CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JUNE 2021
LEVEL 6 – UNIT 6 – EUROPEAN UNION LAW

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 2021 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

As is normal, this paper attracted a small entry of eight candidates, 3 of which passed. It was noticeable how some of these papers demonstrated very poor verbal technique and much of what was written was very difficult to make sense of. Text was repeatedly copied over, in large amounts of the answer, to one part of a multi part question into other parts. This material was often of only marginal relevance in any event, but the cutting and pasting was clearly inappropriate. Weaker candidates also had a tendency to reproduce, either by copying over or closely paraphrasing, material from the statute book without making any real attempt to analyse or apply this.

Furthermore, the weaker candidates often failed to address the specific issue which was raised by the question or part question. Where the issues were addressed, this was often in an illogical order. Propositions of law were put forward without any supporting authority. The fact patterns in the problem questions were not analysed sufficiently closely to identify the specific issues that arose and accordingly application was often very unsatisfactory.

The better candidates did demonstrate a reasonable level of knowledge and understanding, unstructured answers which dealt with this using a logical order. These answers could have been further improved if candidates had been able to deal with all the issues raised effectively. There are numerous comments about individual questions tailing off without dealing with all issues or dealing only in

a fairly superficial way with certain aspects. This applied both to essay and to problem questions.

CANDIDATE PERFORMANCE FOR EACH QUESTION

SECTION A

Question 1

Answers were generally relevant and focused on the issues. Candidates sometimes struggled to articulate the test for individual concern and also did not utilise all the case law on what constitutes a regulatory act.

Question 2(a)

Generally, answers did not focus specifically on the concept of concerted practice. Some did deal with it in the context of a much more general explanation of Art 101 but could have been much more focused.

(b)

Even good answers did not seem to understand or deal with the concept in the round. Examples such as the research and development block exemption and the vertical block exemption were identified, and some reference was made to de minimis, but there was no real understanding displayed of why market share should be relevant in this context.

(c)

Answers recognised and gave some account of the leniency scheme, but not in as much detail as was expected.

Question 3

Candidates generally displayed reasonable knowledge and understanding in relation to direct effect while answers tended to deal more briefly with indirect effect and member state liability.

Question 4

This was a rather peculiar answer with much copying and paraphrasing from the statute book, but with some insight displayed into the relationships and processes involved.

SECTION B

Question 1(a)

Candidates generally understood that this required a consideration of whether the body qualified as a tribunal within the special EU definition. The Dorsch criteria were generally recognised and explained, but not always as effectively applied.

(b)

Answers to this part question were somewhat disappointing. It required a fairly detailed consideration of the circumstances in which a discretionary reference could and should be made. Many answers deviated from this into other irrelevant areas. Better answers did recognise that there was a difference of judicial opinion search that a reference was desirable.

(c)

Most answers recognised the status of the Supreme Court. The issue of what consequences might follow from a failure to make a reference was not as clearly articulated or explained.

Question 2

Candidates generally understood what was required in terms of the non-tariff barriers and were able to discuss the measures having equivalent effect to quantitative restrictions in some detail and with clarity a full stop application was not necessarily as short footed. The tariff barrier was less well dealt with. It was omitted altogether on one occasion and discussed in the context of Art 28 in another. Art 110 was not analysed and explained in detail and there was little detailed consideration given to the precise structure of the taxation in question and whether it could therefore be justified.

Question 3(a)

Those candidates who were able to engage with the question generally provided a reasonable account of the factors necessary to establish dominance, although when it came to application there was no detailed examination of what constituted the relevant product market, and no recognition that this was a market that was evolving quite significantly over time.

(b)

This part question was generally handled less well than the first one. Candidates did not focus on the actions of the undertaking in order to identify them as potentially abusive. The price increase is a potential exploitative abuse but is potentially also justified for the reasons the company asserts. The discounting practices needed to be looked at in more detail.

Question 4

Most candidates attempted this question had a reasonable general grasp of the law in this area. They tend to not have the commander detail required to give full answers. The status of R as a non-EU switches who could potentially have rights only as a partner in a durable relationship was not always identified. They were clearly significant potential concerns in relation to his behaviour in the context of public order and this was also not always discussed to the necessary level of detail. The coverage of issues relating to M was somewhat better although a candidate seemed to have only a fairly generic understanding of the law relating to the recognition of qualifications.

SUGGESTED POINTS FOR RESPONSES LEVEL 6 – UNIT 6 – EUROPEAN UNION LAW
The purpose of this document 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 2021 examinations. The Suggested Points for Responses do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed. Candidates and learning centre tutors should review this document in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate's performance in the examination.

