ENEL, the framework of direct effect in van Gend, van Duyn and other cases, that of indirect effect in von Colson; Marleasing and Member State liability in Francovich; Factortame III. [Credit can of course be given for alternative examples.] Over the decades CJEU has been more or less activist in its approach. One example is the rights attached to the status of union citizen. Initially in cases such as Grzelczyk; Sala it was stated that union citizenship was destined to be the principal status and as a result entitlements to various forms of financial support could derive from it. More recently the stress	**10**

	has been on qualification for such support depending on coming within the classification contained in Directive 2004/38: Dano; Alimanovic. In some cases CJEU has restructured an incorrectly formulated reference if it provided a means to articulate a principle. E.g. Marleasing, where a reference which addressed the issue of horizontal direct effect was used to expand and clarify the principle of indirect effect, and Francovich, where a reference asking whether Italy could be regarded as equivalent to the body responsible for making payments under a directive was used to articulate the principle of Member State liability.	
		Question 4 Total: 25 marks

SECTION B

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	Art 101 deals with anti-competitive agreements between undertakings. Strictly each limited company is a separate legal person, however CJEU, when dealing with a group of companies adopts an economic reality approach and does not regard them as separate undertakings for the purposes of Art 101: Viho. This would apply to the dealings between MFL and EMF which are therefore outside the scope of Art 101. Art 101 applies to vertical arrangements between the manufacturer and distributor. The proposed agreement between MFL and TB is therefore potentially within scope. It does restrict competition as it precludes MFL dealing with other distributors or customers in the defined territory (Art 101.1 (b)). It may also involve price-fixing (Art 101.1 (a)). The market share of MFL exceeds the limits for the agreement to benefit from the provisions of the Notice on Agreements of Minor Importance (NOAMI). In any event it would contain provisions which had the object of restricting competition and/or which are blacklisted. Originally the Commission scrutinised such vertical agreements closely to ensure that they did not result in price-fixing or the preservation of the compartmentalised nature of the pre-EEC national markets: Consten & Grundig. Exclusive and selective distribution agreements are however a recognised and legitimate method of doing business, particularly for an undertaking seeking to enter new markets: Nungesser. In consequence it was recognised that such agreements could fall within Art 101.3 by improving the distribution of goods provided that they did not include additional restrictions. Currently regulated by the Vertical Agreements Block Exemption Regulation. Art 101.1 does not apply to vertical agreements subject to compliance with VABER (Art 2.1). VABER will not apply if there are blacklisted provisions.	**17**

	Price-fixing (Art 4 (a)), although this does not prohibit price recommendations as long as these do not constitute a fixed or minimum sale price as a result of pressure or incentives. Absolute territorial protection. Active sales to customers in an area reserved to the manufacturer may be prohibited, but passive sales may not (Art 4 (b) (i)). VABER also restricts noncompete clauses to a maximum duration of five years (Art 5.1 (a)). The proposed agreement is potentially within VABER, as the market shares are compatible, but the specific provisions would be objectionable on a number of grounds: MFL appears to be seeking to impose fixed or minimum prices on TB. This is a blacklisted provision which would remove the protection of VABER. MFL can suggest prices but cannot impose pressure or offer incentives. MFL can in principle restrict TV to active sales within the defined territory. However, it cannot prevent passive sales, so TB must be free to respond where the transaction is initiated by the customer, even if located in the areas which have been assigned to EMF. The prohibition on passive sales is again a blacklisted provision which would remove the protection of VABER. The prohibition on distribution of goods which are in competition with those of MFL is a non-compete clause. It cannot run for the full seven year period of the agreement and must be limited to 5 years.	
Question Number	**Suggested Points for Responses**	**Marks (Max)**
1(b)	Art 101 will in principle apply to this agreement. Again the market share exceeds the limits for it to benefit from NOAMI. The Commission has always treated horizontal agreements such as this as being potentially a means for undertakings to engage in anti-competitive practices. However, the Commission recognised that there could be situations in which collaborative research and development could enable activity to take place which neither undertaking could fund individually: Vacuum Interruptors;Philips/Osram.This is seen as promoting technical progress, and thus brings the agreement within Art 101.3 therefore legitimising it. The situation is now governed by the Research and Development agreements Block Exemption Regulation. This provides for an exemption from Art 1014 agreements covering joint research and development of products or technologies and in some cases the exploitation of the results. Where, as here, the parties are competing undertakings their combined market share must not exceed 25% on the relevant product and technology markets (Art 4.2 (a)). As the combined market share of MFL and US is 22% the agreement falls within that threshold.	**8**

