LEVEL 6 - UNIT 6– EUROPEAN UNION LAW

CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2020

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested answers 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 2020 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

Candidates and learning centre tutors should review the suggested answers 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

A very low number of candidates attempted this paper. There is nothing which can effectively be said about performance.

CANDIDATE PERFORMANCE FOR EACH QUESTION

There was nothing to suggest that any candidate failed to understand what was required by the questions and their answers were generally in line with the suggested answers so far as they went, although not all issues were identified and fully covered.

LEVEL 6 - UNIT 6– EUROPEAN UNION LAW

SUGGESTED ANSWERS

SECTION A

Question 1(a)

Art 101 TFEU *prima facie* prohibits all anti-competitive agreements. However, paragraph 3 of the Article provides that in certain circumstances agreements which have anti-competitive aspects may nevertheless be permitted on the grounds that their positive contribution to technological development or the operation of the market outweighs the anti-competitive effect. Originally, the Commission determined that it would investigate all potentially anti-competitive agreements, and either declare them incompatible with the single market, grant negative clearance on the basis that they did not offend Art 101 or grant individual exemptions where 101.3 applied. This, particularly as the membership expanded, imposed very considerable burdens on the Commission with the result that in many cases files were not fully investigated but closed on the basis of comfort letters indicating what the attitude of the Commission was likely to be.

The Commission had initially taken the view that vertical agreements should be scrutinised in the same way as horizontal ones, with a view to eliminating distribution arrangements which have the object or effect of maintaining the existing fragmentation of the market along national lines as in Consten & Grundig (1966). However, it came to recognise that exclusive (e.g. Nungesser (1982)) and selective (Metro (1977)) distribution networks, and franchising schemes (Pronuptia de Paris (1986)) represented a rational means of marketing goods, particularly since the effect of interbrand competition would largely preclude any significant abuses arising from restrictions on intra brand competition. This approach is not uncontroversial. Some commentators have argued that the Commission and Court have been too ready to accept arguments that products subject to selective distribution agreements justify this treatment because of their characteristics. This may be justified where the products are technical and genuinely require expert pre-and post-sale advice and service, but not where the product has a premium image but is not technically complex, as with perfumes and cosmetics. Similarly, the Commission, while initially suspicious that collaboration horizontally in such areas as research and development might be a cloak for wider anti-competitive activity, has recognised that in certain circumstances desirable technical development can only be financed by collaborative efforts, e.g. Vacuum Interrupters (1977) and Philips/Osram (1994).

In consequence, there was a change of approach. Regulation 1/2003 radically changed the way in which competition policy was managed. Enforcement was substantially decentralized to National Competition Authorities in the Member States. The previous system of individual exemption and negative clearance was effectively abolished. Undertakings would henceforth be expected to review their own arrangements to ensure that they were compliant. A range of soft law instruments, such as the existing Notice on the Definition of relevant market (1997), and the Guidelines on the effect on trade concept (2004) were designed to assist with this, but a more important development was the system of Block Exemptions. These apply to undertakings which are too large to benefit from the Notice on Agreements of Minor Importance

(2001, updated 2014) but whose market share is not sufficient to reach the threshold of market power. In the Vertical Agreements Block Exemption Regulation (VABER) this is set at 30% but in the Research and Development Block Exemption Regulation the precise figures vary depending on the exact nature of the collaboration. In addition, these Regulations spell out what activities are permitted while indicating provisions which are regarded as "hard-core" and therefore unacceptable. For example, in VABER, Art 2 provides that Art 101.1 "shall not apply to vertical agreements". However, there are a number of conditions and restrictions, so this broad statement is heavily qualified. Absolute territorial protection is prohibited, since passive sales must be permitted: Art 4 (b) (i). Price maintenance is also prohibited: Art 4 (a). Noncompete clauses are restricted to 5 years: Art 5.1 (a). In the Research and Development BER the parties must not be restricted in their ability to conduct the research, and the agreement should not normally result in any restriction or limitation of output or sales: Art 5.

There is no doubt that the original approach was both intrusive for the undertakings concerned, and extremely labour-intensive for the Commission. The new approach places greater responsibility in the hands of the undertakings and those advising them but does recognise commercial realities both in relation to the organisation of distribution networks and the need for collaboration in technical areas. There have not been any high-profile cases involving abuse of the system, which suggests that, at least so far as the Commission and the National Competition Authorities are concerned, it is working effectively.

1(b)

This policy is set out in the Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006). By their nature, cartels are secret activities in territories where they are known to be prohibited. Obtaining cogent evidence of such anti-competitive behaviour is therefore difficult. The policy seeks to induce participants to own up, desist and produce evidence to facilitate dismantling the cartel as a whole. The advantages, to the public of the termination of the cartel with the resulting reduction in costs and to the Commission in terms of investigation and adjudication, are deemed to outweigh any moral objection that guilty parties are escaping the normal consequences of their behaviour, even though they will have benefited during the period of operation of the cartel. As a consequence, virtually all the cartel decisions of the past few years involve at least one application for immunity.

The first participant must either apply for a marker, which is a form of provisional notification, and which secures priority, or make a formal application for immunity. This must contain all relevant information about the cartel. Provided that the undertaking has cooperated genuinely and fully, has discontinued its involvement in the cartel and has complied with all the other requirements of the Notice, it will be given immunity from fines.

A second or subsequent undertaking may benefit from a reduction of fines if it provides evidence to the Commission that represents significant added value. This might apply in a situation where there was a complex network of cartels and the information provided by the initial informant undertaking dealt fully with its own involvement, but the new information relates to other elements with which it was not involved.

1(c)

Art 101 is intended to apply to those agreements which "may affect trade between member states". Originally the Commission considered that all agreements, even those between very small undertakings with very small market shares, came within scope, and therefore needed to be notified, evaluated and granted either negative clearance or individual exemption if appropriate. In Völk v Vervaeke (1969) the Court held that an agreement between a German manufacturer and an exclusive distributor in Belgium and Luxembourg did not fall within the scope of Art 101 where the market share in Belgium and Luxembourg was so small that it had only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question. This was because it was not possible to say that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between member states in such a way that it might hinder the attainment of the objectives of a single market between states.