Section A

Question Number	Suggested points for responses	Max Marks
Q1	• Art 263 TFEU provides for the action for annulment. The court, namely the CJEU, or, in cases involving nonprivileged applicants the General Court examines the challenged act and ascertains its lawfulness or otherwise. • This partially conflates two distinct legal functions, namely the process of judicial review of the legitimacy of the legislative acts undertaken by the Parliament and Council, and also a challenge which is essentially an appeal against the quasi judicial decision-making of the Commission. • Member States and the institutions of the EU as privileged or quasi privileged applicants were intended to have access to both limbs, and nonprivileged applicants, namely natural and legal persons, only to the latter. • Originally a nonprivileged applicant could challenge an act addressed to it or which, although not addressed to it, or in the form of a regulation, was of direct and individual concern. • The scope of the extended access proved controversial. Direct concern was considered to arise whenever the act itself affected the position of the applicant, as opposed to a situation where the act confer discretionary powers, e.g. on a member state: UNICME, Differdange. Individual concern was interpreted by the court in the early case of Plaumann as requiring that the applicant was affected in the same way as if the addressee by reason of circumstances peculiar to the applicant. This was restrictively interpreted as applying only to such situations as membership of a definitively closed class (e.g. Toepfer) or a particular relationship to the legal issues arising, e.g. through contractual (e.g. Piraiki-Patraiki) or intellectual property (e.g. Codorniu) rights or status as informant in relation to a competition adjudication (e.g. Metro) or those involved in anti-dumping measures (e.g. Extramet). It did not apply simply	25

because the applicant was the only entity affected by the measure: Spijker Kwasten, Jégo-Quéré. In the case of a regulation there was a further requirement that this should be identified as a decision in the form of a regulation, which usually required that there was a direct reference to the applicant and an allocation of a quota or penalty (e.g. Roquette Frères, Allied Corporation).

- The court took the view that eligibility should be narrow as there was an alternative remedy whereby a party to proceedings before a national court could invoke the plea of illegality under Art 277 TFEU and invite the national court to make a preliminary reference under Art 267 TFEU to enable the CJEU to rule on the validity of any act of general application.
- Some applicants were reluctant to pursue this route, in particular where the state did not provide for a pre-emptive or declaratory remedy.
- Matters came to a head in Jégo-Quéré. The applicant was the only fishing company directly affected by an administrative regulation which had been made despite its objections. It did not satisfy the Plaumann test for individual concern as although it was the sole member of the affected class, this class was not closed. The then Court of First Instance accepted that no declaratory or pre-emptive remedy was available in the national court. To invoke the plea of illegality the applicant would have had to defy the regulation and await enforcement action. This was considered not to provide and effective remedy. Supported by the Advocate General, the CFI proposed an amendment to the definition to include those cases where the applicant was affected 'in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him.' The CJEU rejected this, and reasserted the established position, stating that any deficiency in the legal protection of the applicant was the responsibility of the state in question.
- This position was not regarded as acceptable by the Member States and as a result Art 263 was amended in the Lisbon Treaty. It now provides for a challenge to an act addressed to the applicant or of direct and individual concern and to a regulatory act which is of direct concern.
- Although regulatory act is not defined, it has been confirmed by the CJEU that it applies to regulations made by the Commission under delegated powers and not involving a legislative process: Inuit Tapariit Kanatami, thus confirming that the effect of Jégo-Quéré has been reversed. It also applies to decisions which are intended to be of general application as in Microban. Only a challenge to a legislative act is now definitively excluded.

	• The amendment has facilitated access to the General Court for a pre-emptive challenge to regulatory acts and addressed the specific area of concern. Whether it was necessary to exclude legislative acts is more controversial, but the CJEU justified this in Inuit by stating that not all national legal systems permitted a challenge to the validity of primary legislation (e.g. the UK under Parliamentary sovereignty). • Marks for quality of evaluation	
	Total	**25 marks**
Question Number	**Suggested points for responses**	**Max Marks**
Q2(a)	• One of the three types of conduct prohibited under Art 101. Given the very wide definition of "agreement" to include informal gentlemen's agreements as well as formal contracts in Quinine, the value of a concerted practice lies in the focus on analysing the nature and impact of the behaviour of the undertakings concerned in the absence of any evidence of actual agreement. Undertakings are aware of the illegality of anti-competitive practices and will seek to conceal evidence relating to any agreement that may exist. • Very often the question to be decided is whether actions undertaken in parallel, such as simultaneous and similar price increases, arise from coordinated behaviour or a common reaction to external forces (such as an increase in the price of raw material affecting each undertaking similarly) or the ordinary operation of an oligopolistic market, as in Woodpulp. The Commission places considerable weight on whether the parallel behaviour corresponds to the normal conditions of the market having regard to such matters as the degree to which the market is integrated and the number of producers involved, and will find a concerted practice where it considers that behaviour does not correspond to normal conditions and amounts to practical cooperation: Dyestuffs; Sugar. • The crucial question is whether the Commission can carry out a sufficiently sophisticated analysis to reach a reliable answer to these questions.	7
(b)	• Initially the approach of the Commission was to regulate all anti-competitive or potentially anti-competitive behaviour. It considered that all such behaviour was capable of affecting trade within the common market, actually or potentially, directly or indirectly: STM. The initial approach was to bring everything within scope and then consider whether to grant negative clearance or individual exemption. The sheer volume of agreements which fell within scope as having an anti-competitive dimension, whether or not this was the intention or indeed a primary characteristic then led the Commission to	13

