CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2023

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 January 2023 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

Insufficient data for meaningful response.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

Answers covered direct effect well, but at excess length, and covered Member State Liability effectively. Indirect effect was a weak link in both cases, with little coverage.

Question 2(a)

Answers were thin and weak, with little case law and limited knowledge, understanding and evaluation.

Question 3 Not attempted.

Question 4

One good comprehensive answer, others failed to get to grips properly with the CILFIT criteria and omitted other aspects.

Section B

Question 1(a)

Two good answers, explaining the law effectively and applying it sensibly. (b) Good answers, but less depth and precision than (a).

Question 2

A competent answer with effective explanation of the law and sensible application. Failed to distinguish family members (Art 2 CRD) from beneficiaries (Art 3).

Question 3 - Not attempted.

Question 4

Decent responses on the criteria for dominance and their application. More tentative on abuse in each case, especially the non-discount behaviours.

SUGGESTED POINTS FOR RESPONSE

JANUARY 2023

LEVEL 6 UNIT 6 – EUROPEAN UNION LAW

Question Number	Suggested Points for Responses	Marks (Max)
1	Direct Effect Explicitly applies to regulations (Art 289 TFEU). **Applied to treaty articles which are clear, precise and unconditional (CPU) by van Gend en Loos.** **Crucial extension of the scope of EU law by the Court. Allows litigants to rely on relevant treaty articles in national courts** both vertically (van Gend) and horizontally where appropriate (Defrenne v SABENA), rather than relying on the Commission to take action under Art 258 TFEU. **Applied in principle to directives which are CPU in van Duyn, another major judicial expansion of the impact of EU law.** Limitations of GE in respect of directives: Generally only after transposition date (Tullio Ratti), but cf Mangold, Vertical effect only (Marshall (No 1); Facchini Dori) Uncertainty of scope of 'emanation of the state' (Foster v BG; Farrell v Whitty) **Advantageous where applicable as inconsistent national law is simply ignored (Marshall).** Overall probably the single greatest contribution of the Court to the development of the legal order of the EU. Indirect Effect **Derives from the obligation on Member States pursuant to Art 4 TEU to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.** **An interpretive obligation requiring relevant national legislation and other rules of law to be interpreted consistently with relevant EU law** (in practice usually in relation to IHE of directives or where EU law is not CPU). Originally arose in the context of ensuring appropriate remedies (von Colson) but now applies much more generally to all national legislation whether or not intended to implement EU law (Marleasing). **Unavailable where there is no relevant national legislation and does not require interpretation *contra legem*** (Wagner-Miret); the member states could adopt very robust approaches to construction as the UK did (Pickford, Litster). Member State Liability **Another judicial intervention by the Court.**	**25**

	Francovich – Italy had clearly failed to transpose a directive (established by Art 258 proceedings) but the relevant provisions were not CPU so no DE. No relevant Italian legislation so no IE. Court transmuted the obligation of the Italian state into the equivalent of liability for breach of statutory duty to implement the directive. **Expanded to cover all forms of non-compliance with EU law in Brasserie du Pêcheur/Factortame III.** **Liability where the breach of EU law intended to confer rights on individuals has caused harm to the claimant and the breach is sufficiently serious** (the approach to this has been harmonised with the approach taken to actions under Art 340 TFEU in respect of the noncontractual liability of the EU: Bergaderm). While some breaches are seen as automatically sufficiently serious, e.g. non-transposition of a directive (Dillenkofer), others have to be evaluated. Liability will exist for a mis-transposition only if the errors are seen as grave and manifest (BT). The same applies to a failure to make a reference by a court of final jurisdiction (Köbler). Similar considerations apply to introducing measures which proved to be inconsistent with EU law. Considerations such as whether the Member State was following guidance from the EU institutions, whether the error was common to a number of Member States, whether the error was wilful or inadvertent will all be taken into account when assessing whether the seriousness threshold has been crossed. The rigorous application of the requirement of seriousness does to some extent limit the availability of this remedy, but it does constitute a valuable addition as a remedy of last resort when neither DE nor IE is available.	
	Question 1 total:25 marks	
2(a)	Art 263 primarily enables a nonprivileged applicant to challenge an act addressed to it. However it may also challenge an act of direct and individual concern and a regulatory act of direct concern. These concepts need to be assessed in this context. Direct concern **The impact on the claimant must follow from the act itself and not from the actions of a Member State or other third party exercising options or discretions conferred on them** by the act (Differdange), unless such option has been foreclosed by a prior decision (Bock). Individual concern **The Court adopted in Plaumann a very restrictive definition which it has consistently adhered to despite efforts of AG Jacobs and the then Court of First Instance** in cases such as Jégo-Quéré. The original definition required that the claimant be affected by reason of attributes peculiar to them or by reason of circumstances in which they differentiated from all others which distinguishes them individually just as in the case of the person addressed. The proposed alternative would have focused on the significance of the impact on the claimant but was rejected by the Court.	**17**

