CHIEF EXAMINER REPORT

JANUARY 2024

LEVEL 6 UNIT 6 - EU Law

The purpose of the suggested points for responses is to provide candidates and Training Providers with guidance as to the key points candidates should have included in their answers to the January 2024 examinations.

The suggested points for responses sets out points that a good (merit/distinction) candidate would have made.

Candidates will have received credit, where applicable, for other points not addressed in the suggested points for responses or alternative valid responses.

Chief Examiner Overview
On the very limited evidence available due to the small cohort size, there is nothing to suggest any concern.

Candidate Performance and Suggested Points for Responses

It is noted that the low numbers of candidates taking this examination limits the scope for constructive and valid feedback to be given and for firm conclusions to be reached and embraced for positive use by candidates.

Therefore, no feedback on candidate performance has been included.

Section A

Question 1	25 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	

- Explain scope and purpose of Art 101.
- Agreements, concerted practises etc. between undertakings with the intent or effect of adversely affecting competition within the EU.
- Fixing prices, sharing markets, restricting choice and inhibiting development.
- Negative clearance or individual exemption always available where the pro competitive effects of the agreement outweighed the anti competitive ones, eg by improving production or distribution of goods or promoting technical development (Art 101.3).
- Classic cartels at producer level were always the prime target: Quinine (1970), Dyestuffs (1972).
- However, vertical agreements which created exclusive distributorships along national lines were originally seen as suspect as tending to maintain differentials between national markets which pre existed the institution of the EEC, in particular historic price differentials: Consten & Grundig (1966).
- Initial desire to retain control over these by keeping them within the negative clearance/ exemption scheme.
- Subsequent recognition of selective (e.g. Metro (1977)) and exclusive (e.g. Nungesser (1982)) distribution agreements as potentially legitimate ways to improve distribution if the selective criteria are objectively justified and territorial exclusivity does not extend to passive sales.
- Reduced intrabrand competition compensated for by effective interbrand competition.
- Administrative burden of managing negative clearance/ individual exemption, particularly with the progressive expansion of the EU.
- Vertical Agreements Block Exemption Regulation 1999, 2010 and 2022.
- Market share threshold of 30%. (Cf NOAMI which also covers vertical agreements, but with lower market share thresholds)
- Recognition that vertical agreements compliant with VABER are justified under Art 101.3.
- Prohibition of hardcore terms: e.g price fixing and absolute territorial protection.
- Non compete provisions limited to five years.
- The result is that legitimate and compliant exclusive and selective distribution agreements are outside the scope of Art 101.
- Block exemptions have been much less deployed in relation to horizontal agreements, but note exceptions such as research and development. Cartels continue to be a problem and the Commission and NCAs can now devote their resources to them.

- Overall, the differential approach can be justified, in that many vertical agreements, while technically falling within the scope of Art 101, are actually intended to facilitate the distribution of goods and any impact on intrabrand competition is minimised by the possibility of interbrand competition. Residual concerns can be met through use of the hard-core provisions. Horizontal agreements, with rare exceptions such as research and development, have a much greater potential to operate against the public interest, and this justifies the continued level of attention paid to them.

Question 2	25 marks

Attempts too limited to provide feedback.

Suggested Points for Response:

- Commission functions are defined and assigned by Art 17 TEU

<u>Guardian of the Treaties</u>

- 'It shall ensure the application of the Treaties': Art 17.1
- Extends to measures adopted pursuant to the Treaties and oversight of the application of EU law.
- in particular covers ensuring compliance by the MS with obligations under Art 4.3 TEU.
- Informal administrative procedures: own initiative investigations, pursuing complaints submitted through the online complaints process, monitoring progress in transposing directives (including discussion forums).
- Most issues resolved at this stage.
- Formal procedure under Art 258 TFEU – formal allegation (mise en demeure), state response, reasoned opinion, action before CJEU.
- Instant penalty for non-transposition: Art 260.3 and enforcement proceedings in other cases: Art 260.2.
- Concerns over transparency, particularly in the pursuit of complaints and the extent of the discretion of the Commission in where and how far to take action.