	recognise that it did not have the resources to carry out this degree of intensive regulation. From an early stage the Commission recognised that agreements which only had an insignificant effect as a result of the weak market position of the participants could not affect trade: Völk v Vervaeke. • The Commission also came over time to the view that vertical agreements creating exclusive or selective distribution networks, while restricting intra-brand competition could nevertheless have countervailing benefits such as facilitating new entrants into a market (e.g. Nungesser) or ensuring improved customer service in the case of selective distribution. Similar considerations could also apply to horizontal cooperation in such areas as research and development (e.g. Vacuum Interrupters). • While market share has always been considered a key factor in establishing whether or not dominance existed for the purposes of Art 102, it has played an increasingly important part in the approach to regulating market behaviour under Art 101. In particular, the approach to definition of market share developed for Art 102 is adopted for Art 101 purposes. • The general de minimis provision is now formalised for agreements which have an anti-competitive effect but not an anti-competitive intent in the Notice on Agreements of Minor Importance. • The upper threshold for market share is 10% where the participants are actual or potential competitors, and 15% otherwise, but subject to a 5% threshold where there is a parallel network or networks of agreements creating a cumulative foreclosure effect. This reflects cases such as Brasserie de Haecht, where a number of breweries had established networks of financial ties restricting bars and restaurants to selling their products to certain extent that other breweries could not enter that particular market. • As part of the move towards self-regulation through block exemption agreements, market share thresholds have been applied to vertical agreements, where the upper threshold is 30%, reflecting the lower threshold for significant market power, and also to horizontal agreements in relation to research and development, although with a rather more complex set of thresholds for different circumstances. • Overall the adoption of market share as a key indicator for exemption provides a degree of transparency and permits the Commission and National Competition Authorities to focus on those areas where there is more likely to be a deleterious effect on the market.	

2(c)	• Cartels have always been regarded as among the most serious forms of anti-competitive behaviour. They permit the participants to charge excessive prices and also to reduce the effort they put into securing business by sharing the market. Because participation is known to be unlawful there is a strong tendency to secretiveness. As a result, even where suspicions have been aroused, investigation is complex and difficult. • As a result the Commission introduced, by way of the Notice on immunity from fines and reduction of fines in cartel cases, a formal scheme permitting immunity from fines for a decisive contribution to the opening of an investigation or finding of an infringement, which essentially means immunity for the first participant to make full disclosure. In addition reduction of fines will be considered where further undertakings have provided the Commission with evidence of significant value, e.g. where a cartel contains a number of subsets, and the initial disclosure has not covered all of these. • The scheme has been criticised for permitting some participants to avoid the consequences of their illegal actions in whole or in part, but the Commission justifies it by reference to the number of investigations which have relied on disclosures under the scheme and argues that its resources would not have allowed it to successfully investigate all of these cartels.	5
	Total	**25 marks**

Question Number	**Suggested points for responses**	**Max Marks**
Q3	• Direct effect is a principle of EU law largely created by the jurisprudence of the CJEU. The exception is the direct effect of EU regulations as specified in Art 288 TFEU. • Direct effect was first established in van Gend en Loos, in which the court held that the EEC, rather than merely being an entity in international law creating rights and responsibilities only at the level of the institutions and the high contracting parties, had created a new legal order such that where rights and obligations were conferred or imposed on natural and legal persons by the treaty, these could be enforced by action before the national courts. The alternative of enforcement by the Commission under Art 258 TFEU was considered to be insufficient to adequately secure an effective remedy to guarantee the legal rights of those concerned. This case concerned vertical direct effect as between a company and the state, but Defrenne v SABENA confirmed that this could also	25