	Individual concern can be satisfied by membership of a closed class, e.g. of applicants for a licence governed by the act in question who had applied by a particular date (Toepfer). **Membership of an open class does not count (Plaumann), even if the applicant is the sole member of the class** (Spijker Kwasten; Jégo-Quéré). Individual concern may exist where the act interferes with existing contractual arrangements (Piraiki-Patraiki) or intellectual property rights (Codorniù), or where the applicant, while not an addressee, is referred to in the act, e.g. as entitled to some benefit or liability under it (Roquette Frères and the anti-dumping cases). On the one hand this restrictive but not fully consistent approach has been criticised while on the other it is argued that the action for annulment is not the appropriate remedy for a nonprivileged applicant unless very specifically concerned, as the combination of a preliminary reference and the plea of illegality under Art 277 TFEU provides an alternative remedy. Regulatory act **This concept was introduced by the Lisbon Treaty. The intention was to reverse the effect of Jégo-Quéré, which had involved an attempt to challenge a regulation made by the Commission under devolved powers.** **The term is not defined, but has been interpreted as covering regulations made by the Commission under devolved powers and not by legislative process (Inuit Tapiriit Kanatami) and also decisions which are intended be of general application, e.g. removing an item from a list of permitted chemicals for a given application** (Microban). The requirement that there should be no implementing measures has been strictly interpreted by the Court (Telefonica) and this has reduced the utility of the provision. The Court still appears reluctant to permit non-privileged applicants to utilise Art 263.	
2(b)	**The Court considers that nonprivileged applicants should normally use the plea of illegality procedure under Art 277 in the course of a preliminary reference under Art 267.** The Court has the same jurisdiction to declare on the validity of the act in question but has the benefit of the national court acting as a filter to ensure that only appropriate references are made. **One difficulty is that some Member States do not provide a mechanism for pursuing what is in essence declaratory relief as to the effect of the act prior to it being applied.** Where such an action is possible there is ample scope for a preliminary reference incorporating the plea of illegality. Otherwise the applicant will have no alternative but to wait until the act is applied and then challenge the appropriateness of the action taken, which may involve the application of criminal or administrative penalties. **It was for this reason that critics considered that this did not constitute adequate legal redress. The Court however took the view that any deficiencies should be remedied by the Member State improving its own system.**	**8**

	The applicant could make a complaint to the Commission with a view to an investigation and, if necessary the institution of Art 258 proceedings, but this is likely to be time-consuming, and the Commission has a discretion whether or not to investigate a complaint. Similarly seeking to persuade the Member State to take action on behalf of the applicant carries no guarantee of success.	
		Question 2 total:25 marks
3	In formal terms the Commission has the sole right of legislative initiative. The ordinary legislative procedure commences when a draft regulation, directive or, rarely, decision is submitted by the Commission to the Parliament and Council. **However, there is a considerable body of informal activity which will normally have taken place prior to this**. **On the one hand the Commission will normally have undertaken substantial preparation**, for example by issuing green and white papers, so-called roadmap documents and preliminary drafts of the act in question. These will have attracted observations and representations from the Member States and from a range of civil society organisations with an interest in the subject matter**. On the other hand the draft act will normally have been part of an agreed long-term legislative programme.** This will have emerged from discussions between the European Council, the Commission and the President of the Parliament. It should also be noted **that the Council, the Parliament and a sufficiently large body of EU citizens can request the Commission to prepare draft legislation** in a particular area, although they cannot compel this. The formal procedure for the ordinary legislative procedure is set out in Art 294 The first response to the initial draft is made by the Parliament. The draft act will be considered in detail in committee and the various political groups within the Parliament will express their views. External lobbying will also take place throughout the legislative procedure. **The Parliament will adopt its position at first reading which may include amendments to the Commission's text. This is considered by the Council which may approve the Parliament's position, in which case the act is adopted at first reading**. Otherwise it adopts its own position and communicates this to the Parliament, accompanied with full reasons. The Commission will also submit its observations to the Parliament **The Parliament may now accept the Council's position in which case the act is adopted at second reading**. **The Parliament may reject the draft act by an overall majority and it will fall.** **The Parliament may propose amendments by an overall majority and these will go back to the Council, which may approve the act as amended normally by qualified majority.** If the amendments are not accepted the Conciliation Committee comprising an equal number of members of the Council and Parliament is convened. However in practice most of the work of seeking to secure agreement on a text is undertaken in informal trialogues involving the	**25**