<u>Legislative Process</u>

- Sole right of legislative initiative: Art 17.2 TEU.
- Legislative programme agreed on a tripartite basis – Commission, Council and Parliament.
- A formal draft act (regulation/directive) will be preceded by extensive preliminary consultations and information gathering (consultation papers, road maps, green and white papers, preliminary draft legislation).
- The Commission must deliver an opinion if the act is not adopted at first reading or by the parliament at second reading: Art 294.6 and .7 c respectively.
- If the Council adopts an act at second reading it must act unanimously on amendments on which the Commission has expressed a negative opinion: Art 294.9
- The Commission participates in the work of the Conciliation Committee (and in practice that of the associated trialogues) and has a responsibility to take initiatives to reconcile the positions of Council and Parliament: Art 294.11.
- The Commission thus has a responsibility to engage at all stages with the iterative process leading the adoption of legislation.
- Above relates to the ordinary legislative procedure, but other procedures adopt the same principles.

Question 3a	17 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	

- Arts 34-6 relate to quantitative restrictions (QR) on imports and exports between Member States and measures having equivalent effect (MEQR).
- These are generally prohibited to facilitate the free movement of goods by eliminating or minimising non-tariff barriers to the free movement of goods.
- QR are total or partial (by reference to value volume or otherwise) prohibitions on relevant imports or exports: Geddo (1973).
- QR may be justified only on the limited grounds in Art 36. The measure must not be applied differentially to domestic products: Conegate (1986), must be justified on the basis of scientific evidence: Sandoz (1983), must be an appropriate means of achieving a legitimate aim: Deutsche Parkinson (2016) and must not be a disguised restriction on trade: Commission v UK (Newcastle Disease) (1982).
- In general a high threshold must be met to justify QR.
- MEQR widely defined: Dassonville (1974).
- Distinctly applicable and indistinctly applicable with differential effect (e.g. Walter Rau (1982)
- Cassis (1979) rule of recognition and rule of reason (additional justifications for indistinctly applicable MEQR where proportionate).
- Keck (1993) differentiation of product characteristics (within scope of MEQR) and selling arrangements (prima facie outside scope.
- Rule of recognition substantially contributed to developing markets for the different styles of food produced in the different states, as recipe rules did not require harmonisation,
- Rule of reason allows some flexibility for evolving concerns such as environmental protection.
- Keck removed selling arrangements such as Sunday trading, which could normally only have incidental and accidental impact on flows of trade, while allowing for exceptions (e.g. De Agostini (1997)).
- Progressively matters such as labelling and packaging are regulated at EU level in any event.
- Overall the interpretation and application of law on MEQR has produced a balanced and sensible set of outcomes.

Question 3b	8 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	

- Art 110 prohibits certain forms of taxation as part of the internal taxation system of a Member State where these are in excess of the tax imposed on similar domestic, or provide indirect protection to other goods. This is intended to prevent interference with free movement of goods.
- Similarity assessed by reference to consumer practice, and actual usage: John Walker (1986); Commission v France (Taxation of Spirits) (1980).
- Graduated and differentiated tax structures are permitted but must be based on objective criteria and pursue a legitimate aim: Commission v Greece (Vehicle Taxation) (1990), cf Humblot (1985).
- Differential collection arrangements which favour the domestic product are caught: Commission v Ireland (Taxation of Alcohol) (1980).
- Art 110.2 seeks to prevent use of taxation to restrain inhibition of potential competition where dissimilar products could meet similar needs (e.g. beer and wine): Commission v UK (Beer and Wine) (1980), however the tax differential must be such a significant part of the overall price differential to be a major deterrent in itself: Commission v Sweden (2008).
- Actual cases under the Article are now rare, but it remains a useful reserve power while Member States still have considerable discretion over the imposition and level of excise duties and other special sales taxes in order to deal with intentional or inadvertent tax discrimination.