	apply horizontally. This applied insofar as the treaty provisions created or imposed rights and liabilities in a way which was clear precise and unconditional. • Van Duyn v Home Office established that the same could apply to the vertical effect of a directive. • In declaring that treaty provisions could be directly effective, the court was filling a gap as the treaty itself was silent on the point. However, extending direct effect to directives appeared to be contradicting Art 288 which stated that directives were binding as the result to be achieved but were addressed to member states who were responsible for ensuring that the result was achieved by appropriate means. Again, Art 258 provided an explicit enforcement mechanism, but it was considered that the obligation of the state under what is now Art 4.3 TEU to ensure fulfilment of the obligations arising out of the treaties created an alternative basis for vertical direct effect. This is subject to the proviso that the transposition date for the directive has expired: Tullio Ratti, as the obligation of the state is not complete until then. Although several attempts have been made to establish horizontal direct effect of these have always been rejected on the basis that a directive does not impose any obligation on entities that do not constitute emanations of the state: Faccini-Dori. • The impact of this is however mitigated by the expansive definition of emanation of the state as any entity governed by public law, or subject to the authority or control of a public body or which has been required to perform a task in the public interest and for that purpose granted special powers not available to individuals: Farrell v Whitty. • Where direct effect is not available, either because the provision in question is not clear precise and unconditional, all because the case involves the horizontal application of a directive, the principle of indirect effect may be invoked. • This is a principle of interpretation whereby any relevant national legislation must be interpreted, so far as it is possible to do so, consistently with the requirements of non-directly effective EU law. • This principle derives from von Colson, where the court required a German legislation to be interpreted in such a way as to ensure that the applicant received an effective remedy for a breach of the equal treatment directive. • It was extended in Marleasing so as to apply more generally to all national legislation whether predating or post-dating the EU law, and whether or not intended to implement the same. • It is however subject to the caveat that the interpretation proposed must be a possible one: Wagner Miret, although	

	national courts, mindful of their own obligation to comply with Art 4.3 TEU, have tended to take a fairly robust approach to the extent of their powers of interpretation, e.g. Pickstone v Freeman and Litster v Forth in the UK. • Member State Liability (MSL) is also a creation of the CJEU. It originated in the case of Francovich. This case concerned the conspicuous failure of Italy to transpose a directive. The relevant provisions were not clear precise and unconditional because the states were given a series of options, so vertical direct effect was unavailable. There was no relevant national legislation to interpret so indirect effect was not available. The failure was nevertheless found to constitute a noncontractual liability of the state pursuant to Art 4.3 TEU, and by analogy with the noncontractual liability of the EU under Art 340 TFEU. • The concept was broadened in the case of Brasserie du Pêcheur/Factortame III to extend to any sufficiently serious failure of the state to comply with its legal obligations which caused loss to the applicant. The issue of seriousness had not arisen in Francovich, as the failure had already been the subject of a ruling against Italy under Art 258 TFEU. Some breaches, such as non-transposition of a directive, are automatically serious (e.g. Dillenkofer), but others, such as mistransposition will require an assessment of whether the error is deliberate or accidental, obvious or obscure, significant or trivial (e.g. British Telecom). Other relevant factors will be whether the Commission or other EU institutions have provided misleading advice, and the scope of the discretion afforded to the member state in the circumstances. • A range of behaviours may constitute breach, such as introducing legislation which interferes with rights under EU law (e.g. Factortame), retaining legislation which has been found to breach EU law (e.g. Brasserie du Pêcheur), administrative practices incompatible with EU law (e.g. Hedley Lomas) and failure by a Supreme Court to make a reference under Art 267 representing a manifestly incorrect understanding of EU law (e.g. Köbler). • The requirement of seriousness mirrors that for actions under Art 340, and the court has confirmed that the approach to member state liability should be consistent with that to the liability of the EU: Bergaderm. One consequence of this is that there is a slightly higher threshold for liability than under some domestic law relating to breach of statutory duty, e.g. in the United Kingdom. • Quality and scope of evaluation	
	Total	**25 marks**

Question Number	Suggested points for responses	Max Marks
Q4	• The principal institutions comprised within the framework are the European Parliament, the European Council, the Council, the Commission and the Court of Justice of the EU. The question requires consideration of the relationship between these. • While the Parliament, which represents the democratic principle as it is directly elected by the citizens of the EU is regarded as the senior institution, the EU remains essentially an intergovernmental institution. The states operate through the European Council which is the principal policy-making institution and the Council, which exercises legislative and coordinating functions. • One distinctive feature of the current framework is the extent of iteration and interaction between the different institutions, pursuant to the requirement of mutual sincere cooperation and to Art 295 TFEU. • While the European Council is responsible for establishing the overall policy of the EU, and thus the long-term legislative programme, and the various policy initiatives, this is done in close conjunction with the Commission and with the participation of the President of the European Parliament. The European Council will normally act by consensus, but this can prove difficult to achieve among 28 or 27 states with very different political agendas and priorities. • While the Commission has the sole responsibility for preparing draft legislation, it will do so pursuant to the agreed programme, and the Parliament is entitled to request that the Commission consider producing draft legislation pursuant to Art 225 TFEU. • The European Parliament elects the president of the Commission on the basis of a proposal made by the European Council. This nomination must take into account the elections to the European Parliament (Art 17.7 TEU). This has been interpreted not simply as meaning that the nominee should come from the same political background as that of the largest party in the Parliament, but that each party should nominate a lead candidate (Spitzenkandidat) and that this individual representing the largest party should become the nominee. This procedure was followed in 2014 despite reservations about the suitability of the nominee, but not in 2019, although the eventual nominee did come from the appropriate political background.	25