	Council Parliament and Commission. The Committee will normally only meet to endorse a text which has been agreed in trialogue. **If an agreed text emerges from the Conciliation Committee process the act will be adopted, provided the Parliament by an absolute majority and the Council by a qualified majority approve it, but if not the act will fall.** While the formal process set out in Art 294 is somewhat long-winded, it is designed to ensure that if an act is ultimately adopted it does represent a consensus opinion. There is considerable communication between the various institutions expressed in the Article, but it is important to note that there is considerably more undertaken informally and involving input from the Member States and from civil society. **It is an intensely iterative process, designed to ensure that all interested parties can make an appropriate input.**	
		Question 3 total:25 marks
4	General The preliminary reference procedure allows the Court to give an authoritative interpretation of the Treaties and the acts of the institutions of the EU, and an authoritative ruling on the validity of the latter (Art 267.1). Any court or tribunal may make a reference. **A tribunal is a body which is established by law, independent of the executive, deals with issues *inter partes* (although this does not require a full hearing in all cases), applies rules of law, has compulsory jurisdiction and is permanently constituted** (Dorsch Consult). A court against which an appeal is possible within the Member State system (even if such an appeal is not automatically available: Lyckeskog) has a discretion to make a reference (Art 267.2). That discretion rests with the court and the parties to the national litigation cannot insist on a reference. A court against which an appeal is not possible is under an obligation to make a reference (Art 267.3) and **a failure to do so which is manifest and grave can lead to proceedings for Member State Liability (Köbler). However, where the CILFIT criteria are satisfied a reference will not be necessary.** Harmonious interpretation Ensuring consistent interpretation of EU legal rules throughout the EU is of paramount importance. It interpretation took place independently in the various Member States**, it is highly likely that divergences of approach would soon appear and there would rapidly be fragmentation and incoherence.** Establishing the Court as the sole authoritative interpreter was therefore an essential prerequisite for harmonious interpretation. The ruling on the interpretation of the EU legal rule in question is binding not only in relation to the national litigation in question, but *erga omnes* (against everyone).	**25**

	Initially, the judges in national courts did not have any knowledge of or expertise in, EU law. It was therefore necessary to ensure that all questions of interpretation were referred so that the Court could develop its expertise. The Court does have a discretion to reject a reference. It has done so on a number of grounds: Failure to explain the factual or legal context (Grau Gomis) The point raised is irrelevant or hypothetical (Meilike; Paint Graphos; Lourenco Dias). There is no genuine dispute between the parties (Foglia v Novello). However, the approach to references where the relationship between the reference and the ultimate dispute is somewhat strained have been accepted, e.g. Eau de Cologne v Provide; Celestini v Faber; much seems to depend on the extent to which the Court considers that the reference is artificial. **The decision of the Court in CILFIT is specifically addressed to the question of whether an Art 267.3 court is always obliged to make a reference**, and if not, in what circumstances it is not obliged to do so. **The criteria laid down are however also helpful to an Art 267.2 court when considering whether to exercise its discretion.** The three criteria are: **Is the reference necessary in order to enable the national court to give judgment.** This is effectively simply reminding the court not to refer irrelevant or hypothetical questions that do not relate to the issues between the parties. **Is there an existing ruling of the court.** As suggested in Da Costa, the case considered by the Court immediately following van Gend en Loos, which raised exactly the same point, the court said that the existence of the existing authority emptied the obligation to make a reference of its content. In that case it is very obviously so. There should have been no possibility of a different approach being taken. However, when some time has elapsed, such that the economic and social context may have altered, or when the present case arises out of a slightly different context there is the possibility that the Court will take advantage of the fact that it does not bind itself to depart from an earlier read ruling. The guidance here is that **where the earlier ruling can definitely be relied upon a further reference is not necessary, but a reference can always be made if the referring court entertains doubts on the matter.** Acte clair. **Where the meaning of the EU law in question is obvious reference would appear to be unnecessary. This reflects the fact that national judges under modern circumstances do have knowledge of and experience in handling EU law and can therefore be trusted with such simple decisions**. However, this is subject to significant caveats. Firstly there must be no doubt over the interpretation. English courts used to deal with this by saying that if any of the judges hearing the case had adopted or even been attracted by an alternative	