Question 4a	17 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	

- Art 263 primarily intended to allow the Member States and EU institutions to challenge the validity of official acts, including a form of constitutional judicial review.
- Non privileged applicants given limited rights intended to allow a challenge to the validity of a quasi-judicial decision by the Commission in areas such as competition and formerly common agricultural policy.
- Attempts were then made to expand this but with limited success.
- Originally the measure had to be addressed to the applicant or be of direct and individual concern.
- Direct concern is interpreted as meaning that the measure itself affects the applicant rather than the exercise of discretion by a third party, eg Differdange (1984).
- Individual concern has been restrictively interpreted as meaning that the applicant must be affected by reason of characteristics personal to him, in the same way as the person addressed: Plaumann (1963).
- Membership of a closed class all affected by a measure in the same way will count, e.g. Roquette Frères (1980), but not of an open class (Plaumann) even if only one member: Spijker Kwasten (1983).
- A differentiated legal position arising out of contractual (Piraiki-Patraiki (1985)) or intellectual property (Codorniú) (1994) rights may suffice, as may standing in the proceeding in question, eg the informant in a competition case: Metro (1977).
- Challenges based on the inadequacy of alternative remedies leading to an absence of full legal protection, founded on the argument that in some cases a pre-emptive challenge could not be made to a measure in the national courts as they lack jurisdiction to give a prospective or declaratory judgement. This argument was rejected in Jégo-Quéré (2004). The Court considered that any deficiency in national court procedures was not its concern. The Member States indeed recognised the need for reform and in the Lisbon Treaty Art 263 was amended to allow a challenge to a regulatory act of direct concern. This has been interpreted as applying to regulations made by the Commission under devolved powers and not by a legislative process; Inuit Tapariit Kanatami (2013) and also to decisions of general application (e.g. approving or prohibiting chemicals): Microban (2011).
- The explicit variation of the jurisdiction of the court is an unusual example of the Member States demonstrating their ultimate ownership of the substance of the EU.
- The amendment does not necessarily address all concerns, but in addition to the enhanced jurisdiction there is also the option of national proceedings resulting in invocation of the plea of illegality under Art 277 TFEU in conjunction with a preliminary reference under Art 267 TFEU. The scope of 'regulatory act' could also have been more clearly defined in the Article.

Question 4b	8 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	

- Art 340 requires the EU to make good damage caused by its institutions or servants.
- The latter represents a form of vicarious liability, although the activities which fall within the scope of the performance of the duties of the servant are narrowly defined: Sayag v Leduc (1969), and the level of fault required seems to be higher than mere inadvertence: Richez-Parise (1971).
- The former represents compensation for maladministration (historically often in the management of the common agricultural policy). This is more than being disadvantaged as the result of policy choices: Skimmed Milk (1978).
- Initially the Schöppenstedt (1971) formula, required a 'sufficiently flagrant violation of a superior rule of law for the protection of the individual'. This was then restated as 'manifest and grave disregard for the limits of discretion' in Skimmed Milk (1978).
- The latter formula is also used in relation to Member State Liability, which is clearly a parallel concept: Bergaderm (2000).
- In recent years the EU, and particularly the Commission, has adopted a more strategic role and is less likely to engage in activities which wrongfully cause harm.
- Equating the test for Art 340 claims to that for member State Liability (in certain cases) does demonstrate coherence of approach.

Section B

Question 1a	13 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	

- In order to be dominant, an undertaking must be in a position to act independently of ordinary market forces: United Brands (1978).
- Dominance must exist within a specific geographic and product market.
- The geographic market is presumed to be the EU and there is nothing on these facts to contradict that.
- The primary test for whether goods form part of the relevant product market is whether there is cross elasticity of demand, normally assessed by using the SSNIP test where the impact of a small (approx 10%) but significant non-transitory increase in price is modelled or assessed using historic data. If demand for one product increases when the price of the other also increases the goods are considered to form part of the same product market: United Brands.
- If the market share so assessed exceeds approximately 80% that will normally be sufficient evidence of dominance: Hoffmann-La Roche (1979). If it is less than approximately 40% it is generally considered incompatible with dominance as there is no evidence of market power.
- Between these percentages other factors must be considered, for example fragmentation of the market, extent of vertical integration, possibility of crosselasticity of supply: United Brands.
- The position identified should have a degree of stability and permanence, and not simply be a single snapshot, as markets are dynamic and market conditions can change.
- Here we have two potential relevant product markets. The wider one, which Kallax would argue for is computer chips generally as it has such a low market share that dominance is not arguable. The narrower one is for the specialised payment touchscreen market, including Kalchips.
- It is unlikely that cross elasticity of demand would be shown between the specialised chips and others, as other chips would not have the required features.
- It is probable that the relevant product market is the more specialised chips and with a 65% share of that market, Kallax is likely be held dominant, although if the remainder of the market is occupied by only one competitor, this is arguably not the case.
- A further factor is the imminent expiry of the patent. It may be necessary to defer a conclusion until the market has adjusted to this. However, if it is likely to take a considerable period before generic versions of the Kalchips reach the market, an assessment of dominance could be made.