This allowed the Commission to exclude from consideration such insignificant agreements, and this was formalised in the Notice on Agreements of Minor Importance in 2001. This provides a set of criteria for assessing whether an agreement falls outside the scope of consideration. The Agreement was updated in 2014, and currently provides that it applies to agreements between competitors where the aggregate market share on any relevant market does not exceed 10%, agreements between non-competitors (e.g. vertical agreements) where the market share does not exceed 15% and in situations where there is a cumulative effect of parallel networks of agreements the market share does not exceed 5%. In Expedia (2014) the Court held that agreements which have the object of affecting competition fell within the scope of Art 101 irrespective of the circumstances, such as limited market share. As a result, the Notice only applies to those agreements which have the effect, but not the objective of restricting competition. Furthermore, there are some hard-core provisions which will deprive an agreement of the protection of the Notice, such as price-fixing and allocation of markets or customers between competitors and any others listed as hard-core in a Block Exemption Regulation.

In practice, it has been noted that Expedia does not appear to have resulted in any major change of approach. The overall effect of the Notice appears to have been beneficial in allowing the undertakings concerned, which are primarily SMEs, to operate without having to concern themselves with regulation at the EU level.

Question 2

The preliminary reference procedure under Art 267 TFEU provides a mechanism whereby national courts can seek a ruling from the Court of Justice of the EU on the interpretation of EU law and the validity of EU secondary legislation. The decision to make a reference is that of the national court, and it may do so of its own motion or in response to an application by one or more parties to the national litigation. Any court or tribunal may make a reference, and a court against, which there is no appeal in the national legal system, in principle must make a reference "if it considers that a decision on the question is necessary to enable it to give judgment".

It is normally easy to determine whether a particular body constitutes a court as this will be specified in national legislation. The concept of "tribunal" is however an autonomous concept of EU law. A number of criteria have been developed, the principal ones of which are that the body should: be independent (in the sense that its members are not part of the executive and have sufficient security of tenure to guarantee independence from the executive); be permanently constituted and not ad hoc; apply rules of law, and determine disputes inter partes: Dorsch Consult (1997).

The original intention was that the Court, as a body specifically established as the ultimate judicial authority on EU law, should be invited by way of a reference to consider all such issues of validity or interpretation. Courts, other than courts of last instance, have however always had a discretion whether to refer and, particularly following the decision in CILFIT (1982), courts of last resort have also had some discretion. The guidelines laid down in this case acknowledge that the court is entitled to consider whether the reference is necessary in order to enable it to give judgment. This simply reiterates that references should not be made to answer hypothetical questions, or questions which do not, or may not, arise in the national litigation; see e.g. Meilicke (1992). They also reflect the fact that, while the Court is not self-binding, it has evolved a strong tendency to follow its earlier decisions. Accordingly, a reference may not be necessary if there is an existing decision covering the point. Indeed, the practice of the Court registry is to draw to the attention of the referring court any relevant previous decisions in order to check whether these have been taken into account when formulating the reference. This approach goes back to the case of Da Costa (1963), the case immediately following van Gend en Loos (1963) on the court docket and which raised precisely the same point. In those circumstances, the Court indicated that even a court of last resort could treat the obligation to make a reference as having been "deprived of its content". However, it has always been made clear that the national court is entitled to make a reference, as it may wish to question whether a decision of the Court, particularly one dating back some time, will still be followed, and there will be situations where the earlier decision is on slightly different wording, or in a different context, such that it might not be followed. Finally, the Court acknowledged that where the point of EU law was entirely clear and free from doubt, a national court might consider it appropriate to determine that it was *acte clair*, so no reference would be necessary. This recognised the fact that lawyers and judges, particularly in the original six Member States, had some 30 years' experience of dealing with EU law, and could therefore be trusted to make certain elementary and obvious decisions as to its interpretation. However the Court also issued caveats, pointing out that it was important that EU law be interpreted consistently, and only the Court could do so in a way that would be binding in all Member States; its procedure is also allowed for interventions by the Member States and the institutions so the Court would have a full picture of the legal, economic and social context. The Court could also take account of the possible discrepancies between different language versions of the instrument in question, which national courts might not be aware of. Finally, the Court stressed the importance of it taking responsibility for the development of autonomous concept of EU law, such as "worker" and indeed "tribunal".

It is also important to note that, while the Court cannot decide any issue of national law, and indeed cannot decide the outcome of the case, since it is for the national court to apply EU law in accordance with the judgment of the Court, the Court does require sufficient information about the context of the

case to enable it to fully understand the circumstances of the questions which have been put in the reference. It is therefore necessary for all points of national law to have been agreed or determined, and the relevant facts of the case agreed or found. Subject to this a reference can be made at any stage of proceedings, but will be rejected if the Court is unable to determine what the factual context is and/or what the legal issues are, e.g. Grau Gomis (1995).

It is against this background that we must consider the specific question. Preliminary references constitute one of the three principal jurisdictions of the Court, the others being the action for annulment (Art 263 TFEU) and Commission actions against Member States (Art 258 TFEU). The Court, particularly when interpreting the Treaties and major EU legislation, has the opportunity to flesh out the legal principles on which the EU is founded, not all of which are explicitly detailed in the Treaties.

In van Gend en Loos the Court was faced with a situation where the Dutch customs authorities had reclassified certain industrial products for the purposes of the Dutch customs classification. This was at a time when the transitional arrangements for the creation of the Common Market were in force. The common customs tariff had not yet been brought into effect, but the Member States were under an obligation not to increase their existing customs duties. When the reclassification was challenged before a Dutch court, it considered itself bound to apply Dutch law, but referred a question as to whether or not the applicant could rely on the Treaty Article in question to lay claim to individual rights which the courts must protect. Some Member States argued that this was unnecessary, as there was already a mechanism whereby the Commission, if satisfied that a Member State was not applying the Treaty, could pursue an informal or formal investigation and, if necessary bring the matter before the court under what is now Art 258 TFEU. The Court, however, determined that EU law constituted a new legal order which did not simply operate at the level of the high contracting parties, but which conferred rights, and imposed liabilities, on natural and legal persons. Such rights could be conferred under Treaty Articles provided that these were clear precise and unconditional. This case is therefore the origin of the principle of direct effect. This principle was extended to Directives in van Duyn (1975), and the interpretive obligation constituting indirect effect was established in von Colson (1984). Similarly the principle of the supremacy of EU law was established in cases such as Costa (1964) and Simmenthal (1978). These are two examples of major principles established as the result of preliminary references.