	• The Parliament must also approve the members of the Commission and has from time to time declined to approve particular nominees. It can pass a vote of no-confidence in the Commission as a whole. Although this has never occurred, the threat of it did lead to the resignation of the Commission on one occasion. • Preparation and approval of the EU budget, and any special budgetary initiatives, such as the coronavirus recovery fund is also a shared responsibility, with the budget being prepared by the Commission and Parliament and finally approved by the Parliament and European Council. • The prime example of the iterative process is the ordinary legislative procedure. The initial draft produced by the Commission is considered by the Parliament at first reading. It is then submitted to the Council, and if both institutions are agreed on the text it will be adopted. Otherwise the text as amended by the Council will be considered by the Parliament at second reading where it may be approved, amended or rejected. Rejection will lead to the measure falling. Amendments are then further considered by the Council and if not accepted the conciliation phase will be commenced allowing for direct negotiations between representatives of the Council and Parliament supplemented by informal trialogue discussions. If an agreed text results, the measure will be adopted but otherwise it will fall. It should be noted that the Commission is actively involved throughout this process giving its opinion on the various amendments. There is also considerable opportunity for intervention by outsiders lobbying on behalf of various interest groups. National Parliaments also are required to scrutinise draft legislation, and can raise objections, primarily based on issues of subsidiarity and proportionality. If there are sufficient objections, these must be addressed. • The role of the European Parliament, and of national Parliaments has been expanded over the life of the European project to give greater prominence to the democratic principle. Nevertheless, the primacy of the member states is reflected by the leading role of the European Council and the process for amending the treaties by Intergovernmental Conference, thus confirming that essentially the member states have created the EU. • Overall, the institutions appear to collaborate effectively. They certainly communicate extensively, and while political differences between European level political parties and also conflicting national political priorities present certain difficulties in securing the necessary degree of consensus in certain areas, in particular in recent times a common response	

	to migration and asylum seeking, and responses to major economic events such as the banking crisis of 2008 and the coronavirus in 2020, it has usually prove possible to resolve these differences through compromise and with a certain amount of creativity. • Quality and scope of evaluation	
	Total	**25 marks**

Section B

Question Number	Suggested points for responses	Max Marks
Q1(a)	• In order to make a reference a body must be a "court or tribunal" as provided for by Art 267 TFEU. The CJEU has established an autonomous definition. The body must be permanently established, independent of the executive, must apply rules of law to resolve disputes inter partes, and must have compulsory jurisdiction: Dorsch Consult. It is immaterial whether it is regarded as a public or private body in national law: Broekmeulen. An arbitral panel will not qualify: Nordsee, but a permanent arbitration body may do so: Merck Canada. • Here the AS has compulsory jurisdiction and has a permanent existence. It appears to apply rules of law inter partes and be independent. While private law in nature, it appears to have sufficient characteristics to qualify as a court or tribunal.	7
(b)	• It is clear that the Court of Appeal is one from which there is a further recourse in national law, so it had a discretion, rather than an obligation, to make a reference. • The dispute concerns the interpretation of an EU Regulation. It is therefore a freestanding issue of EU law. While it is necessary to establish the factual and legal context of the dispute in order to make an effective reference (Irish Creamery Milk), there is no suggestion that the facts have not been found or agreed before the case reached the Court of Appeal. • The factors which should be considered are those identified by the CJEU in the context of a mandatory reference in CILFIT. • Is a ruling on the reference necessary in order to enable the national court give judgment? This will eliminate points which are hypothetical as in Meilicke or which are regarded as arising from an artificially created piece of litigation as in Foglia v Novello. The English courts have suggested that appropriate test is whether the point in question is or might be crucial: Samex, ex p Else.	11