	interpretation of the matter could not be seen as acte clair. Secondly, autonomous concept of EU law are the particular responsibility of the Court and there is a particular danger of national judges misinterpreting them by reference to similar national concepts, e.g. worker. Thirdly, EU law is produced in numerous language versions, all equally authentic. While a national court cannot be expected to investigate all these versions to identify any possible discrepancies, if there is a known discrepancy between two versions a reference will be necessary to enable the Court to resolve the issue. Overall the preliminary reference procedure appears to have operated effectively, and national courts appear to have become increasingly experienced and reliable in determining when to make a reference. One possible source of difficulty may be the practice of the Court Registry of sending to the referring court details of earlier cases which may be seen as in point. Particularly in complex technical areas, it may be difficult to establish whether this is the case. A failure to appreciate that an earlier decision did not cover the current case was at the root of the problems in Köbler. Contribution to development Many of the major contributions to the development of EU law made by the Court have come as the result of preliminary references, e.g**. direct effect (van Gend; van Duyn), supremacy (Costa v ENEL), indirect effect (von Colson; Marleasing), Member State Liability (Francovich), free movement of goods (Cassis de Dijon).** As such, most of these cases merely gave the Court the opportunity to develop its jurisprudence. **In some cases the Court went further by taking a reference which had failed to ask the correct question and repurposing it.** In Marleasing the question asked whether the act in question had horizontal direct effect. The Court repurposed it to address the issue of whether indirect effect was appropriate. In Francovich the questions related to the direct and indirect effect of the directive in question which was inappropriate on the facts and the question was repurposed to address the then normal issue of Member State Liability. **These cases show the Court willing to go further than merely giving judgment, however innovative, on the questions and issues raised, but adopting a more activist approach and positively seeking out further developments.**	
		Question 4 total:25 marks

SECTION B

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	MEQR generally **Question relates to potential quantitative restrictions/MEQR (Arts 34 – 36 TFEU).** **Quantitative restrictions are the prohibitions or restrictions by reference quantity or value on the import or export of goods within the EU. There is no evidence of any such here.** **MEQR were described in Dassonvill e as any trading rules which are capable of hindering, directly or indirectly, actually or potentially, intra-Union trade.** MEQR may be subdivided into those which are **distinctly applicable**, i.e. applying only to the imported product. Numerous examples were given in the (now spent) Dir 70/50. These are now relatively rare and can be justified only under the derogations in Art 36. those which are **indistinctly applicable**, i.e. applying to all goods irrespective of origin, but which can be seen as having a differential impact on imported goods, e.g. by requiring additional cost or effort to comply with national rules (Walter Rau). These are relatively common and can be justified under Art 36 and also under the rule of reason (see below) In Cassis de Dijon the court laid down two principles in relation to the operation of MEQR. **The first was the role of recognition** which provided that where a product was manufactured in a Member State in accordance with the requirements of that State, in particular as to its composition, there was a presumption that it could be marketed freely in all Member States even though it might not comply with all the requirements of the state where it was being marketed. This presumption could be rebutted by evidence that there was a specific issue which justified imposing restrictions (Kaasfabriek Eyssen). The second **was the rule of reason which provided that an indistinctly applicable MEQR could be justified if it was a proportionate means of achieving a mandatory requirement of the Member State.** These have not been exhaustively defined, but include a number of policy areas including life and health (which creates a somewhat awkward overlap with the equivalent provision in Art 36), consumer protection, the protection of fiscal transactions, and environmental considerations. **MEQR can also be subdivided into product characteristics, that is to say rules relating to the composition, packaging and labelling of a given product and selling arrangements,** that is to say rules relating to the way in which trade generally is carried on, such as permitted opening hours, restricting goods to a specific outlets, e.g. pharmacies, and regulation of advertising. Originally the same approach was taken to both types of rule: Torfaen v B & Q. The Keck exemption	**18**