For much of its existence the Court has been relatively activist in the sense that it has used the cases referred to it to expand and develop the scope and coverage of EU law and to incorporate additional principles. The court has held that general principles of law common to the Member States should be considered part of the legal framework of the EU, e.g. Nolde (1974). It has also declared that EU citizenship is destined to be the fundamental status of nationals of the Member States: Grzelczyk (2001), although more recently it has acknowledged that citizenship rights only exist in a specific context, so the rights of residence and access to social assistance granted by Directive 2004/38 can only be asserted by those who are economically active (or qualify as students or those who can support themselves from their own resources) e.g. Dano (2014).

One noteworthy aspect of the approach of the Court to preliminary references has been a willingness to re-purpose references where the referring court has incorrectly categorised its question but the Court has recognised that there is a significant issue. Prominent examples of this are Marleasing (1990) and Francovich (1991). In the former case, the Spanish court, in effect, asked in a reference whether it should give horizontal direct effect to a Directive which formed part of the acquis communautaire and which had not been transposed. The Court pointed out that it had already ruled that a Directive could not have direct horizontal effect, but proceeded to deal with the reference on the basis of whether indirect horizontal effect could apply in a case where the national law predated the relevant EU law. In the latter, the reference asked whether the Italian state should by default be under an obligation to make certain payments to employees of companies which had gone into insolvent liquidation. The Court concluded that the relevant Directive did not entail any such default allocation, but used the case to establish the principle of Member State Liability for noncontractual loss suffered as a result of the failure of the state to transpose a directive, in circumstances where direct effect was not available because the Directive was not clear precise and unconditional.

It is therefore clear, even without exploring the full range of major decisions of the Court arising from preliminary references, that these have enabled the court to develop the scope and principles of EU law in a number of important directions. There are some who argue that the Court has, at least from time to time, gone too far in pursuing its own, usually activist, approach, however the major innovations by the Court, such as the principle of direct effect and Member State Liability, have proved to be important elements in the overall legal architecture of the EU.

Question 3

'Democratic deficit' is a term used by people who argue that the EU institutions and their decision-making procedures suffer from a lack of democracy, and seem inaccessible to the ordinary citizen due to their complexity. However, the precise complaints comprised within this overall phrase have changed and developed over time.

The European Coal and Steel Community was very much modelled on the structures necessary to operate a department or ministry within a national government, with the Council of Ministers exercising collective power to direct policy and make secondary legislation and the High Authority, later the Commission, operating as the civil service, drafting secondary legislation, researching policy options and administering the policy laid down. While there was a Parliamentary Assembly this was not directly elected but comprised representatives of the national legislatures of the Member States, and its function was equivalent to that of a select committee in the UK system, in that it could comment on issues and seek explanations, but was not involved in the legislative process, and had limited authority over the budget. This model was then adopted for the EEC and EURATOM. Even when direct election to the Parliament commenced in 1979 it was still not regarded as a full Institution, only enjoying semi privileged status for the purposes of the action of annulment. In terms of status, the Parliament is now officially the senior Institution and has fully privileged status. It has also progressively become effectively a co-legislator with the Council. Initially it was only consulted, but subsequently a series of Treaty changes has meant that under the ordinary legislative procedure the Parliament and Council have equal status. The Parliament can reject proposed legislation at second reading, and unless

Parliament and Council agree at first, second or, following the conciliation procedure, third reading the Act in question cannot be adopted: Art 294 TFEU. This means that one aspect of the democratic deficit has been addressed.

Another specific complaint has been that the Parliament has no power of legislative initiative. It is true that the sole power of legislative initiative rests with the Commission (Art 17.2 TEU), so it is not possible for an individual MEP to introduce the equivalent of a private member's bill. However, it must be remembered that the vast majority of legislation in all Member States is promoted by the government and drafted on its behalf by its officials, so the EU procedure simply mirrors this. Furthermore, the legislative programme is established as a result of negotiations between the European Council, the Commission and the Parliament (Art 295 TFEU). In addition, the Parliament may pass a resolution pursuant to Art 225 TFEU requesting the Commission to submit a proposal for an act which it considers necessary. While the Commission is not obliged to comply, it must give reasons for a refusal. The President of the Commission, Ursula von der Leyen, undertook when seeking the approval of the Parliament to engage in even further consultation with regard to the legislative programme. There is therefore a technical, but strictly limited deficit in this respect.

The precise institutional arrangements of the EU do not directly reflect those of a state. The EU is still essentially an intergovernmental organisation, although a very complex and extensive one. It is therefore important not to translate thinking about the institutions comprising a national constitution directly to the EU level. For example, one complaint sometimes made is that the EU has five presidents, none of whom are elected. It is true that none of the five presidents are directly elected, but that does not mean that they lack democratic legitimacy. The President of the Court is elected by his or her fellow judges, and this is consistent with the principle of judicial independence and autonomy. The President of the European Council is elected by the members of the Council. In any event, he or she has a largely coordinating function, since the European Council itself exercises its powers. The Presidency of the Council continues to follow the principle of rotation. Those exercising the powers of the Presidency will therefore be ministers in the government of the state which currently holds the Presidency. The President of the Parliament is elected by the members of the Parliament. The most controversial is, of course, the President of the Commission. The President is nominated by the European Council, having regard to the outcome of the most recent European Parliamentary election (Art 17 TEU). In 2014, the parties in the European Parliament agreed that each would nominate a Spitzenkandidat (a lead candidate), and the candidate of the party which secured the largest number of seats in the election should be the nominee. In 2014, this occurred and M. Juncker, as candidate of the victorious European People's Party, was eventually nominated and elected by the Parliament. Some Member States were unhappy with this, considering that this gave too much weight to the elections, and might result in a candidate who was considered unsuitable, however most did not press these objections.

In 2019, the process of debate among the Member States took a different course. The candidate of the European People's Party, which had again secured the largest number of seats, was regarded as unacceptable. The candidate of the Socialists and Democrats, which came second, was a stronger candidate as he was a senior Commissioner in the 2014 – 2019 Commission, but ultimately the nominee came from the European People's Party. She eventually secured a small absolute majority in Parliament. It is important to

recognise that, while the perceived scope of the activities of the Commission is broad, and the role of the President is influential, she is, nonetheless, simply the head of the Administration of the EU, albeit one which has specific responsibility for ensuring that Member States comply with their obligations.