	• Is there an existing ruling on the point? If so, and it is clear that the ruling will be followed, there is no need to make a further reference: Da Costa. While the CJEU is not bound to follow its existing decisions, it will normally do so unless there is some good reason to depart from an earlier decision as in Keck. The existence of a prior ruling does not preclude a further reference, and this may be necessary if the earlier ruling is open to challenge, either because of changes in economic or social circumstances, or because it is a ruling on similar words in the same context or the same words in a slightly different context, such that a different interpretation conclusion is possible. • Is the interpretation of the point of EU law free from doubt? The CJEU recognises that judges and lawyers in national courts, particularly in the original member states, have a lifetime of experience dealing with EU law, and do not need to refer every point to the CJEU. However, caution is required before concluding that there is no doubt. Firstly, the role of the CJEU as a central and authoritative interpreter of EU law is essential to the maintenance of a consistent interpretation. Secondly there are concepts of EU law which require particular deference to the role of the CJEU, such as "worker" and "court or tribunal" as there is a particular danger in allowing national interpretations in these areas. Thirdly, the CJEU is better placed to deal with issues over any potential discrepancy between the various language versions, all of which are equally authoritative. Again, the English courts have suggested that if there is any disagreement between national judges, even if this only extends to being attracted to an alternative view, this should be sufficient to require a reference to be made: Samex; Henn & Darby. • It is clear that there is a genuine dispute over the interpretation of the Regulation which is central to the resolution of the issue between the parties. • The facts do not suggest that there is any previous ruling by the CJEU. • The arbitrators and two of the judges have adopted the same interpretation of the Regulation, but there is clearly an alternative interpretation which has commended itself to one judge (and which s/he appears to have incorporated into their judgment). Accordingly, the Court of Appeal could not reasonably have concluded that the interpretation of EU law was free from doubt. • There is no other reason to suggest that a reference could not have been made.	

1(c)	• The CILFIT criteria apply here as this is a court of last resort which pursuant to Art 267.3 is obliged to make a reference. The factors which led to a conclusion that the Court of Appeal should have made a reference are equally applicable. • Furthermore there is now additional material to suggest that there is a potential discrepancy between the different language versions. This reinforces the obligation to refer. • Failure to make a necessary reference can result in a successful claim for Member State liability provided that there has been a manifestly incorrect understanding of EU law: Köbler; Ferreira da Silva; Traghetti del Mediterraneo. • If the failure is seen as part of a pattern, it can result in an investigation under Art 258 TFEU.	7
	Total	**25 marks**
Question Number	**Suggested points for responses**	**Max Marks**
Q2	• The first two measures described appear to raise issues under Art 34 TFEU. Each may be an MEQR. • Art 34 prohibits quantitative restrictions and measures having equivalent effect. There is no suggestion that either of these measures imposes an actual quantitative restriction. • MEQR were described in Dassonville as any trading rules imposed by member states which could actually or potentially, indirectly or directly impact on trade which would otherwise have occurred. Subsequently they have been divided into distinctly applicable MEQR which apply separate rules to imported products and to domestic products, and indistinctly applicable MEQR which apply across the board but are potentially problematic because they have a differential impact, e.g. by requiring compliance with idiosyncratic national rules as in Walter Rau. • A further distinction was made in Keck between product characteristics which apply to content packaging and labelling, and selling arrangements which apply to the mode of doing business, e.g. Sunday trading rules, the prohibition of loss leading or restriction on advertising. The latter, if indistinctly applicable will be outside the scope of Art 34 so long as they apply in the same way in law and in fact to imported and domestic products. The onus is on the applicant to demonstrate a differential impact, and if successful the measure will be evaluated as an indistinctly applicable MEQR. • In Cassis de Dijon the CJEU established two important principles relating to MEQR. • The first was the rule of recognition. If a product is produced in a member state in accordance with the requirements of that state there is a presumption that it can be marketed throughout	25

	the EU, irrespective of whether it complies with all the requirements of each state. • The second was the rule of reason which provided that an indistinctly applicable MEQR could be regarded as justified if it represented a proportionate means of securing compliance with a mandatory requirement of the state, in other words it addressed issues such as health and safety, consumer protection and environmental concerns without imposing unnecessary burdens. • In addition to the rule of reason, member states may impose prohibitions and restrictions pursuant to Art 36 TFEU which provides for an exhaustive list of derogations, including the health and life of humans. • The first measure appears to apply to all confectionery bars in respect of origin and is therefore indistinctly applicable. It is clearly a product characteristic as it relates to permitted ingredients. • The objection relates to the safety of the ingredient and can therefore potentially be justified either under Art 36 or under the rule of reason in relation to public health. • The onus is on the Spanish authorities to demonstrate that their measure is based on a sound scientific footing, and is proportionate. They must also overcome the presumption in the rule of reason that a product produced in accordance with Irish standards should be marketable throughout the EU. • We do not have sufficient information to evaluate the merits of the Spanish case, although a precautionary principle has been applied: Sandoz. There is nothing to suggest that this is a disguised restriction on trade. • The restriction on advertising clearly constitutes a selling arrangement. It will fall outside the scope of Art 34 unless it can be established that it does not operate in the same way in law and in fact in relation to domestic and imported products. Otherwise it will be an indistinctly applicable MEQR. • There is evidence that importers rely more heavily on advertising, particularly where they are attempting to enter a market where national producers are already established: Gourmet. • If a differential impact can be demonstrated, it is for the national court to determine whether or not it infringes the rule of reason. • The stated reason for the restriction on advertising is protection of children, but this product is targeted at adults. The question to be determined will be whether the restriction is proportionate in all the circumstances.	