	Applying Art 34 to selling arrangements proved burdensome and in Keck the court departed from its previous approach and held that there was a presumption that selling arrangements which operated in the same way in law and in fact in relation to imported and domestic products did not constitute an MEQR. However, it was open to an applicant to adduce evidence before the national court with a view to demonstrating that the measure in question did have a disproportionate impact. There were several successful submissions in relation to the disproportionate impact of advertising restrictions on new entrants to the market who relied on advertising to obtain market share (Gourmet). **If successful at this stage, the national court should then consider the measure in question as an indistinctly applicable MEQR. The Member State may still able to justify the measure either under the rule of reason or under Art 36.** (i) **This appears to be an MEQR. It appears to be indistinctly applicable since there is no suggestion that the ingredients in question are not prohibited in Belgian products. It will clearly impose a burden on Soraya as she would have to change the formulation of the product** and, no doubt, the details of the labelling. The Belgian authorities do not appear to be positively asserting that the ingredients are hazardous, merely that they have not been approved in Belgium. **It would seem that the rule of recognition could be applied as they meet the requirements in the Netherlands.** **The Belgian authorities could seek to rely on either the health provision in Art 36, or the equivalent in the rule of reason.** The overall consensus appears to be that these ingredients are safe, so there is **a fairly heavy onus on the Belgian authorities to produce evidence to demonstrate that it is proportionate** to prohibit their use. (ii) **This is very obviously a selling arrangement which prima facie benefits from the Keck exemption**. Soraya appears to have a case that there is a differential impact, but even if successful in a national court on this point, the **French authorities may be able to justify the restrictions on rule of reason grounds analogous to consumer protection.**	
(b)	**This appears to be internal French taxation which can contravene Art 110 TFEU if the requirements of that Article are met.** Art 110.1 prohibits the imposition on the products of other Member States any internal taxation in excess of that imposed directly or indirectly on similar domestic products. **Similarity is assessed by reference to the use made of the product and how it is perceived by the consumer**. So grape and grain spirits are considered similar (Commission v France (Taxation of Spirits)), but whisky and fruit wine of the liqueur type are not, because they are of radically	**7**

	different strength, produced by different techniques and typically consumed on different occasions (John Walker). Direct discrimination, where a separate system of taxation is applied to the imported product, can never be justified (Lütticke), but where it is alleged that there is indirect discrimination because of the way in which the tax system operates this can be justified by demonstrating that the system of taxation applies objective criteria which are reasonably necessary to achieve the objectives of the state (Commission v Greece (Taxation of Vehicles)). Art 110.2 is a broader prohibition on **internal taxation which is imposed on the products of other Member States in such a way as to afford indirect protection to other products**. This may apply where the product in question are not currently seen as either similar or competing for the same market, but in the absence of taxation advantages could do so (Commission v UK (Taxation of Beer and Wine)), but the tax differential must be a significant feature in the comparative advantage of the domestic product (Commission v Sweden (Taxation of Wine)). Here Soraya's product can readily be seen as similar to Italian cosmetics and accordingly there appears to be a differential taxation, although it appears that this is indirectly rather than directly discriminatory in the absence of evidence that only imported products are targeted for the higher rate of tax. It will therefore **depend on the justification** provided by the Italian authorities for placing this product in the higher tax band as to whether it is justified. There would not appear to be any need to invoke Art 110.2.	
	Question 1 total:25 marks	
2	EU rights of free movement of persons including the right to reside or settle in another Member State are derived partly from the status of a citizen of the Union (Arts 20-21 TFEU) and partly from the free movement of workers (Art 45 TFEU) and the self-employed (Art 49 TFEU). The articulation of these rights is now largely contained in Dir 2004/38. **All citizens have the right to reside in another Member State for a period of three months for any lawful purpose and without formality other than proof of identity and status. They may be accompanied by their family members who are not nationals of a Member State: Dir Art 6**. Family members include spouses and children under the age of 21 of the spouse: Dir Art 2. **A right of residence for longer than three months is conferred on workers (including self-employed workers) and their family members: Dir Art 7.** **A worker is someone who performs services of some economic value for and under the direction of another person in return for remuneration**: Lawrie-Blum. This will include part-time employment even where it does not fully support the worker: Levin. A part-time worker may have recourse to public funds to supplement their income: Kempf.	**25**