Perhaps the most persistent and intractable aspect of the democratic deficit is the disconnection that many citizens of the EU feel from the institutions. In part this is a function of the scale of the EU, both in terms of its responsibilities and its geography. Some responsibility can be laid at the door of MEPs who do not communicate effectively with their constituency. It is also the case that much of the work of the institutions is technical and complex in nature, and of interest primarily to those who are directly affected. The general public has little interest in the detail of proposed regulations in fields such as telecommunication standards, product labelling and licensing of transport operators. The Institutions do make a vast body of information available in electronic form, but again this is of interest only to specialists.

There is the possibility of a citizens' initiative under Art 11.4 TEU and Reg 211/2011, which requires one million citizens from a 'significant number' of Member States to participate. Such an initiative invites the Commission to introduce proposals for a legal Act which the proponents consider to be necessary.

Particularly in the 21st-century, efforts have been made to engage national legislatures more in the work of the EU. Draft legislation is submitted to national legislatures with a view to them scrutinising the same and there are now procedures whereby national parliaments can, operating collectively, challenge proposed legislation, primarily on grounds of failure to respect the principle of subsidiarity. While national parliaments do not yet have an absolute veto, a sufficiently substantial number of objections will lead to a requirement on the part of the Commission to explain and justify the measures it is proposed. However, while national parliaments do devote significant time to this activity, it does not tend to be widely reported, because it is essentially dry and technical.

While the European Parliament still lacks an actual right of legislative initiative, as indicated above, this is more of a technical than a substantial deficit, and in other respects the Parliament now has full legislative status. It also has substantial powers in relation to the EU budget and in addition to electing the President of the Commission must approve the other Commissioners (and has in the past successfully objected to individuals, or to their allocation to particular portfolios). The President of the Parliament plays a full part in the iterative process whereby the three principal institutions establish and pursue legislative and policy objectives. The continuing deficit is largely in the area of public involvement with the workings of the EU, and this is almost inevitable, given the factors outlined above which militate against active public interest or extensive coverage by the mass media.

Question 4

Art 263 TFEU provides for the action for annulment of the validity of acts of the institutions of the EU. In so doing, it arguably seeks to achieve a number of distinct objectives. At one extreme, it provides for a mechanism for constitutional judicial review at the instance of Member States or other institutions, e.g. the cases involving the extent to which the Parliament is obliged to continue to hold plenary sessions in Strasbourg: France v

Parliament (1996) and (2012). At the other, and much more relevant to the question, it provides a mechanism for the addressees of decisions made by the Commission in areas such as competition law to challenge these in what is, to all intents and purposes, an appeal on the merits.

The original wording of what is now Art 263 provided for a nonprivileged applicant, i.e. a natural or legal person, to challenge an act which was addressed to them, or an act which was of direct and individual concern to them. The provision for challenge of an act addressed to the applicant is clear and uncontroversial. It reflects the intention to allow for an appeal. Problems have however arisen in determining what constitutes direct, and more particularly individual, concern.

In the event, direct concern has been interpreted in a relatively straightforward manner. It simply requires that the act directly affects the position of the applicant without the possibility of the exercise of discretion by a third party: Differdange (1984).

Individual concern, on the other hand, has proved controversial. The Court initially held in Plaumann (1963) that individual concern meant that the applicant must demonstrate that the measure in question affected him in the same way as if he were the addressee by reason of attributes personal and specific to him. In the case, a decision addressed to the Member State impacted on all those engaged in the importation of clementines, which included the applicant. However, the Court ruled that since any undertaking could enter or leave the relevant market at any time for its own reasons there was nothing inevitable or personal about the impact of the measure. This led to a restrictive approach. The most common basis on which individual concern could be established was by demonstrating that the measure in question applied to a fixed and defined closed class, e.g. those who had applied for a particular permit or licence at a fixed time in the past: Toepfer (1965). In addition, those who could demonstrate that the measure in question impacted on them in a differential way because of contractual or administrative engagements they had entered into might establish individual concern: Bock (1971); Piraiki-Patraiki (1985). Similar considerations apply where the intellectual property rights of the applicant are affected: Codorniù (1994). The mere fact that the applicant had been instrumental in seeking the measure, and was in fact the only undertaking affected, was not in itself sufficient: Spijker Kwasten (1983).

Almost inevitably, applicants continued to test the boundaries. It was accepted that some Regulations could be characterised as bundles of decisions, particularly in the field of anti-dumping, where a single rationale for deciding that dumping had taken place was combined with a series of countervailing measures applied to each undertaking involved. It was also accepted that in relation to a competition decision, an unsuccessful complainant could be treated as in an equivalent position to that of the addressee for the purposes of challenging the legal basis of the non-infringement decision: Metro (1977).

Matters came to a head with the case of Jégo-Queré (2004). This concerned a challenge to the validity of a Commission Regulation specifying the minimum size of fishing net mesh to be used in a certain area. The measure was designed to protect juvenile fish of a particular species. The applicant was the only undertaking actually fishing in that area for a different species. That species was smaller and could only be caught with smaller mesh sizes. The

two species did not occupy the same part of the underwater environment. The applicant had been actively involved in lobbying prior to the introduction of the Regulation. It sought to challenge the validity of the regulation on the basis of direct and individual concern, since it was clearly not addressed to the applicant and was, prima facie, a Regulation. The applicant persuaded the Advocate General and the Court of First Instance (2002) that it would suffer injustice if it was not allowed to pursue the action for annulment. The undertaking was based in France, and French law did not permit a prospective challenge by way of an action for declaration or similar. It was therefore argued that, if not allowed to pursue the action for annulment, the applicant could only contravene the regulation and await enforcement action. At that stage the applicant could, in the national proceedings, invite the national court to make a preliminary reference and invoke the plea of illegality under Art 277 TFEU. It was argued that this did not constitute an effective or appropriate remedy, and failure to allow the applicant to utilise Art 263 resulted in a failure of effective legal protection. The Court of Justice (2004) rejected these arguments. It asserted that if there was any lacuna in the effective legal protection this was the responsibility of the Member State concerned, and that the original Plaumann approach remained applicable.