	• The final measure relates to a provision of German internal taxation. States are entitled to establish a system of taxation, this is subject to the requirements of Art 110 TFEU. The internal taxation system must not impose, directly or indirectly, differential taxation on similar products on the basis of their origin. Furthermore the internal taxation system must not afford indirect protection to other products on the basis of their origin. • Similarity is determined by considering the use to which the product is put and how it is considered by consumers. Strong liquors produced by distilling grain and grapes were considered similar because of their similar and comparable use, rather than the raw materials involved: Commission v France (Taxation of Spirits). However Scotch whisky and liqueur fruit wine were not considered similar because the alcoholic content was very different, as was the means of production, and the evidence was that they were consumed on different occasions by different groups of consumers. • Differential taxation which indirectly benefits the domestic product may be justified if it is imposed on an objective and logical basis in order to achieve a legitimate purpose, but not otherwise: Humblot. • Where products are not similar but are potentially in competition, taxation must not afford indirect protection, that this will not be the case if the price differential irrespective of taxation is such as to make the imported product uncompetitive: Commission v Sweden. • Here, it seems clear that the GE confectionery bars are similar to the other bars affected by this taxation. The taxation system appears on the face of it not to target imported products. It appears to be imposed for the prima facie legitimate reason of the protection of human health. It is however necessary to consider whether it has been skewed in order to provide protection for domestic products. The court will need to consider whether the level at which the higher taxes charged has been manipulated in order to benefit German manufacturers as in Humblot, or represents a legitimate objective approach as in Commission v Greece.	
	Total	**25 marks**

Question Number	Suggested points for responses	Max Marks
Q3(a)	• To be dominant, an undertaking must be able to "prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers": United Brands. • Dominance does not exist in a vacuum but in relation to a specific relevant market. This comprises two elements, the product market and the geographic market, and occasionally account must be taken of temporal considerations. Market share is a key factor, although others, such as barriers to entry may also be relevant. • The default position is that the geographic market is the EU as a whole, unless conditions of trade are clearly different in different regions: United Brands. • In order to establish the relevant product market the key factor applied by the Commission pursuant to the Notice on the Definition of the relevant market is cross elasticity of demand, using the SNIPP test to establish whether a 5 to 10% non-transitory price increase results in a decrease in demand for the product whose price has increased in relation to the comparator. If so, they form part of the same market. • The undertaking will normally argue for the widest possible market as this will tend to dilute its share, while the commission will argue for a tightly defined market: United Brands. • Where it is technically possible for producers of similar products to adapt production this cross elasticity of supply may also be taken into account: Continental Can. • Once the relevant market has been determined, the market share of the undertaking can be calculated. A market share of less than 40% is, under all normal circumstances, incompatible with dominance. A market share of 80% or more is usually regarded as conclusive of dominance: Hoffmann-La Roche; Hilti. • In the middle range, other factors such as the extent to which the market is fragmented, whether the undertaking enjoys advantages based on vertical integration or intellectual property rights will be taken into account: United Brands. • The current Guidance on enforcement priorities indicates that it is also necessary to consider the duration of the high market share by having regard to the dynamics of the market (para 13) and likely entry of competitors (para 16). • Here, the evidence is that cybersil chips have previously been a separate product market. While there is some overlap with	15

	borosilicate chips, they have substantially different uses and there is a significant price differential. As Alfachip is currently the only producer of cybersil chips it has a 100% market share. • If the overall market for silicon chips is regarded as the relevant one, Alfachip currently has 50% of that market. This is consistent with, but not conclusive of, dominance. The information given does not permit sufficient analysis of the overall market structure and the relative advantages and disadvantages of the undertakings concerned to reach a firm conclusion. • In the current case there are important issues of market dynamics to consider. It is immaterial how dominance is attained, so the previous merger, and the subsequent departure from the market of the remaining competitor are essentially immaterial. However, the imminent entry into the market of a new competitor will clearly dilute Alfachip's market share. More significantly the announced changes in relation to borosilicate chip availability and pricing are likely to change the market dynamics. Although the SNIPP test as such cannot be applied, there is a clear indication that there will be much greater cross elasticity of demand between the two types of chip in the short to medium-term. • On the basis of a current snapshot of the market, Alfachip is dominant in the cybersil chip market, and arguably so in the silicon chip market. However future developments are likely to result in the cybersil chip market ceasing to be the relevant one. Even before any impact of the borosilicate developments, the re-entry of a further cybersil producer will dilute Alfachip's overall market share significantly below 50%, and probably below the lower threshold for dominance. • The conditions for an assessment that there is a durable dominant position do not appear to be met.	
3(b)	• Abuse can take various forms. Exploitative abuse extracts an unfair advantage to the detriment of customers and end-users, e.g. by charging prices which include a monopoly rent in excess of the cost of production together with a reasonable commercial profit. Anti-competitive abuse unfairly prejudices potential competitors by altering the terms of trade to their disadvantage, e.g. by predatory pricing (Akzo Chemie) or all requirements/cumulative discounts which unfairly tie customers to the undertaking (Hoffmann-La Roche). The current Guidance focuses on anti-competitive abuse, with the objective of promoting competition on the merits of the goods and services concerned and protecting the competitive process, rather than protecting competitors as such, recognising that a dominant undertaking may simply be more	10