	If the agreement is restricted to research and development and provides that both parties shall have full access to the results of that research and development it would not appear to fall foul of any other provision in the Regulation.	
		Question 1 Total:25 marks
Question Number	**Suggested Points for Responses**	**Marks (Max)**
2	Otto is an EU citizen. As he is retired he is not exercising rights as a worker under Art 45 TFEU. He is however exercising rights under Art 21 and must do so in accordance with the requirements of Directive 2004/38. Fatima and Ali as non-EU citizens have no EU right to reside in Spain, but once married both will be family members (Art 2.2) and will acquire such a right by virtue of the relationship with Otto. Frida is a spouse and her previous irregular status is irrelevant: Metock. Aldo is a direct descendant of Otto's spouse and is under 21. Otto is seeking to exercise a right of residence for more than three months pursuant to Art 7. Part 7.1 (b) grants a right of residence to those who have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State and have comprehensive sickness insurance cover in Spain. This right extends to family members of whatever nationality. Occasional recourse to social assistance does not automatically constitute becoming a burden on the social assistance system: Brey. Member States may not lay down a general amount for "sufficient resources, but must take into account the personal situation of the person concerned and may not impose a figure higher than the threshold for receipt of social assistance by nationals or the minimum social security pension payable to nationals (Art 8.4). The Spanish authorities are entitled to investigate whether Otto does have sufficient resources (Art 14.2), particularly as there is no mention of Fatima being employed or having resources of her own. However, they must take all the circumstances into account, in particular that Otto will become entitled to additional resources from his German state pension in a few months time. A decision to revoke his residence permit and expel him should not be the automatic consequence of recourse to the social assistance system (Art 14.3). In view of the limited recourse over a period of four and a half years such a decision would appear to be disproportionate. Otto is entitled to have access to redress procedures which should ensure that the decision is not disproportionate (Art 31.1 and 31.3 as applied by Art 15.1). Frida, once married to Otto, is entitled to equal treatment with Spanish nationals (Art 24.1). She should therefore not be charged the international student fee.	**25**

	Frida has not been lawfully resident in Spain for five years and thus has not acquired the right of permanent residence. In this situation by way of derogation from the right to equal treatment Spain is not obliged to grant maintenance aid for studies by way of student grants or loans (Art 24.2). Spain may restrict Aldo's right to free movement and residence by excluding or expelling him if he constitutes a danger to public policy or security (Art 27). Such measures must be proportionate and based exclusively on his personal conduct. Previous convictions do not in themselves constitute grounds. Spain must be able to demonstrate that his personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. If Spain has evidence that Aldo is currently an active member of the illegal organisation this could constitute a sufficient ground for it to be proportionate to exclude or expel him. Factors relating to integration into Spanish society appear irrelevant, as Aldo has hitherto lived in Mexico and appears to have strong links there. There is no information of any health considerations.	
	Question 2 Total:25 marks	
Question Number	**Suggested Points for Responses**	**Marks (Max)**
3(a)	This appears to be potentially discriminatory internal taxation: Art 110 TFEU. The alcohol duty appears to be part of a general taxation system: Denkavit. Art 110.1 prohibits the imposition on the products of other Member States internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Similarity is assessed by considering the circumstances in which the respective products are used or consumed. In the case of alcohol factors such as strength, the consumers to whom they appeal and the typical occasions on which they are consumed will all be relevant: John Walker. The nature of the raw material is less significant than the interchangeability of the finished product: Commission v France (Taxation of Spirits). Although liqueurs and 'cocktails' may have similar alcoholic strength further evidence would be needed as to whether they are consumed in similar circumstances and by a similar demographic. If so they are likely to be similar for the purposes of Art 110. It appears that liqueurs are taxed at the same rate in respect of origin. The question is therefore whether the higher rate of tax on the cocktail category can be seen as part of a rational and objectively based taxation system, in which case it is permissible, or whether it constitutes an	**8**