The Member States considered that this was not an appropriate state of affairs. As a result, the wording of Art 263 was amended in the Lisbon treaty. A new category was introduced. A nonprivileged applicant could henceforth seek annulment of a regulatory act of direct concern not involving implementing measures. The concept of "regulatory act" was not defined, but the Court has subsequently confirmed that it applies to Regulations introduced by the Commission under delegated powers and not using a legislative process: Inuit Tapariit Kanatami (2013) and to decisions which are of general application, for example those which establish which chemicals are, and are not, permitted for use in certain circumstances: Microban (2011).

The new provisions have certainly provided a remedy for the specific issue which was raised in Jégo-Queré. That case concerned a Commission Regulation which did not require implementing measures. It therefore falls squarely within the definition. Where decisions are concerned, the applicant must still demonstrate direct and individual concern. This does mean that in such cases there is a greater possibility of having to institute or be subjected to national proceedings with a view to following the preliminary reference and plea of illegality route. This is more acceptable in those jurisdictions where the applicant can take the initiative by seeking declaratory relief, but still leaves a potential loophole, not in the ultimate legal protection but in the process. It is submitted that the view taken by the Advocate General and the Court of First Instance, that individual concern should be reinterpreted as being established where the applicant could demonstrate that the measure in question would have a material adverse impact, would be preferable. However, in Telefonica (2013), a different Advocate General indicated that in her opinion the amendment had provided a complete solution, albeit reliant on national mechanisms where implementing measures are involved.

SECTION B

Question 1(a)

This part of the question involves a measure of internal taxation which is potentially incompatible with Art 110 TFEU. While Member States are entitled to develop and operate their own systems of internal taxation, including excise duties and other taxation on goods, Art 110 prohibits, on the one hand, the imposition of internal taxation on the product of other Member States in excess of that imposed directly or indirectly on similar domestic products, and on the other internal taxation which is of such a nature as to afford indirect protection to other products.

In order for the first limb to apply, the two products must be "similar". This involves an analysis of the way in which the two products are used. They do not need to be identical in composition or method of manufacture, so in Commission v France (French Taxation of Spirits) (1979) grain-based and fruit-based spirits were regarded as similar, and in John Walker (1986) the Court first considered the objective characteristics of the two products, including taste and alcohol content, and subsequently whether the two categories were capable of meeting the same needs from the point of view of consumers.

In this case, the actual function of the sun cream is exactly the same in both cases. There is nothing to suggest any differences in methods of manufacture. The "play value" may help parents to get their children to accept sun cream, but does not affect the function. It is strongly arguable that the products are similar. There is nothing to suggest that the taxation system has been artificially manipulated in any way, or that a comparable Greek product would not be defined as a toy, but there is a clear and direct imposition of differential tax.

It is probably unnecessary to consider the alternative limb. This primarily concerns the protective effect of taxation where products are not similar but may potentially be in competition: Commission v UK (Excise Duties on Wine) (1980. It is necessary to consider whether the differential taxation itself provides protection, as opposed to other economic factors: Commission v Sweden (2008). If it were necessary to do so, the analysis in this case would almost certainly lead to the conclusion that the differential taxation does provide protection, as the production costs and therefore sale price net of tax of the different products is likely to be similar.

1(b)

These two measures both require consideration as potential measures having equivalent effect to quantitative restrictions (MEQR). There is no suggestion of quantitative restrictions as such, as there are no prohibitions or quotas: Geddo (1973). MEQR were originally broadly defined as any trading rules capable of affecting, directly or indirectly, actually or potentially the flow of trade which would otherwise take place: Dassonville (1975). However, this definition has been substantially refined and developed in the case law. Initially, the focus was primarily on distinctly applicable measures which applied only to the imported product and which were dealt with exhaustively

in the, now spent, Directive 70/50. However, in most cases alleged MEQRs are now of the indistinctly applicable type, where the measure is applicable to goods irrespective of origin, but can be demonstrated to have a differential impact on importers because of the cost of compliance. One example is Walter Rau (1982), where it was successfully argued that a Belgian regulation requiring margarine to be packed in square shaped containers imposed differential burdens on importers who were used to selling in oblong shaped containers and would need to establish a new packaging line, whereas Belgian manufacturers were not prevented from selling their square section packaged margarine elsewhere.

One crucial distinction between distinctly and indistinctly applicable measures is that the former can only be justified by reference to the limited and exhaustive list of potential derogations in Art 36 TFEU. Indistinctly applicable measures can be justified in this way and also under the rule of reason in the Cassis de Dijon (1979) case. This permits such measures where they are a proportionate means of achieving a mandatory requirement of the state. Mandatory requirements have not been exhaustively defined, but are more extensive than the Art 36 derogations, although there is an overlap in relation to public health. The rule of reason extends to consumer protection, fairness of transactions, protecting the fiscal system and environmental concerns.

Cassis de Dijon also established a rule of recognition under which goods produced lawfully in, and in accordance with the requirements of, a Member State should prima facie be marketable throughout the EU.

A further distinction was introduced in Keck (1993). Selling arrangements were distinguished from product characteristics. Prima facie, a selling arrangement which operated on all products in the same way in law and in fact fell outside the scope of Art 34 – 36 altogether. Selling arrangements include such things as Sunday trading legislation, regulation of trading practices such as loss leading and regulation of advertising. An undertaking may seek to establish that there is a differential impact in fact. If there is evidence to this effect, e.g. where advertising restrictions impact more harshly on importers seeking to enter the market than they do on established domestic producers, the measure will be treated as an indistinctly applicable MEQR, so it will still be open to the State to seek to justify it under Art 36 or the rule of reason: KO v De Agostini (1997).

The first measure here is clearly a selling arrangement. There is nothing to suggest that the measure in question has any differential legal impact in relation to imported products, but it may have a differential impact in fact as Liam is seeking to enter the market. If Liam can produce sufficient evidence to establish this, it will be necessary to consider whether the measure is a proportionate means of achieving a mandatory requirement, or falls within Art 36. The basis for the restriction appears to be protection of health. There is nothing to suggest that it is in any way a means of arbitrary discrimination or a disguised restriction which would take it outside the scope of Art 36. The outcome of the case will turn on the nature of the risk which the measure is designed to avoid, and whether this could be achieved by means which are less restrictive. We do not have sufficient evidence to reach a conclusion on this point.