	Member States may restrict the freedom of movement and residence of citizens and family members on grounds of public policy, public security or public health, where the conduct of that person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society: Dir Art 27. Past criminal convictions in themselves will not suffice, but current criminal activity or involvement in terrorism or extremism may do so. Any decision must be proportionate and take into account all relevant factors: Dir Art 28. **Family members are entitled to equal treatment with host state nationals. There are derogations, but these do not include access to the education system as such**: Dir Art 24. In principle professional qualifications should be recognised. **Complementary medicine is not specifically covered in Dir 2005/36 which deals with the recognition of professional qualifications. However the general provisions of the Directive provide for mutual recognition of a range of qualifications and, in particular, attestations of competence or evidence of formal qualifications issued by one Member State, subject to the proviso that the host Member State may require an adaptation period or aptitude test** if there is a significant difference between their requirements and those evidenced from the other Member State: Arts 12-14. There is also the possibility of taking supplementary qualifications to supply any deficiencies: Morgenbesser. Olivia – right of residence (max 3 marks) **She is a citizen of the Union and therefore entitled to reside in Spain for three months (Reg 6) and is a worker as she is employed part-time as a shop assistant. She would also be a self-employed worker if and when she establishes herself as a complementary therapist. She therefore satisfies the requirements of Reg 7.** It is immaterial that she may have to have recourse to public funds from time to time as this is not incompatible with worker status (Kempf). **She is also entitled to be accompanied by her family members, Nathan, Zach and Emily.** Olivia - qualifications **Spain should accept the Dutch qualification pursuant to the Directive. If there are differences between the requirements to practice in Spain this can be addressed by a supplementary qualification**, or by an adaptation period or aptitude test. Nathan **He has rights to reside only as Olivia's family member as he is a third country national.** Zach He qualifies as a family member as the child of Olivia's spouse and is under 21.	

	He is potentially at risk of exclusion as a result of his involvement in environmental protest, and while his previous convictions in themselves will not justify this, the Spanish authorities are entitled to assess the degree of threat which he poses on the basis of his current involvement. When assessing proportionality, he has no existing links to Spain, and strong links to the UK. We have no information about health or other issues which might militate in favour of his remaining with his family. Emily She is a family member and will **benefit from the presumption of equal treatment in terms of access to appropriate educational facilities**	
		Question 2 total:25 marks
3(a)	Art 101 prohibits many forms of collaborative anti-competitive behaviour, in particular agreements between undertakings and concerted practices which have the object or intent of preventing or restricting or distorting competition within the internal market by fixing selling prices, controlling markets or sharing markets. **Any agreement, however informal is caught**: Quinine. As participants in agreements are aware of their illegality, evidence relating to them is often concealed. **Concerted practices may be found where the evidence suggests that there has been coordination, e.g. parallel price rises. In other words the undertakings are "knowingly substituting practical cooperation… for the risks of competition"**: Dyestuffs. However, alleged concerted practices must be carefully analysed to ensure that **the parallel behaviour does not result from outside factors, particularly in oligopolistic markets**: Woodpulp. These could include a common response to external factors such as state price controls, or a common response to a price increase by a monopoly supplier of raw materials. **Horizontal anti-competitive behaviour occurs where the parties are at same level of production, e.g. manufacturers. It is regarded with particular suspicion by the Commission.** The Commission and National Competition Authorities have substantial powers of investigation. The agreement/practice must affect trade between Member States, but this is easily satisfied where the undertakings concerned are established in a number of Member States and dealing with customers across the EU. **The magazine article does not seem to indicate that there is evidence of an actual agreement. There is however evidence to suggest concerted practices.** **The parallel price increases would suggest concerted practice unless there is evidence of external factors** affecting all producers and explaining the increase.	**12**