	arbitrary and unjustified distinction; compare Commission v Greece (Motor Vehicle Taxation) and Humblot. If the products are not similar it may still be seen as a tax affording indirect protection to other products, provided that the tax differential constitutes an important part of the price differential between the products: Commission v Sweden (Taxation of Wine).	
Question Number	**Suggested Points for Responses**	**Marks (Max)**
3(b)	Both measures appear to be nontariff barriers to the free movement of goods which potentially fall foul of Art 34 TFEU. Quantitative restrictions and equivalent measures (MEQR) are prohibited subject to the permitted derogations in Art 36. Quantitative restrictions are complete or partial, in the form of quotas, prohibitions on the importation of goods. This is inapplicable here. MEQR were originally explained as being any trading rules which actually or potentially directly or indirectly interfered with movement of goods within the single market which would otherwise take place: Dassonville. Distinctly applicable MEQR apply only to imports. There is nothing to suggest that either of the measures is distinctly applicable. Indistinctly applicable MEQR are rules which apply irrespective of origin but which can be demonstrated to impose a greater burden on the imported product. They can be further categorised as: Product characteristics, such as recipe laws or rules relating to packaging and labelling, e.g. Walter Rau (Belgian requirement for margarine to be packaged in square section packages created differential burden for importers who were unable to use their standard oblong packaging thus incurring extra expense). Selling arrangements, being rules regulating trade by fixing trading hours, regulating advertising, restricting categories of goods to particular outlets et cetera. Following the Keck decision, these are presumed to operate evenhandedly in law and in fact and are thus outside the scope of Art 34. However, a claimant may seek to persuade a national court that there is a differential impact, and if so the measure has to be evaluated as an indistinctly applicable MEQR in the usual way: Gourmet. Cassis de Dijon established two important rules in relation to MEQR. The rule of recognition establishes a presumption that products produced in a Member State in accordance with the relevant national should be marketable throughout the EU. This rule is not relevant here is neither measure seeks to prevent the marketing of Absent as such. The rule of reason provides that an indistinctly applicable MEQR can be justified not only pursuant to Art 36 but as a proportionate means of achieving a mandatory requirement of the state. Such requirements can include environmental issues: Commission v Denmark (Recycling). The Estonian measure appears to be an indistinctly applicable MEQR. It mandates certain features of the packaging to facilitate the deposit and recycling scheme. This is capable of being an environmental mandatory	**17**

	requirement. The issue will be whether it is proportionate to insist on all packaging complying, or whether alternative measures could be adopted. The Latvian measure relates to advertising rules and prima facie benefits from Keck. It may be possible to argue that the prohibition bears more severely on an importer who is seeking to enter the market as compared to a well established local competitor whose product will already be familiar. The onus will be on Gaston to establish this, but the Latvian authorities can still argue that this is justified on public health grounds under Art 36 or under the rule of reason, but it will be necessary to demonstrate in either case that it is a proportionate and appropriate means of addressing a legitimate concern.	
	Question 3 Total:25 marks	
Question Number	**Suggested Points for Responses**	**Marks (Max)**
4	The direct means of challenge would be an action for annulment under Art 263. Greta, and the co-operative, are both non-privileged applicants as a natural and legal persons respectively. None of the measures referred to is addressed to either of them, so they will need to demonstrate that the measures are either of direct and individual concern, or constitute a regulatory act of direct concern not entailing implementing measures. Direct concern means that the position of the applicant is directly affected by the measure itself and not by the exercise of discretion by a third party: UNICME. Individual concern requires that the applicant must be affected by reason of attributes peculiar to them or circumstances which differentiate them from all other persons and distinguishes them individually just as in the case of the person addressed: Plaumann. Generally it is insufficient to show that the measure impacts on the commercial activity of the applicant, even where they are the only undertaking engaged in this activity: Jégo-Quéré. The expression "regulatory act" is not defined in the Treaty, but has been interpreted as including a regulation made otherwise than under a legislative procedure and including regulations made by the Commission under delegated powers: Inuit Tapariit Kanatami. Greta and the cooperative will not be able to establish direct concern in relation to the refusal by Sweden to allocate funding to them. What they complain of is a decision taken by Sweden which may be an improper exercise of discretion. Greta could challenge this in proceedings against the Swedish authorities invoking direct and indirect effect and Member State liability.	**25**

	Greta can establish that the Commission regulation is a regulatory act. There is no reference to any implementing measures. It is of direct concern to her as it affects her ability to apply for EU funding. The Decision does not appear to fall within the definition of regulatory act. Greta can establish direct concern as the Decision does not leave any discretion to Sweden. However, she does not appear able to establish individual concern, as her situation is indistinguishable from that of the applicant in Jégo-Quéré. Greta does appear to have standing under Art 263 in relation to the Commission regulation. She will have to establish one or more of the grounds set out in Art 263. There is little information, but she may be able to establish that the exclusion of this breed is not supported by reasons or is so egregious as to constitute a misuse of power. Greta could invite Sweden to challenge the Decision as a privileged applicant but there would need to be substantive reasons for the challenge. If the Decision required Greta to repay the funding already received, she could refuse to pay and, if proceedings were brought against her, she could invite the Swedish court to make a preliminary reference under Art 267 and raise a plea of illegality under Art 277. If Swedish law provides for the equivalent of an action for a declaration she could commence such proceedings and then invoke Art 277.	
	Question 4 Total: 25 marks	