Question 1b	12 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	

- Dominance is a neutral concept. It is abuse of the dominant position which is prohibited, but no derogations are permitted.
- Abuse may be exploitative, targeted at the end user and securing unfair advantages such as the extraction of a monopoly rent or tying users to acquire spare parts or other products.
- Abuse may also be anti-competitive, targeted at the residual competition and seeking to exclude them from the market by offering terms of business to customers which cannot be met by competitors.
- The Commission has for some years taken note of the fact that a dominant undertaking may simply be more successful and efficient than its competitors, and therefore that preventing the dominant undertaking from pursuing its trading strategy may simply be propping up failing undertakings.
- Various forms of discounting constitute standard business practice.
- However, some forms of discounting have been regarded as improper, primarily as anti-competitive.
- Generally discounts for quantity and in respect of regular orders have generally been regarded as acceptable. However, discounts which tie customers to the dominant undertaking, for example “all requirements” discounts and cumulative discounts which provide escalating benefits over a reference period are seen as abusive when practised by dominant undertakings: Hoffmann-La Roche.
- Tying in or bundling can be seen as exploitative where the object is to ensure that end-users obtain supplies of spare parts which they could otherwise obtain on better terms in the open market by invalidating guarantees where third-party spare parts are used, and can also be seen as anti-competitive where the object is to induce customers to obtain different classes of goods, thus restricting the possibility of competitors obtaining those orders.
- In this case the 5% discount offered for regular quarterly orders would seem to be acceptable. The 10% discount for exclusively ordering Kalchips and the 15% discount for a two-year exclusivity appear to be abusive in the sense described above.
- The additional discounts where the customer orders substantial quantities of the non-specialised chips would also appear to be anti-competitive bundling of the two classes of goods and consequently also abusive.

Question 2	25 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	

- EU law provides for free movement of citizens on two distinct bases.
- Art 45 TFEU provides for free movement of workers and Art 49 for free movement of self-employed persons providing services.
- Arts 20-21 provide for free movement of citizens. Directive 2004/38 makes further provision for the detailed exercise of such rights, which also extend to family members of citizens who are not nationals of a Member State.
- Family members include spouses: Art 2 (2) (a), and children under 21 of the union citizen or spouse: Art 2 (2) (c).
- The Directive also requires a host Member State to facilitate entry and residence for other family members irrespective of nationality who are dependents or members of the household of the union citizen with the primary right of residence or where serious health grounds strictly require personal care of the family member: Art 3.2 (a).
- The Directive provides for a general right of residence on the territory of another Member State for a period of up to 3 months without conditions other than possession of an identity card or passport: Art 6.
- The Directive further provides for a right of residence for more than three months where the citizen is a worker or self-employed person, has sufficient resources not become a burden on the social assistance system of the host Member State or is a student.
- By way of exception to the normal requirement for equal treatment the host Member State is not obliged to grant maintenance aid, including student grants or loans other than to workers and members of their families: Art 24.2.
- Member States May restrict freedom of movement and residence of union citizens and their family members on grounds of public policy or security. Such measures must be proportional and based on the personal conduct of the individual. Previous criminal convictions do not in themselves constitute such grounds and the individual must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society: Art 27.
- Here Marja, George and Toby are union citizens but James and Esme are not.
- Marja is entitled to relocate to Italy, initially for the three-month period available to all, and thereafter as a worker. She would be entitled to remain in Italy for at least a further six months if she is continuing to seek employment with a genuine chance of being engaged: Art 14.4 (b). See also Antonissen (1991). She may of course remain on an indefinite basis if she is a worker.
- The part-time post would appear to satisfy the conditions of being a worker, as it appears to be genuine and effective economic activity under the direction and supervision of the design studio: Lawrie-Blum (1986); Levin (1982). It is immaterial that Marja may be partly supported by James at this point.
- Marja may also qualify for indefinite residence on the basis of sufficient resources derived from James, whose inheritance and pension would seem ample for that purpose, see Art 8.4.
- James is entitled to move to and reside in Italy as Marja's spouse.
- He has no entitlement in his own right under EU law based on his financial independence.
- George is entitled to move to Italy for up to 3 months in his own right, and on a longer term basis as a member of Marja's family.