The second measure is clearly a product characteristic since it relates to the packaging of the product. It appears to be indistinctly applicable since there is nothing to suggest that it does not apply to all sun cream of whatever origin.

The justification advanced centres on environmental protection, which is a potentially acceptable mandatory requirement. Widespread current concern over the environmental impact of single-use plastics is widely documented, and many states have introduced measures to restrict the use of these or to encourage recycling. Therefore, even though Liam can demonstrate that the measure will have a significant impact, the Croatian authorities may very well be able to demonstrate that it is a proportionate response and therefore falls within the rule of reason.

Question 2

This question concerns freedom of movement of persons. Originally this was afforded as one of the four freedoms of the Common Market. It applied, by virtue of Art 45 TFEU, directly to workers, who were defined as those who for a certain period of time perform services of some economic value for and under the direction of another for remuneration: Lawrie-Blum (1986). This is an autonomous definition in EU law. It extends to those who are working part-time even if that work is not sufficient fully support them and they are therefore partly dependent on family members: Levin (1982) or on state benefits: Kempf (1986). The only exclusions of those for whom work is purely therapeutic or rehabilitative: Bettray (1989). Self-employed professionals did not come within this definition but have the right to freedom of establishment under Art 49 TFEU.

Art 45 and Regulation 492/2011 (replacing Regulation 1612/68) guarantee those who have actually secured work the right to travel and reside in the host Member State and to benefit in employment from the same terms and conditions as national workers with no discrimination. Case law, e.g. Antonissen (1991) has extended the right to enter and reside in another state for the purpose of seeking employment. What constitutes seeking employment will depend on whether the applicant can demonstrate that they have a genuine prospect of securing employment, but in any event at least six months must be allowed for this purpose.

Subsequently, the Maastricht treaty, which created the European Union, also created the concept of citizenship of the EU. Rights associated with citizenship coexist with those granted under Arts 45 and 49. Directive 2004/38 now sets out the conditions under which the right of free movement established in general terms in Arts 20 and 21 TFEU it can be exercised. All EU citizens have the right to move to, and reside in, any Member State for a period of three months, without any formalities other than proof of identity and status, but subject to the proviso that they have no recourse to public funds (other than access to health services using the E111/EHIC scheme): Dir Art 6. This can be for any purpose, including jobseeking. The right extends to their family members, of whatever nationality. Core family members are spouses, registered partners, dependent children and dependent ascendant relatives of either the EU citizen or their spouse: Dir Art 2.2. Other family members, namely those who are financially dependent or require personal care on serious health grounds, together with partners enjoying a durable relationship enjoy a slightly less extensive right to have entry and residence facilitated: Dir Art 3.2.

A citizen, together with family members, may reside for longer than three months if they are a worker or self-employed person in the host member state. Note that, in this respect, the right of establishment for a self-employed worker (as opposed to the activities of legal persons) is largely equiparated

to the right of a worker. The same applies to those who are of independent means, and those who are pursuing a course of study at a recognised educational establishment, including, but not limited to, undergraduate and postgraduate degrees: Dir Art 7. Architects and nurses are both covered by specific provisions of Directive 2005/36 which sets up a comprehensive scheme for the mutual recognition of professional qualifications.

Pursuant to Dir Art 27 a Member State may refuse admission to, or expel, an EU citizen or family member on grounds of public health, public order and public security. Note that the public health exemption relates solely to infectious or contagious diseases on a WHO list of diseases with potential epidemic implications. Action taken in respect of public order and security must be based exclusively on the actions of the individual and not on the basis of association with others. It must also be based on an assessment of whether or not the individual constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Previous criminal convictions do not of themselves constitute grounds (as previously established by the Court in Bouchereau (1977)) but may form part of an assessment of the threat currently posed by the individual. The response of the state must also be proportionate.

If Emily secures the job referred to before moving to Spain, as an EU national she will have the right to accept the job offer, move freely within Spain and stay there for the purposes of employment in accordance with provisions governing employment of nationals in Spain: Art 45, Dir 2004/38 and Reg. 492/2011. She will clearly fall within the definition of a worker. Under Art 7(2) Reg 492/2011 she is entitled to the same social and tax advantages as Spanish nationals. If she opts for the self-employed alternative, she has the same right of extended residence, but will not benefit from the additional specific protections attaching to workers. She is however entitled to establish herself under the conditions laid down by Spain for its own nationals. In each case she will have to produce the necessary evidence confirming her architecture qualifications as specified in Dir 2005/36, specifically Arts 46 and 49 and Annex VI, point 6.

If Emily leaves Ireland before obtaining a job she will be able to enter Spain and reside there for a reasonable time as a job seeker: Royer (1976). The length of this period is not certain. Royer suggested 3 months may be appropriate but Antonissen suggested 6 months or longer if someone was actively and genuinely seeking work. However, Emily's position is less secure if she enters as a work-seeker – she is not entitled to a residence permit.

Alternatively, if she has sufficient resources and comprehensive sickness insurance, she could rely on Dir 2004/38 as a person of independent means (as could any family members falling within Art 2.2).

Derek has a number of alternatives to establish his rights to live in Spain. Firstly, he could try and rely on his rights as an unmarried partner of a worker if Emily secures a job before moving to Spain. An unmarried partner (even if they have been in a long term and stable relationship) does not fall within the definition of spouse in Art 10(1) of Reg 492/2011. If Spanish law permits its own nationals to cohabit with a national of another member state and gives them certain rights, then the provisions prohibiting discrimination on grounds of nationality under Art 12 will apply: Reed (1986). If Emily is classed as a worker, the right to have her cohabitee living with her may be included within the ambit of a social advantage under Art 7(2) Reg 492/2011. His right to

study may also be included within the ambit of Art 7(2). Even if Spain does not recognise unofficial partnerships, he is still entitled to have his entry and residence facilitated on the basis of a durable relationship.

If this route is not successful and if he is serious about a change of career, he could try and establish his own independent right to enter as a student.