	The restricted willingness to tender could also be evidence of sharing of the market, although given the location of the producers, it may be necessary to exclude the possibility that transport and other costs render it uneconomic for other producers to tender in Member States remote from the one in which they are established. If a concerted practice is found, the participants are liable to substantial financial penalties.	
3(b)	Art 101 does apply to vertical restrictions on competition arising out of agreements between manufacturers and distributors. **Initially these were regarded as equally significant as horizontal restrictions and infringements pursued in the same way (Consten & Grundig).** **It was then recognised that selective and exclusive distribution agreements represented a rational and economically sound approach to the distribution of goods across the internal market and did not operate to the disadvantage of consumers. As a result the approach was substantially liberalised** and is currently governed by the Vertical Agreements Block Exemption Regulation 330/2010. **Effectively agreements which are compliant with VABER are deemed to fall outside the scope of Art 101.** VABER applies where the market share of the parties does not exceed 30%. The Notice on Agreements of Minor Importance also applies where the market share does not exceed 15% where the parties are not in direct competition. **VABER contains a list of provisions which are regarded as prohibited. The principal ones are a prohibition on fixing minimum prices, although the producer is entitled to suggest prices as long as this is not a disguised requirement, and a prohibition on the exclusion of passive sales by the distributor into territories reserved to the manufacturer or to other distributors. A prohibition on active sales into such territories is permissible as this is the essence of an exclusive distribution network.** **A "noncompete" provision** whereby the distributor undertakes not to distribute competing products from other manufacturers **is permissible, but cannot be imposed for a period exceeding five years.** **Art 101 only applies to agreements between undertakings. The members of a group of undertakings which are under the same ultimate control and management, e.g. wholly-owned subsidiaries which do not have any authority to set their own policies, do not fall within the scope of Art 101** despite having their own independent legal personality, the activities within the group are regarded as its internal affairs, taking an economic rather than legalistic approach: Viho Europe/Parker Pen. **CD and its wholly owned subsidiary in the Netherlands will be treated as a single undertaking** (Viho) and raise no issues under Art 101. **The agreement with PKO will not fall within the Notice on Agreements of Minor Importance as the market share threshold is too high. It is capable of falling within VABER as the market share.** **thresholds are met.**	**13**

	The proposed provision requiring PKO to "have regard" to CD's price list is not in its terms objectionable if it does indeed only impose a requirement to consider, and is not a covert way of imposing a minimum price which is a blacklisted provision and would take the agreement outside the protection of VABER. **The requirement not to distribute other anaerobic digesters is a noncompete clause and cannot exceed five years duration. The proposed contract is for seven years, and this provision would be unenforceable unless the time limit is reduced**. **The prohibition on active marketing in the territory reserved to the CD subsidiary is entirely legitimate.** **However, the prohibition on accepting orders from customers in that territory amounts to a prohibition on passive sales which is again a blacklisted provision and will take the agreement outside the protection of VABER.**	
		Question 3 total:25 marks
4	Is Safegear (S) dominant Art 102 prohibits the abuse of a dominant position. It is only applicable in this situation if S can be shown to be occupying a dominant position in the market. Dominance does not exist in a vacuum. It is necessary to consider the relevant product market and the relevant geographic market. **The presumption is that the relevant geographic market is the EU, unless there are any areas within the EU where market conditions are significantly different:** United Brands. **The relevant product market comprises all those goods which meet the needs of end-users in the same way such that there is significant cross elasticity of demand.** **This is normally ascertained by the Small but Significant Non-transitory Increase in Price test**. Historic data can be used to establish whether a 10% to 15% increase in the price of commodity A results in a corresponding increase in demand for commodity B. If so the two are seen as forming part of the same market: United Brands. **The undertaking will normally argue for the relevant product market to comprise the widest range of goods as this is likely to dilute its share**: United Brands. Once the relevant product market has been established, it is necessary to determine whether the undertaking is dominant. **Dominance is not the same as a full monopoly. It means the ability for an undertaking to act in its own interests without having regard to the ordinary constraints imposed by the market**: United Brands. Market share is normally the principal factor to be taken into account. **A very high market share (c 80%) does itself establish dominance**: Hoffmann La Roche. **A market share of less than 40% is not considered consistent with dominance as it does not confer a sufficient degree of market power or the ability to act autonomously**.	**25**