- His convictions in themselves do not provide grounds for refusing him entry or expelling him pursuant to Art 27.
- However, the Italian authorities may conduct an assessment based on his current and potential future activities and may conclude that he does constitute a sufficient threat. They must take into account all the circumstances, including its level of integration in Italian society (which appears to be minimal) his continued integration into English or Spanish society, which would appear to be substantial and any other factors such as health, which does not appear to be material.
- Toby is entitled to attend university in Italy, but is only entitled to a student loan and fee waiver if at the time of application he qualifies as a family member of an EU citizen worker. Once Marja has attained that status this condition will be satisfied.
- Esme appears to satisfy the requirements of Art 3.2 (a) in that she was a member of the household of Marja in the UK and serious health grounds require personal care. It is not clear whether Esme is financially dependent on James and Marja or has her own resources, but in any event the family unit clearly appears to have sufficient resources as stated above.

Question 3	25 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	

- This question concerns the enforcement of EU law through national courts utilising direct and indirect effect and the concept of Member State Liability as appropriate.
- Direct effect means that an individual can rely on a provision of EU law to the exclusion of any national law.
- Van Duyn v Home Office (1974) held that a Directive was capable in principle of having vertical direct effect provided it satisfied the conditions laid down in relation to Treaty articles in van Gend en Loos (1963) of being clear precise and unconditional.
- The Directive must have reached its transposition date, under normal circumstances: Tullio Ratti (1979).
- Vertical direct effect applies in proceedings involving an emanation of the state. In Farrell v Whitty (2017) this was defined as being a legal person governed by public law which is part of the state in the broad sense, or which is subject to the authority or control of a public body, or which is performing tasks on behalf of the state for which it has been granted special powers.
- A Directive cannot have horizontal direct effect: Marshall (No 1) (1986); Facchini-Dori (1994).
- Indirect effect is a principle of interpretation. It requires that any national law which is relevant to the situation should be interpreted consistently with relevant EU law as far as it is possible to do so. It is based on the obligations of the Member State under Art 4.3 TEU.
- It applies to all relevant national law of whatever date, and whether or not intended to implement or give effect to the EU law in question: Marleasing (1990).
- Indirect effect may apply in the case of a Directive which is being given indirect horizontal effect, as in Marleasing, or in relation to a provision which is not regarded as

clear precise and unconditional, but it does require there to be a relevant piece of national law to interpret.

- Member State Liability exists where the State is in serious breach of its obligations under EU law and this has caused loss to the applicant. It is also based on Art 4.3 TEU. The principle was established in relation to non-transposition of a Directive in Francovich (1993) in circumstances where the relevant provisions were not regarded as clear precise and unconditional so direct effect was not available, and where there was no relevant national legislation to which the principle of indirect effect could be applied.
- The principle was extended to encompass any breach by the State in Brasserie du Pêcheur/Factortame III (1996) which also included the requirement that the breach must be sufficiently serious and should normally constitute a 'manifest and grave disregard for the limits of discretion' conferred on the State.
- Some breaches such as non-transposition of a Directive are automatically regarded as sufficiently serious: Dillenkofer (1996).
- In cases of defective transposition, seriousness is assessed by reference to the nature of the error, whether it is obvious or technical, intentional or inadvertent, whether other States have made the same error, whether the Commission has provided Member States with ambiguous or incorrect guidance and any other relevant consideration.
- In this case, Kat is employed by an organisation which clearly satisfies the requirements to be an emanation of the state. Sam appears to be employed by an undertaking in the private sector which is not such an emanation.
- Kat can in principle rely on the vertical direct effect of the Directive.
- The average period allowed for transposition of a Directive is two years, so it is highly likely that the transposition date of this Directive has passed, particularly since the Irish legislation was amended in 2017, apparently in response to the Directive.
- The provisions of the Directive must be clear precise and unconditional for vertical direct effect to apply.
- The wording of the provisions referred to in the question is not always necessarily clear and precise, although there do not appear to be any conditions, as such. Phrases such as "eliminate or reduce" "safe means of storage" and "designed to minimise", may be considered to lack the necessary degree of precision for direct effect.
- To the extent that the provisions of the Directive are considered to be clear and precise, Kat can rely on them to the exclusion of the Irish legislation.
- To the extent that the provisions of the Directive are not considered to be clear and precise, Kat can seek to rely on indirect effect. The relevant provision of the Irish legislation requires that PPE and storage of ionising radiation sources "shall so far as reasonably practicable protect workers", but this is subject to a proviso that reasonably practicable does not involve unreasonable expense or unreasonable interference with activities. The Directive is more detailed, and in addition to requiring "all practicable steps to eliminate or reduce workplace exposure of workers" requires safe means of

storage and provision of PPE designed to minimise exposure. There is no reference to unreasonable expense. The hospital has sought to justify its response by reference to the extra cost of the requested PPE and its limited additional protection.