	efficient, innovative and quality conscious than its competitors. • Here, the discounting practices inherited from the predecessor company would all have been regarded as normal commercial behaviour when practised by a non-dominant undertaking (as the predecessor must have been with only a one third share of the most tightly defined possible product market). However, while discounts for regular orders and minimum order size are acceptable, the cumulative loyalty discount would render it uneconomic for customers to place orders elsewhere and would probably be seen as abusive. • Increasing prices at a time when there is temporarily no alternative source of supply suggests an attempt to extract a monopoly rent, but it would be necessary to analyse whether there is indeed an increase in the cost of production necessitated by the increasing output as a result of exceptional costs such as overtime working.	
	Total	**25 marks**
Question Number	**Suggested points for responses**	**Max Marks**
Q4	• Every citizen of the EU is in principle entitled to move and reside freely within the territory of the EU: Art 21 TFEU. Under Directive 2004/38 workers and students are entitled to reside for longer than three months. • Worker is an autonomous EU concept. The essence of worker status is "that for a certain period of time a person performs services of some economic value for and under the direction of another in return for remuneration": Lawrie-Blum. This includes part-time work, even where this does not fully support the worker who is otherwise dependent on family members or social security: Levin, Kempf. • Workers are entitled to equal treatment with nationals of the member state, including access to Social Security and social assistance (Dir 24) • Students must have sufficient resources not to become a burden on the social assistance system of the host member state (Dir 7.1(c)). However, they may nevertheless be entitled to benefits based on their citizenship arising from the prohibition on discrimination on grounds of nationality. In Grzelcyk a student who had supported himself for the majority of his course sought social assistance for a short period. It was held that such recourse should not automatically result in a finding that he ceased to fulfil the requirements in Dir 7.1(c), and the principle of non-discrimination should prevail.	25

	• Martina appears to qualify as a worker within the above definition. She may therefore be entitled to Social Security benefits or social assistance as such. This may extend to a student grant or loan (Dir 24.2). However, the Dutch authorities are entitled to impose restrictions, such as a residence requirement, provided this is applied to Dutch nationals equally: *Forster*. • If she does not qualify as a worker, she may have entitlements as a student, deriving from her citizenship, as her situation seems to be analogous to that in Grzelcyk. • Mutual recognition of professional qualifications and the components thereof is regulated by Directive 2005/36. Under Art 12 a diploma relating to training of at least one year at postsecondary level is a qualification governed by the Directive and should be accepted as evidence accordingly. If there are differences between the scope of the qualification in the two states any requirement for further study must relate only to the discrepancy: Morgenbesser. • Here, Martina appears to satisfy the requirements for her Croatian diploma to be recognised, subject to any significant differences in coverage. • The right of residence conferred by Art 7 of Directive 2004/38 extends to family members, of whatever nationality of workers and students, but in the case of the latter this is limited to spouses, registered partners and children. In the case of the former there is an additional category of partners in a durable relationship whose entry and residence should be facilitated. (Dir 3.2 (b)). • However, pursuant to Art 27 free movement may be restricted on grounds of public policy, public security or public health. Such measures must be based exclusively on the personal conduct of the individual concerned, and previous criminal convictions do not in themselves constitute grounds taking such measures. The personal conduct of the individual must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. • Current active participation in terrorism or other violent political extremism would appear to be comparable in seriousness to active and persistent involvement in organised crime such as drug dealing, which has been held to justify exclusion or expulsion: Tsakourides. • The state must carry out an assessment having regard to all the circumstances before reaching and executing a decision to exclude or expel. This will normally focus on the extent to	

	which the individual has become integrated into society, having regard to the length of residence and also his family and economic situation. • Here, if Martina has the status of worker, and there is sufficient evidence of the durability of the relationship with Radovan, he will qualify as a partner. If they were to marry, he would qualify as a family member whether Martina is regarded as a worker or a student. • However, there is a potential issue of public policy/security. • The conviction in itself cannot be the basis: Bouchereau, there is no evidence of an ongoing or current criminal lifestyle. Previous membership of an extremist organisation is unlikely to constitute a sufficiently serious present threat, but if there is evidence that, contrary to Martina's understanding, Radovan is currently actively involved, the current activities involving violent confrontation between various groups of Balkan nationals would appear to constitute a sufficient basis for exclusion or expulsion of active participants.	
	Total	**25 marks**