	Where the market share is between these two values it is necessary to consider other factors. These will include the extent to which the market is fragmented. **If the undertaking in question is competing with a large number of other undertakings with relatively small market shares this may indicate a sufficient dominance**: United Brands; British Airways. A market dominated by three large undertakings with market shares of 45%, 28% and 27% respectively is more likely to be seen as an oligopoly than an instance of dominance. **Additional factors can be considered when assessing dominance, this will include impediments to cross elasticity of supply, such as the cost of establishing production, or constraints imposed by intellectual property, and whether the undertaking benefits from vertical integration.** It is also necessary to examine whether the allegedly dominant position is durable or transitory. **Only if there is considerable durability can it be said that there is an established dominant position.** In this case, there is nothing to indicate that the relevant geographic market is anything other than the entirety of the EU. So far as the relevant product market is concerned, there are two possibilities. The two classes of safety boot could be treated as forming separate product markets, in which case S would clearly not be dominant in relation to the ordinary safety boots but would almost certainly be dominant in relation to the higher specification boots. **Alternatively the relevant product market could be all safety boots of both specifications.** **The reason for this is that the most recent figures appear to indicate cross elasticity of demand, although this has not previously been observed. It is possible that the latest figures represent a blip in which case if the previous pattern re-establishes itself there is no real basis for dealing with the two classes together.** **If, however the current pattern can be demonstrated to be durable, S has a market share consistent with dominance, and the market is relatively fragmented.** There is inadequate information concerning other factors which might be taken into account, but it is unlikely that there are substantial barriers to entry to the market as there are already 16 participants. It is entirely possible that S could be regarded as dominant if the two classes of boot are considered to form a single product market. Is there abuse Dominance is a neutral concept and it is only where the dominant undertaking abuses its position by imposing unfair purchase or selling prices or other unfair trading conditions, or imposing supplementary obligations on contracts with other parties that there is a breach of Art 102 which can lead to both financial and behavioural penalties.	

	Abuse may be exploitative, where the undertaking is seeking to take advantage of the consumer/end-user by charging a monopoly rent of forcing the end-user to take additional items which they do not necessarily want as a condition of obtaining the item they do want. **It may also be anti-competitive where the target is primarily the remaining competition and the objective is to further undermine their position and strengthen that of the undertaking.** This may involve requiring distributors to carry the whole range of the undertaking's goods, or refusing to deal with those who stock competing products. It may also involve the use of predatory pricing (Akzo Chemie), **In addition some forms of discount are regarded as improper. Discounts for quantity or where the purchaser undertakes to order on a regular basis are acceptable as ordinary business practice, but discounts which tie the customer to the undertaking, in particular where there is a cumulative element, are seen as unfairly foreclosing the market to competitors**: Hoffmann La Roche. It should be noted that in the short term at least predatory pricing and excessive discounting actually operate to benefit the end user as the cost of the product reduces. If the initiative is successful, of course, competition will have been eliminated or further weakened and the dominant undertaking will be able to revert to more exploitative practices. **It has been accepted by the Commission that in some cases the reason for the success of a dominant undertaking is its superior products or commercial skills and that weaker competitors may not be as efficient, and as a result less emphasis has been given since a change of policy in 2009 to pursuing cases of purely anti-competitive abuse** **Requiring distributors to stock the full S range appears to be imposing unfair trading conditions and/or requiring acceptance of supplementary obligations**. The same applies to refusing to supply distributors of competing products. **Although the discounts are referred to as significant, there is no suggestion that they will reduce the cost below the average variable cost of production and therefore constitute predatory pricing.** **Discounts are based on the quantity ordered and on submission of regular orders are likely to be regarded as acceptable but any requirement to use S as an exclusive supplier will be seen as anti-competitive.**	
		Question 4 total:25 marks