- The essential question is whether, having regard to the requirements of the Directive the Irish court can interpret its own legislation in such a way as to exclude any reference to unreasonable expense.
- Sam can clearly not rely on the vertical direct effect of the Directive. She may seek to rely on its indirect horizontal effect.
- The Irish legislation only applies to "workers directly exposed to" inter alia carcinogens. This may prove to be a problem in terms of interpretation. If it is not, there does not seem to be any issue about reading the Irish legislation compatibly with the Directive so as to apply to Sam in relation to the provision of equipment as there is no issue relating to the cost.
- There is a further issue in relation to the availability of compensation. There is a requirement that there be an adequate remedy for breach of EU law: von Colson (1984). This imposes a significant interpretive obligation on the Irish courts.
- In the event that neither direct nor indirect effect provides appropriate redress, both Kat and Sam may commence proceedings against Ireland on the basis of Member State Liability.
- There is no doubt that the Directive in question is intended to confer rights and benefits on them, or that causation can be established.
- The breach in question is failure to transpose the Directive properly. The errors, particularly restriction to workers directly exposed and incorporating financial criteria, seem clear and obvious, not incidental and technical. Further evidence would be needed as to whether the errors were intentional and whether other states have made similar errors in transposition, but on the face of it, it appears to be sufficiently serious to amount to a manifest disregard of the limits of discretion afforded to the state.

Question 4a	7 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	

- The issue is whether the Committee satisfies the definition of "court or tribunal". It does not appear to be a court in the ordinary sense of the word.
- To qualify as a tribunal it must satisfy the Dorsch Consult (1997) criteria of being established by law, permanence, mandatory jurisdiction, inter partes procedure, application of rules of law and independence.
- The Committee appears to be permanent; although appointed by the Minister, the members have a five year term of office which appears sufficient for independence; it is unclear from the facts exactly how it is established and what procedure it adopts, although the fact that Lunnom has been able to present arguments suggests an inter partes procedure.
- The Committee will probably satisfy the requirements.

Question 4b	13 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	

- The Commercial Court is clearly a court for the purposes of Art 267, and it is clearly not an Art 267.3 court as there is an appeal to the Corte di Cassazione.
- The Commercial Court therefore has a discretion to make a reference.
- The issue would appear to be a pure one of interpretation of EU law and all relevant facts have been established, so it is not too early in the proceedings to consider a reference: Irish Creamery Milk (1981).
- The issue concerns interpretation of a Regulation which is directly applicable and directly effective EU law and there is no need for any interpretation of associated Italian legislation as there would probably be in the case of a Directive.
- The Commercial Court should take account of the decision in CILFIT (1982).
- There is a live issue of interpretation of EU law which is necessary in order to allow the national court to give judgment.
- There is no suggestion that there is any existing decision of the Court on which reliance can be placed.
- The issue does not appear to be acte clair, as the members of the Committee were divided on the interpretation.
- There appears to be some difference between the natural meaning of the English and Italian versions of the Regulation. It is particularly important that the Court is able to deal with such situations in order to fulfil its function of providing a binding uniform interpretation.
- Overall, there are strong arguments for the Commercial Court making a reference, and no convincing arguments to the contrary.

Question 4c	5 marks
Attempts too limited to provide feedback.	
Suggested Points for Response:	

- As an Art 267.3 court, the Corte di Cassazione is obliged to make a reference unless the CILFIT criteria clearly render this unnecessary.
- For the reasons already given, this is not the case, and a reference should be made.
- A failure to make a reference may give rise to an action for Member State Liability, but only in the exceptional case where the court has manifestly infringed the applicable law: Köbler (2003).
- A failure may also give rise to a breach of the right to a fair trial (Art 6 ECHR), if no adequate reasons are given: Dhahbi (2014); Schipani (2015).