It is likely that the course will satisfy the requirements for Dir 2004/38. He will have the right to reside for the duration of the course even if this is a private course. He may not be discriminated against in terms of the fees charged and will be entitled to any loans to finance these, although not to a maintenance loan, unless he qualifies for one under Irish or Spanish national rules. In principle, he should not have access to public funds, although cases such as Grzelczyk (2001) suggest that, particularly if the need for such support is short term and at the very end of the course, it would be inconsistent with the concept of EU citizenship to deny access. There is perhaps an analogy with the case law which indicates that while those who are claiming residence on the basis of independent means should not be having regular recourse to a substantial extent to public funds, occasional recourse should not be regarded as incompatible with the status: Brey (2013).

Kerry may have the right to join Emily as a family member. However, as she is over 21, she will have to demonstrate she is actually dependent. As she will just have completed a university degree, and plans to undertake further advanced vocational training, she may indeed be financially dependent. However, Kerry can simply seek to enter and reside as a student in her own right. In this respect, her position is similar to that of Derek.

The Spanish authorities might try to refuse her entry into their territory. They would be seeking to rely on the fact that Kerry posed a threat to public order or security pursuant to Dir Art 27. Although her previous convictions are significant, and resulted in a custodial sentence, the focus should be on the current situation and whether or not there is evidence to suggest that she currently poses a "genuine and sufficiently serious threat to public policy" "affecting one of the fundamental interests of society". The response of the member state must be proportionate. It seems unlikely that there will be sufficient grounds for Spain to refuse Kerry's entry.

Fred

Fred is not an EU citizen, so has no independent right under EU law to live in Spain. Any rights he has will be due to his relationship with Emily.

Fred does not live with Emily, and we are not told that she is providing personal care on serious health grounds so he will only be able to move to Spain with her in his capacity as a family member within Dir Art 3 if he is dependent on her. If he relies on Emily to do his grocery shopping etc, he may be able to prove he is dependent on her for these purposes, but this is unlikely. Dependence normally entails financial reliance, and the existence of the alternative criterion tends to reinforce this.

Question 3

Prima facie, Jan's style of cooking, specifically the communal stockpot, is unlawful in Ireland by virtue of the 1998 Act. This pre-dates the 2016 Directive and so is obviously not intended to implement it. It is clear from the question

that there has been no attempt to implement the Directive. It also seems clear that under Irish law both the action by Eunice for breach of statutory duty and the prosecution for infringement of the Act are likely to be successful.

The question is therefore whether Jan has rights under the Directive which override the Act.

Unlike Regulations which are intended to constitute the substantive law in the area throughout the EU, directives do not have direct applicability. Nevertheless, as a result of the case law of the Court it has been held that they may, under certain circumstances, have direct or indirect effect. Furthermore, a failure to transpose and implement a Directive may form the basis of an action against a Member State under the principle of Member State Liability. However, it is important to note that, with certain exceptions which do not seem to be applicable here, a Directive does not have any legal force until the date for transposition has passed: Tullio Ratti (1979). The question does not make clear whether or not this is the case. The period allowed to Member States to take the necessary measures to secure effective transposition is typically two years, and significantly longer periods are unusual. It is therefore likely that the Directive should have been transposed, and if this is the case Jan may be able to rely on it.

In van Gend en Loos (1963) the principle of direct effect was established, provided that the measure in question was clear precise and unconditional. This principle was extended to Directives in van Duyn (1975), but the Court has on several occasions made it clear that this direct effect can only be vertical, that is to say an individual can rely on the Directive as against the state but not in an action against another natural or legal person: Marshall (No 1) (1986); Faccini-Dori (1995). As Eunice is a private individual, it is clear that Jan could not rely on the direct effect of the Directive as against her. However, Dublin City Council is clearly a local or regional authority and therefore an entity which forms part of the Irish state apparatus: Fratelli Costanzo (1989). In consequence, Jan can rely on the provisions of the Directive to argue that Walter, acting on behalf of Dublin City Council, cannot rely on the provisions of the Act in his prosecution in so far as these are incompatible with those of the Directive: Tullio Ratti.

The relevant provisions of the Directive appear to place an obligation on the State to ensure that cooking methods integral to the relevant culinary tradition, in this case the use of the communal stockpot, are permitted subject to compliance with relevant food hygiene regulations. In this case, the Irish legislation appears to prohibit this method, rather than provide for food hygiene provisions which are appropriate. It is, however, questionable whether the provisions of the Directive can be seen as sufficiently clear, precise and unconditional so as to invoke vertical direct effect. They clearly envisage that the state may impose regulations on grounds of food hygiene, and there is clearly considerable latitude in how this should be undertaken and what the detailed regulation should be. If this argument succeeds, Jan will not be able to rely on the Directive in this way.

An alternative approach for Jan, for both the civil action and the prosecution, would be to invoke the principle of indirect effect. This is essentially an interpretive obligation imposed on the courts of the Member State in order to ensure that full effect is given to EU law. The principle was first articulated in von Colson (1984). It was further developed in Marleasing (1990) in which it was held that it was the duty of the court under Art 4.3 TEU to interpret

national legislation or other legal rules, whether or not they were intended to transpose the relevant Directive, in such a way as to be consistent with the requirements of the Directive "so far as it was possible to do so". The court must therefore seek to read the national legislation compatibly with the Directive if such a reading is possible in accordance with the principles of statutory interpretation applied by the Member State in question. This does not extend to interpretation contra legem (in defiance of the meaning of the national rule): Wagner-Miret (1993). It will be for the Irish court to determine whether or not a compatible interpretation can be adopted. This would in effect amount to extending the list of cooking apparatus permitted in the restaurant itself, as the currently listed items do not appear to include any which could conceivably accommodate the communal stockpot. As the Irish legislation significantly predates the Directive, the Irish court could not adopt the approach which English courts have taken when dealing with implementing legislation, which is to give effect to what they consider to be the underlying intention of Parliament, namely to comply with its EU obligations, as opposed to their normal obligation to give effect to the semantic meaning of the words enacted: Pickstone v Freeman (1989). If the Irish court cannot identify a compatible interpretation, then the two actions will proceed on the basis of the Irish law.

If neither direct, nor indirect, effect has availed Jan, he may still have some recourse against the Irish state. A further aspect of the duty of the Member State to secure fulfilment of its obligations under EU law under Art 4.3 TEU is that a breach of that duty may give rise to an action for noncontractual damages under the principle of Member State Liability. This was initially established in relation to a complete failure to transpose a directive in Francovich (1991) and further refined in Factortame III (1996). Jan could claim compensation for losses sustained as a result of the failure of Ireland to transpose the Directive effectively or at all. He must demonstrate that the Directive was intended to benefit or protect him, which clearly seems to be the case as is designed to foster a diversity of cuisines, that there is a causal link between the breach and his loss, which also seems clear, and that the breach is a sufficiently serious one. It appears there has been no transposition, and this will automatically be regarded as serious: Dillenkofer (1996). If there had been some transposition, but this particular provision had been omitted, it will be necessary to examine whether or not the omission can be regarded as serious. Issues such as whether it was a deliberate decision, and whether it constitutes a technical misunderstanding of complex provisions will have to be considered. This does not seem to be particularly complex legislation to understand and apply, and there is no apparent reason for non-compliance. It is therefore likely to be considered serious. While this will not eliminate any liability Jan may have to Eunice, or his liability to conviction for contravening the Act, it will allow him to recoup costs and losses sustained. This could also extend to losses resulting from any disruption to his operations and expansion plans, provided that the latter are sufficiently concrete to enable an actual loss to be quantified.

Question 4

Ordinarily, an undertaking is free to determine who it will or will not do business with. The only circumstances in which ACR could demonstrate a breach of EU law is if EFCO has abused a dominant position contrary to Art 102 TFEU. The refusal to supply and the discount system has clearly affected trade within the single market, but we first need to establish whether there is

dominance. In order to do this we need to establish the relevant market and ascertain what share of this market EFCO enjoys.

As there is no suggestion that this particular market is subject to any unusual temporal factors, the two key elements of the relevant market are the relevant geographic market and the relevant product market. The default position is that the relevant geographic market is deemed to be the whole of the EU, unless there are circumstances which justify consideration of a smaller geographical area. There is nothing in the facts given to suggest that this is the case.

The relevant product market comprises all those products which are competing to satisfy the same requirements of the customer. It will usually be the case that those seeking to establish an undertaking is dominant will seek to define these products as narrowly as possible, while the undertaking concerned will argue that a wider range of products should be considered, particularly if it does not produce these, as this will dilute the relevant market: United Brands (1978). In order to determine whether products do form part of the same market the principal test used is cross elasticity of demand. The practice of the Commission, as laid out in the Notice on the Definition of the Relevant Market (1997), is to use the SSNIP test according to which the effect of a small but significant non-transitory increase in price in the case of one potentially competing product is assessed to see whether demand for the other potentially competing product(s) decreases. Here ACR and the Commission would no doubt argue that the relevant product market is copper tubes for use in the air conditioning and refrigeration industry. However, EFCO will no doubt argue that the market is wider and includes the titanium and stainless steel tubes referred to. There is evidence that an increase in the price of copper tubes has led to an increase in market share for the others, and this appears to demonstrate the relevant cross elasticity of demand. On this assumption, the market share of EFCO is reduced from 70% for copper tubes alone to 42% (70% of 60%) for all tubes.

Dominance was explained in United Brands as being a position of economic strength enabling the undertaking to prevent effective competition by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers. While market share is not the sole criterion for determining dominance, it is the primary one. A market share of 70% is probably sufficient to establish dominance, although it falls a little short of the 80% held to be evidence in itself of dominance in Hoffmann-La Roche (1979). However, a market share of 40 – 45% was held in United Brands to be consistent with dominance although not conclusive. In that case, since the remainder of the market was significantly fragmented, with a large number of relatively small competitors with much smaller individual market shares, it was held that United Brands were dominant. Here, further analysis would be needed to determine the structure of the market. If it is fragmented in the same way, and particularly if there are significant barriers to entry to the market due to the cost of establishing a production line, EFCO may be found to be dominant in accordance with the United Brands criteria. However, EFCO may be able to point to the way the market is evolving to suggest that its share is being eroded rather than reinforced. It has fallen from approximately 50% to 42% over the past two years, and it will be necessary to assess whether this trend appears to be continuing. If so, it would be difficult to sustain a finding of dominance.

Dominance itself is a neutral concept. It does, however, impose obligations on the dominant undertaking requiring it to refrain from economic behaviour which would be acceptable for a non-dominant undertaking. Charging a price higher than justified by the cost of production together with a reasonable profit and return on capital deployed, referred to as taking a monopoly rent, may constitute imposing unfair selling prices (Art 102 (a): United Brands. It is not clear whether the price quoted to ACR is excessive in this sense.

Refusal to supply can also constitute an abuse if it is deployed for unacceptable reasons. In United Brands a refusal to supply a distributor who had collaborated with a competing banana producer was considered to be an unacceptable reprisal. EFCO will argue that the refusal was based on objective criteria, namely creditworthiness, and constituted a reasonable and proportionate response. It will be necessary to examine whether there was an objective basis for the concern over creditworthiness, and whether the refusal to supply was proportionate. If it can be established that the refusal was based on the diversion of production to their own subsidiary, this may be seen as disproportionate: Commercial Solvents (1974).

Discounts offered for quantity of supply, or in consideration of regular orders are not normally regarded as abusive. They represent standard rational business practice designed to secure economies of scale and secure continuity of production and supply. However, other forms of discount, particularly those designed to tie the customer to the supplier through an "all requirements" provision, or by providing cumulative discounts over a reference period is seen as unfair means for a dominant undertaking to bind customers to it so as to prevent them potentially dealing with competitors: Hoffman-La Roche, Intel (2014).

Art 102 will continue to apply to EFCO in so far as it continues to trade with the EU, even if Brexit has been effected. ACR can lodge a complaint with the Commission or the relevant National Competition Authority. If the relevant authority is satisfied that there is a legitimate issue, the complaint will be investigated under Reg 1/2003. EFCO will be obliged to comply or face sanctions for non-compliance. If it is established that EFCO is dominant and that abuses have occurred, financial penalties may be imposed, although the current practice is to look also at behavioural remedies, requiring the culprit to desist from the illegal practices. Art 102 is horizontally directly effective, so ACR could also bring an action in the relevant national court in relation to the losses which it has sustained, although it would not be advised to do so unless and until there isa definitive finding of dominance and abuse, since it would otherwise bear the burden of proving these matters before the national court.